

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 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 1. GENERAL PROCEDURES

SUBCHAPTER C. MINORITY PURCHASING

4 TAC §§1.71, 1.73 - 1.75, 1.78

The Texas Department of Agriculture (Department) adopts amendments to Texas Administrative Code, Title 4, Part 1, Chapter 1, Subchapter C, §1.71, concerning Statement of Purpose; §1.73, concerning Identification of Historically Underutilized Businesses (HUBs); §1.74, concerning Certification Requirements; §1.75, concerning Outreach; and §1.78, concerning Historically Underutilized Business Program. The amendments to §§1.71, 1.73 - 1.75, and 1.78 are adopted without changes to the proposed text as published in the December 2, 2022, issue of the *Texas Register* (47 TexReg 8001) and will not be republished. The Department identified the need for the amendments during its rule review conducted pursuant to Texas Government Code §2001.039, the adoption of which can be found in the Review of Agency Rules section of the December 2, 2022, issue of the *Texas Register* (47 TexReg 8053).

The amendments to §1.71 consist of nonsubstantive changes to clarify language related to internal references for ease of the reader.

The amendment to §1.73 provides additional information concerning the state agency responsible for establishing the Texas Historically Underutilized Business Certification Directory and makes an editorial change for clarity.

The amendment to §1.74 provides additional information concerning the state agency responsible for certifying historically underutilized businesses and makes an editorial change for clarity.

The amendment to §1.75 provides additional information concerning the state agency responsible for sponsoring forums for historically underutilized businesses and makes an editorial change for clarity.

The amendments to §1.78 provide nonsubstantive edits by updating a legal citation to administrative rules of another state agency adopted by reference.

The Department received no comments regarding the proposed amendments.

The amendments are adopted pursuant to Section 2161.003 of the Texas Government Code, which provides that all state agencies, including the Department, must adopt the rules of the Texas Comptroller of Public Accounts associated with Texas Government Code, Chapter 2161, Subchapters B and C, as their own

rules; and Section 12.016 of the Texas Agriculture Code, which authorizes the Department to adopt rules as necessary for the administration of its powers and duties.

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 9, 2023.

TRD-202300057

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Effective date: January 29, 2023

Proposal publication date: December 2, 2022

For further information, please call: (512) 936-9360



CHAPTER 17. MARKETING AND PROMOTION

SUBCHAPTER D. CERTIFICATION OF FARMERS MARKET

4 TAC §§17.70 - 17.74

The Texas Department of Agriculture (Department) adopts amendments to Texas Administrative Code, Title 4, Part 1, Chapter 17, Subchapter D, §§17.70 - 17.74 related to certification of farmers markets, including definitions of terms used in the subchapter, issuances of certificates, the application process, eligibility and withdrawal of certificates, without changes to the proposed text as published in the December 9, 2022, issue of the *Texas Register* (47 TexReg 8083) and will not be republished. The Department identified the need for the amendments during its rule review conducted pursuant to Texas Government Code §2001.039, the adoption of which can be found in the Review of Agency Rules section of the December 9, 2022, issue of the *Texas Register* (47 TexReg 8130).

The adopted amendments to §17.70 delete an unnecessary definition for the term, "commissioner," as this term is previously defined in 4 Texas Administrative Code §1.1(5) of the Department's rules and reflect a corresponding change to formatting.

The adopted amendments to §17.71 reflects nonsubstantive changes to accurately reflect the current heading of Texas Administrative Code, Part 4, Chapter 17, Subchapter C as "GO TEXAN Certification Mark" and to remove an outdated legal reference.

The adopted amendments to §17.72 provide updated information on the manner in which the Department currently accepts

applications and corresponding processing and expiration dates, as well as clarification regarding the required frequency of submissions of applications and handling of associated fees.

The adopted amendments to §17.73 modify a reference to the Department for consistency with usage throughout its rules and delete unnecessary language.

The adopted amendments to §17.74 make nonsubstantive changes to refer to the Department in a consistent manner throughout its rules and update a cross reference to the Department's rules of practice.

The Department received no comments regarding the proposed amendments.

The amendments are adopted pursuant to Section 12.016 of the Texas Agriculture Code, which authorizes the department to adopt rules as necessary for the administration of its powers and duties, including certification of farmers markets as reflected in Tex. Agric. Code, Section 15.001(1).

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 13, 2023.

TRD-202300149

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Effective date: February 2, 2023

Proposal publication date: December 9, 2022

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 10. UNIFORM MULTIFAMILY RULES

SUBCHAPTER E. POST AWARD AND ASSET MANAGEMENT REQUIREMENTS

10 TAC §§10.401, 10.403, 10.405 - 10.407

The Texas Department of Housing and Community Affairs (the "Department") adopts with changes the amendment to 10 TAC Chapter 10, Subchapter E, §§10.401, 10.403, 10.405 - 10.407, Post Award and Asset Management Requirements to the proposed text as published in the October 28, 2022, issue of the *Texas Register* (47 TexReg 7162). The rules will be republished. The purpose of the amendment is to make corrections to gain consistency across other sections of rule, correct references, clarify existing language and processes that will ensure accurate processing of post award activities, and to communicate more effectively with multifamily Development Owners regarding their responsibilities after funding or award by the Department.

Tex. Gov't Code §2001.0045(b) does not apply to the amended rule because it was determined that no costs are associated

with this action, and therefore no costs warrant being offset. In general, most changes were corrective in nature, intended to gain consistency across other sections of rule, correct rule references, and clarify language or processes to more adequately communicate the language or process. The only substantial change, located in §10.406 Ownership Transfers (§2306.6713), added clarification under §10.406(a) that a transfer involving a deed-in-lieu of foreclosure does not require approval from Executive, and added a requirement that advance notice must be provided to the Department and the tenants prior to finalizing a deed-in-lieu transfer.

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

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

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the amended rule would be in effect, the amendment does not create or eliminate a government program, but relates to changes to an existing activity, concerning the post award activities of Low Income Housing Tax Credit (LI-HTC) and other Department-funded multifamily Developments.

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

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

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

5. The amendment is not creating a new regulation, but are revisions to provide additional clarification.

6. The amendment will not repeal an existing regulation.

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

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

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

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

2. This amended rule relates to the procedures for the handling of post award and asset management activities of multifamily developments awarded funds through various Department programs. Other than in the case of a small or micro-business that is an owner or a party to one of the Department's properties, no small or micro-businesses are subject to the amended rule. If a small or micro-business is such an owner or participant, the amended rule provides for a more clear, transparent process for doing so and do not result in a negative impact for those small or micro-businesses. There are not likely to be any rural communities subject to the amended rule because this amended rule is applicable only to the owners or operators of properties in the Department's portfolio, not municipalities.

3. The Department has determined that because this amended rule relates only to the process in use for the post award and asset management activities of the Department's portfolio, there will be no economic effect on small or micro-businesses or rural communities.

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

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

The Department has evaluated the amended rule as to its possible effects on local economies and has determined that for the first five years the amended rule will be in effect, there will be no economic effect on local employment, because the amended rule only provides for administrative processes required of properties in the Department's portfolio. No program funds are channeled through this amended rule, so no activities under this amended rule would support additional local employment opportunities. Alternatively, the amended rule would also not cause any negative impact on employment. Therefore no local employment impact statement is required to be prepared for the amended rule.

Texas Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that no impact is expected on a statewide basis, there are also no "probable" effects of the amended rule on particular geographic regions.

e. **PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5).** Mr. Wilkinson has determined that, for each year of the first five years the amended rule is in effect, the benefit anticipated as a result of the amended sections would be increased clarity and consistency across rule sections. There will not be economic costs to individuals required to comply with the amendment.

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

SUMMARY OF PUBLIC COMMENTS AND STAFF REASONED RESPONSE. The Department accepted public comment between October 28, 2022, and November 18, 2022. Comments regarding the amended rule were accepted in writing and e-mail with comments received from: (1) Sally Gaskin, President of SGI Ventures, and (2) Roger Arriaga, Executive Director of Texas Affiliation of Affordable Housing Providers (TAAHP). Comments were received on §10.401(a)(6) - 10% Test (Competitive HTC Only) and §10.401(b)(5) - Construction Status Report (All Multifamily Developments).

§10.401 Housing Tax Credit and Tax Exempt Bond Developments

COMMENT SUMMARY: Commenters (1) and (2) recommended that the Fair Housing Training requirement in §10.401(a)(6), that specifies training certificates cannot be older than two years from the date of the submission of the 10% Test documentation, be changed to every five years unless there is a change in the Fair Housing Rule. Commenter (1) stated that the two-year require-

ment is extremely repetitive and burdensome. Commenter (2) stated that there have been no changes to the Fair Housing Act. The trainings have been the same from year to year, and therefore no significant value is provided by limiting the applicability of a certification earned to two years from the date of submission of the 10% Test documentation. Therefore, they propose to require the certification to be no older than five years from the submission of the 10% Test documentation to eliminate the administrative burden for all applicable parties by creating a more practically applicable parameter.

STAFF RESPONSE: Staff determined that the change cannot be made to the rule because it will create a conflict with 10 TAC Chapter 11 Subchapter D §11.906(d)(1) and (2) concerning Post Bond Closing Documentation Requirements that specifies Fair Housing training certificates must not be older than two years from the date of the submission. Staff also consulted with the Fair Housing Division of the Department and confirmed that no change is recommended to the current requirement in the rules because certified fair housing training providers must include the most up-to-date guidance from HUD. Therefore, new guidance might be missed in some cases if the training is only required in five-year cycles.

COMMENT SUMMARY: Commenter (2) states they disagree with the revision in §10.401(b)(5) regarding the identification of the construction start date on all Third Party construction inspection reports. They state that, due to the limited control they have over what information the third party includes in the reports, they are concerned that requiring this data point after the initial report will create an administrative burden for the owner in navigating the change with the third party construction inspectors and the Department in having to cite inconsequential deficiencies. Therefore, Commenter suggests inserting "(initial submission only)" to the language in §10.401(b)(5) in order to avoid requiring the construction start date to be identified on all subsequent Third Party construction inspection reports.

STAFF RESPONSE: Staff agrees with the Commenter and recommends adoption of the suggested change.

The Board adopted the final order adopting the proposed amendment on January 12, 2023.

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

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

§10.401. Housing Tax Credit and Tax Exempt Bond Developments.

(a) 10% Test (Competitive HTC Only). No later than July 1 of the year following the submission of the Carryover Allocation Agreement or as otherwise specified in the applicable year's Qualified Allocation Plan, documentation must be submitted to the Department verifying that the Development Owner has expended more than 10% of the Development Owner's reasonably expected basis, pursuant to §42(h)(1)(E)(i) and (ii) of the Code and Treasury Regulations, 26 CFR §1.42-6. The Development Owner must submit, in the form prescribed by the Department, documentation evidencing paragraphs (1) - (7) of this subsection, along with all information outlined in the Post Award Activities Manual. Satisfaction of the 10% Test will be contingent upon the submission of the items described in paragraphs (1) - (7) of this subsection as well as all other conditions placed upon the Application in the Commitment. Requests for an extension will be reviewed on a case by case basis as addressed in §10.405(c) of this subchapter and §11.2 of this title, as applicable, and a point deduction evaluation will

be completed in accordance with Tex. Gov't Code §2306.6710(b)(2) and §11.9(g) of this title. Documentation to be submitted for the 10% Test includes:

(1) An Independent Accountant's Report and Taxpayer's Basis Schedule form. The report must be prepared on the accounting firm's letterhead and addressed to the Development Owner or an Affiliate of the Development Owner. The Independent Accountant's Report and Taxpayers Basis Schedule form must be signed by the Development Owner. If, at the time the accountant is reviewing and preparing their report, the accountant has concluded that the taxpayer's reasonably expected basis is different from the amount reflected in the Carry-over Allocation agreement, then the accountant's report should reflect the taxpayer's reasonably expected basis as of the time the report is being prepared;

(2) Any conditions of the Commitment or Real Estate Analysis underwriting report due at the time of 10% Test submission;

(3) Evidence that the Development Owner has purchased, transferred, leased, or otherwise has ownership of the Development Site and a current title policy. The Development Site must be identical to the Development Site that was submitted at the time of Application submission. For purposes of this paragraph, any changes to the Development Site acreage between Application and 10% Test must be addressed by written explanation or, as appropriate, in accordance with §10.405 of this subchapter (relating to Amendments and Extensions);

(4) A current survey or plat of the Development Site, prepared and certified by a duly licensed Texas Registered Professional Land Surveyor. The survey or plat must clearly delineate the flood plain boundary lines and show all easements and encroachments;

(5) For New Construction, Reconstruction, and Adaptive Reuse Developments, a certification from a Third Party civil engineer or architect stating that all necessary utilities will be available at the Development Site and that there are no easements, licenses, royalties, or other conditions on or affecting the Development that would materially or adversely impact the ability to acquire, develop, and operate as set forth in the Application. Copies of supporting documents may be required by the Department;

(6) For the Development Owner and on-site or regional property manager, training certificate(s) from a Department approved "property owner and manager Fair Housing trainer" showing that the Development Owner and on-site or regional property manager attended and passed at least five hours of Fair Housing training. For architects and engineers, training certificate(s) from a Department approved "architect and engineer Fair Housing trainer" showing that the lead architect or engineer responsible for certifying compliance with the Department's accessibility and construction standards has attended and passed at least five hours of Fair Housing training. Certifications required under this paragraph must not be older than two years from the date of submission of the 10% Test Documentation, and must verify that all parts or phases of the offered training have been completed; two certificates supplied for the same part or phase of an offered training will not be counted towards the five hour required minimum, even if they were attended on different dates; and

(7) A Certification from the lender and syndicator identifying all known Guarantors. If identified Guarantors have changed from the Guarantors or Principals identified at the time of Application, a non-material amendment may be required in accordance with §10.405 of this subchapter (relating to Amendments and Extensions), and the new Guarantors or Principals must be reviewed in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee).

(8) Evidence of submission of the CMTS Filing Agreement pursuant to §10.607(a) of this title (relating to Reporting Requirements).

(b) Construction Status Report (All Multifamily Developments). All multifamily Developments must submit a construction status report. Construction status reports shall be due by the tenth day of the month following each reporting quarter's end (January, April, July, and October) and continue on a quarterly basis until the entire Development is complete as evidenced by one of the following: Certificates of occupancy for each building, the Architect's Certificate(s) of Substantial Completion (AIA Document G704 or equivalent form) for the entire Development, the final Application and Certificate for Payment (AIA Document G702 and G703), or an equivalent form approved for submission by the construction lender and/or investor. For Competitive Housing Tax Credit Developments, the initial report must be submitted no later than October 10th following the year of award (this includes Developments funded with HTC and TDHCA Multifamily Direct Loans), and for Developments awarded under the Department's Multifamily Direct Loan programs only, the initial report must be submitted 90 calendar days after loan closing. For Tax Exempt Bond Developments, the initial construction status report must be submitted as part of the Post Bond Closing Documentation due no later than 60 calendar days following closing on the bonds. The initial report for all multifamily Developments shall consist of the items identified in paragraphs (1) - (6) of this subsection, unless stated otherwise. All subsequent reports shall contain items identified in paragraphs (4) - (6) of this paragraph and must include any changes or amendments to items in paragraphs (1) - (3) if applicable:

(1) The executed partnership agreement with the investor or, for Developments receiving an award only from the Department's Direct Loan Program, other documents setting forth the legal structure and ownership. If identified Guarantors or Principals of a Guarantor entity were not already identified as a Principal of the Owner, Developer, or Guarantor at the time of Application, a non-material amendment must be requested in accordance with §10.405 of this subchapter, and the new Guarantors and all of its Principals, as applicable, must be reviewed in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee);

(2) The executed construction contract for the General Contractor, prime subcontractor(s) and Affiliates or Related Party subcontractor(s);

(3) The construction loan agreement. If the loan has not closed, the anticipated closing date must be provided and, upon closing, the agreement must be provided to the Department;

(4) The most recent Application and Certificate for Payment (AIA Document G702 and G703) certified by the Architect of Record (or equivalent form approved for submission by the construction lender and/or investor) for the General Contractor, prime subcontractor(s) and Affiliates or Related Party subcontractor(s);

(5) All Third Party construction inspection reports not previously submitted. If the lender and/or investor does not require third party construction inspection reports, the Development Owner must hire a third party inspector to perform these inspections on a quarterly basis and submit the reports to the Department. Third Party construction inspection reports must include, at a minimum, the date construction started (initial submission only), a discussion of site conditions as of the date of the site visit, current photographs of the construction site and exterior and interior of buildings, an estimated percentage of construction completion as of the date of the site visit, identification of

construction delays and other relevant progress issues, if any, and the anticipated construction completion date; and

(6) Minority Owned Business Report (HTC only) showing the attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses as required and further described in Tex. Gov't Code §2306.6734.

(c) LURA Origination.

(1) The Development Owner must request origination of the HTC LURA as directed in the Post Award Activities Manual. The Department will draft a LURA for the Development Owner that will impose the income and rent restrictions identified in the Development's final underwriting report and other representations made in the Application, including but not limited to specific commitments to provide tenant services, to lease to Persons with Disabilities, and/or to provide specific amenities. After origination, the Department executed LURA and all exhibits and addendums will be sent to the Development Owner to execute and record in the real property records for the county in which the Development is located. A copy of the fully executed, recorded LURA must be returned to the Department no later than the end of the first year of the Credit Period. In general, no Housing Tax Credits are allowed to be issued for a building unless there is a properly executed and recorded LURA in effect at the end of the first year of the Credit Period. Nothing in this section negates a Development Owner's responsibility for full compliance with §42(h)(6) of the Code. The Department will not issue IRS Form(s) 8609 until it receives a copy of the fully executed, recorded LURA.

(2) LURAs for Direct Loan awardees will be prepared by the Department's Legal Division and executed at loan closing.

(d) Cost Certification (Competitive and Non-Competitive HTC, and related activities only). The Department conducts a feasibility analysis in accordance with §42(m)(2)(C)(i)(III) of the Code and Chapter 11, Subchapter D of this title (relating to Underwriting and Loan Policy) to make a final determination on the allocation of Housing Tax Credits. For Non-Competitive HTC Developments, the amount of tax credits reflected in the IRS Form(s) 8609 may be greater or less than the amount set forth in the Determination Notice based upon the Department's determination as of each building's placement in service. Any increase of tax credits will only be permitted if it is determined necessary by the Department, as required by §42(m)(2)(D) of the Code through the submission of the Cost Certification package. Increases to the amount of tax credits that exceed 120% of the amount of credits reflected in the Determination Notice must be approved by the Board. Increases to the amount of tax credits that do not exceed 120% of the amount of credits reflected in the Determination Notice may be approved administratively by the Executive Director or designee. All credit increases are subject to the Tax-Exempt Bond Credit Increase Request Fee as described in Chapter 11, Subchapter E of this Part (relating to Fee Schedule, Appeals, and other Provisions). The requirements for cost certification include those identified in paragraphs (1) - (3) of this subsection.

(1) Development Owners must file cost certification documentation no later than January 15 following the first year of the Credit Period, as defined in §42(f)(1) of the Code.

(2) The Department will evaluate the cost certification documentation and notify the Development Owner of any additional required documentation needed to complete the review. The Department reserves the right to request additional documents or certifications as it deems necessary or useful in the determination of the Development's eligibility for a final Housing Tax Credit allocation amount. Any com-

munication issued to the Development Owner pertaining to the cost certification documentation may also be sent to the syndicator.

(3) IRS Form(s) 8609 will not be issued until the conditions as stated in subparagraphs (A) - (G) of this paragraph have been met. The Development Owner has:

(A) Provided evidence that all buildings in the Development have been placed in service by:

(i) December 31 of the year the Commitment was issued;

(ii) December 31 of the second year following the year the Carryover Allocation Agreement was executed; or

(iii) the approved Placed in Service deadline;

(B) Provided a complete final cost certification package in the format prescribed by the Department. As used herein, a complete final cost certification package means a package that meets all of the Department's criteria with all required information and exhibits listed in clauses (i) - (xxxiv) of this subparagraph, and pursuant to the Post Award Activities Manual. If any item on this list is determined to be unclear, deficient, or inconsistent with the cost certification review completed by the Department, a Request for Information (RFI) will be sent to the Development Owner. Requirements include:

(i) Owner's signed and notarized Statement of Certification verifying the CPA firm's licenses and validity, including any restrictions;

(ii) Owner Summary & Organization Charts for the Owner, Developer, and Guarantors;

(iii) Evidence of Qualified Nonprofit or CHDO Participation;

(iv) Certification and evidence of Historically Underutilized Business (HUB) Participation;

(v) Development Team List;

(vi) Development Summary with Architect's Certification;

(vii) Development Change Documentation;

(viii) As Built Survey;

(ix) A copy of the fully executed Closing Statement for each parcel of land and/or buildings purchased and included in the Development;

(x) Development Owner's Title Policy for the Development;

(xi) Title Policy Update;

(xii) Placement in Service;

(xiii) Evidence of Placement in Service;

(xiv) Architect's Certification of Completion Date and Date Ready for Occupancy (for Developments located in areas where Certificates of Occupancy (COs) are not issued by a local government or rehabilitation Developments that cannot provide COs);

(xv) Auditor's Certification of Acquisition/Rehabilitation Placement in Service Election;

(xvi) Independent Auditor's Report;

(xvii) Independent Auditor's Report of Bond Financing;

- (xviii) Development Cost Schedule;
 - (xix) Contractor's Application for Final Payment (G702/G703) for the General Contractor, all prime subcontractors, Affiliated Contractors, and Related Party Contractors;
 - (xx) Additional Documentation of Offsite Costs;
 - (xxi) Rent Schedule;
 - (xxii) Utility Allowances;
 - (xxiii) Annual Operating Expenses;
 - (xxiv) 30 Year Rental Housing Operating Pro Forma;
 - (xxv) Current Operating Statement in the form of a trailing twelve month statement;
 - (xxvi) Current Rent Roll;
 - (xxvii) Summary of Sources and Uses of Funds;
 - (xxviii) Final Limited Partnership Agreement with all amendments and exhibits;
 - (xxix) All Loan Agreements and Promissory Notes (except for Agreements and Notes issued directly by the Department);
 - (xxx) Architect's Certification of Accessibility Requirements;
 - (xxxi) Development Owner Assignment of Individual to Compliance Training;
 - (xxxii) TDHCA Compliance Training Certificate (not older than two years from the date of cost certification submission);
 - (xxxiii) TDHCA Final Inspection Clearance Letter or evidence of submitted final inspection request to the Compliance Division (IRS Form(s) 8609 will not be issued without a TDHCA Final Inspection Clearance Letter); and
 - (xxxiv) Other Documentation as Required, including but not limited to conditions to be satisfied at cost certification as reflected in the Development's latest Underwriting Report;
- (C) Informed the Department of and received written approval for all amendments, extensions, and changes in ownership relating to the Development in accordance with §10.405 of this subchapter (relating to Amendments and Extensions) and §10.406 of this subchapter (relating to Ownership Transfers (§2306.6713));
- (D) Paid all applicable Department fees, including any past due fees;
- (E) Met all conditions noted in the Department underwriting report, Determination Notice, and Commitment;
- (F) Corrected all issues of noncompliance, including but not limited to noncompliance status with the LURA (or any other document containing an Extended Low-income Housing Commitment) or the program rules in effect for the subject Development, as described in this chapter. Developments in the corrective action period and/or with any uncorrected issues of noncompliance outside of the corrective action period will not be issued IRS Form(s) 8609s until all events of noncompliance are corrected or otherwise approved by the Executive Director or designee; and
- (G) Completed an updated underwriting evaluation in accordance with Chapter 11, Subchapter D of this Part based on the most current information at the time of the review.

§10.403. *Review of Annual HOME, HOME-ARP, NSP, TCAP-RF, and National Housing Trust Fund Rents.*

(a) *Applicability.* For participants of the Department's Multifamily HOME, HOME American Rescue Plan (HOME-ARP), and NSP Direct Loan program, where Commitment of Funds occurred on or after August 23, 2013, the Department is required by 24 CFR §92.252(f) and for all National Housing Trust Fund (NHTF) recipients by 24 CFR §93.302(c)(2), to review and approve or disapprove HOME/HOME-ARP/NSP/NHTF rents on an annual basis. The Department is also required by 24 CFR §92.219 and §92.252(d)(2) to approve rents where Multifamily Direct Loan funds (including TCAP-RF) are used as HOME match. Development Owners must submit documentation for the review of HOME/HOME-ARP/NSP/NHTF/TCAP-RF rents by no later than August 1st of each year as further described in the Post Award Activities Manual.

(b) *Documentation for Review.* The Department will furnish a rent approval request packet for this purpose that will include a request for Development information and an Owner's proposed rent schedule and will require submission of a current rent roll, the most recent 12-month operating statement for the Development, and utility allowance information. The Department may request additional documentation to perform a determination, as needed, including but not limited to annual operating statements, market surveys, or other information related to determining whether rents are sufficient to maintain the financial viability of a project or are in compliance with maximum rent limits.

(c) *Review Process.* Rents will be approved or disapproved within 30 days of receipt of all items required to be submitted by the Development Owner, and will be issued in the form of a signed letter from the Asset Management Division. Development Owners must keep copies of all approval letters on file at the Development site to be reviewed at the time of Compliance Monitoring reviews.

(d) *Compliance.* Development Owners for whom this section is applicable are subject to compliance under §10.622 of this chapter (relating to Special Rules Regarding Rents and Limit Violations) and may be subject to penalties under §10.625 of this chapter (relating to Events of Noncompliance). Approval of rents by the Asset Management Division will be limited to a review of the documentation submitted and will not guarantee compliance with the Department's rules or otherwise absolve an Owner of any past, current, or future non-compliance related to Department rules, guidance, Compliance Monitoring visits, or any other rules or guidance to which the Development or its Owner may be subject.

§10.405. *Amendments and Extensions.*

(a) *Amendments to Housing Tax Credit (HTC) Application or Award Prior to Land Use Restriction Agreement (LURA) recording or amendments that do not result in a change to the LURA (§2306.6712).* The Department expects the Development Owner to construct or rehabilitate, operate, and own the Development consistent with the representations in the Application. The Department must receive notification of any amendments to the Application. Regardless of development stage, the Board shall re-evaluate a Development that undergoes a material change, as identified in paragraph (3) of this subsection at any time after the initial Board approval of the Development (§2306.6731(b)). The Board may deny an amendment request and subsequently may rescind any Commitment or Determination Notice issued for an Application, and may reallocate the credits to other Applicants on the waiting list.

(1) *Requesting an amendment.* The Department shall require the Applicant to file a formal, written request for an amendment

to the Application. Such request must include a detailed explanation of the amendment request and other information as determined to be necessary by the Department, and the applicable fee as identified in Chapter 11, Subchapter E of this title (relating to Fee Schedule, Appeals, and other Provisions) in order to be received and processed by the Department. Department staff will evaluate the amendment request to determine if the change would affect an allocation of Housing Tax Credits by changing any item that received points, by significantly affecting the most recent underwriting analysis, or by materially altering the Development as further described in this subsection.

(2) Notification Items. The Department must be notified of the changes described in subparagraphs (A) - (F) of this paragraph. The changes identified are subject to staff agreement based on a review of the amendment request and any additional information or documentation requested. Notification items will be considered satisfied when an acknowledgment of the specific change(s) is received from the Department and include:

(A) Changes to Development Site acreage required by the City or other local governmental authority, or changes resulting from survey discrepancies, as long as such change does not also result in a modification to the residential density of more than 5%;

(B) Minor modifications to the site plan that will not significantly impact development costs, including, but not limited to, relocation or rearrangement of buildings on the site (as long as the number of residential and non-residential buildings remains the same), and movement, addition, or deletion of ingress/egress to the site;

(C) Increases or decreases in net rentable square footage or common areas that do not result in a material amendment under paragraph (4) of this subsection;

(D) Changes in amenities that do not require a change to the recorded LURA and do not negatively impact scoring, including changes to outdated amenities that could be replaced by an amenity with equal benefit to the resident community;

(E) Changes in Developers or Guarantors (notifications for changes in Guarantors that are also the General Contractor or are only providing guaranties during the construction period are not required) with no new Principals (who were not previously checked by Previous Participation review that retain the natural person(s) used to meet the experience requirement in Chapter 11 of this title (relating to Qualified Allocation Plan)); and

(F) Any other amendment not identified in paragraphs (3) and (4) of this subsection.

(3) Non-material amendments. The Executive Director or designee may administratively approve all non-material amendments, including, but not limited to:

(A) Any amendment that is determined by staff to exceed the scope of notification acknowledgement, as identified in paragraph (2) of this subsection but not to rise to a material alteration, as identified in paragraph (4) of this subsection;

(B) Changes in the natural person(s) used to meet the experience requirement in Chapter 11, §11.204(6) of this title provided that an appropriate substitute has been approved by the Multifamily Division prior to receipt of the amendment request (relating to Required Documentation for Application Submission);

(C) Changes in Developers or Guarantors (excluding changes in Guarantors that are also the General Contractor or are only providing guaranties during the construction period) not addressed in §10.405(a)(2)(E). Changes in Developers or Guarantors will be subject to Previous Participation requirements as further described in Chapter

11 of this title and the credit limitation described in §11.4(a) of this title; and

(D) For Exchange Developments only, requests to change elections made on line 8(b) of the IRS Form(s) 8609 to group buildings together into one or more multiple building projects. The request must include an attached statement identifying the buildings in the project. The change to the election may only be made once during the Compliance Period.

(4) Material amendments. Amendments considered material pursuant to this paragraph must be approved by the Board. When an amendment request requires Board approval, the Development Owner must submit the request and all required documentation necessary for staff's review of the request to the Department at least 45 calendar days prior to the Board meeting in which the amendment is anticipated to be considered. Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and Department staff regarding the amendment will be posted to the Department's website and the Applicant will be notified of the posting (§2306.6717(a)(4)). Material Amendment requests may be denied if the Board determines that the modification proposed in the amendment would materially alter the Development in a negative manner or would have adversely affected the selection of the Application in the Application Round. Material alteration of a Development includes, but is not limited to:

(A) A significant modification of the site plan;

(B) A modification of the number of Units or bedroom mix of Units;

(C) A substantive modification of the scope of tenant services;

(D) A reduction of 3% or more in the square footage of the Units or common areas;

(E) A significant modification of the architectural design of the Development;

(F) A modification of the residential density of at least 5%;

(G) A request to implement a revised election under §42(g) of the Code prior to filing of IRS Form(s) 8609;

(H) Exclusion of any requirements as identified in Chapter 11, Subchapter B of this title (relating to Site and Development Requirements and Restrictions) and Chapter 11, Subchapter C of this title (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules); or

(I) Any other modification considered material by the staff and therefore required to be presented to the Board as such.

(5) Amendment requests will be denied if the Department finds that the request would have changed the scoring of an Application in the competitive process such that the Application would not have received a funding award or if the need for the proposed modification was reasonably foreseeable or preventable by the Applicant at the time the Application was submitted, unless good cause is found for the approval of the amendment.

(6) This section shall be administered in a manner that is consistent with §42 of the Code. If a Development has any uncorrected issues of noncompliance outside of the corrective action period (other than the provision being amended) or otherwise owes fees to the Department, such non-compliance or outstanding payment must be resolved to the satisfaction of the Department before a request for amendment will be acted upon.

(7) In the event that an Applicant or Developer seeks to be released from the commitment to serve the income level of tenants identified in the Application and Credit Underwriting Analysis Report at the time of award and as approved by the Board, the procedure described in subparagraphs (A) and (B) of this paragraph will apply to the extent such request is not prohibited based on statutory and/or regulatory provisions:

(A) For amendments that involve a reduction in the total number of Low-Income Units, or a reduction in the number of Low-Income Units at any rent or income level, as approved by the Board, evidence noted in either clause (i) or (ii) of this subparagraph must be presented to the Department to support the amendment:

(i) In the event of a request to implement (rent to a household at an income or rent level that exceeds the approved AMI limits established by the minimum election within the Development's Application or LURA) a revised election under §42(g) of the Code prior to an Owner's submission of IRS Form(s) 8609 to the IRS, Owners must submit updated information and exhibits to the Application as required by the Department and all lenders and the syndicator must submit written acknowledgement that they are aware of the changes being requested and confirm any changes in terms as a result of the new election; or

(ii) For all other requests for reductions in the total number of Low-Income Units or reductions in the number of Low-Income Units at any rent or income level, prior to issuance of IRS Form(s) 8609 by the Department, the lender and syndicator must submit written confirmation that the Development is infeasible without the adjustment in Units. The Board may or may not approve the amendment request; however, any affirmative recommendation to the Board is contingent upon concurrence from Department staff that the Unit adjustment is necessary for the continued financial feasibility of the Development; and

(B) If it is determined by the Department that the loss of low-income targeting points would have resulted in the Application not receiving an award in the year of allocation, and the amendment is approved by the Board, the approved amendment will carry a penalty that prohibits the Applicant and all Persons or entities with any ownership interest in the Application (excluding any tax credit purchaser/syndicator), from participation in the Housing Tax Credit Program (for both the Competitive Housing Tax Credit Developments and Tax-Exempt Bond Developments) for 24 months from the time that the amendment is approved.

(b) Amendments to the LURA. Department approval shall be required for any amendment to a LURA in accordance with this section. An amendment request shall be submitted in writing, containing a detailed explanation of the request, the reason the change is necessary, the good cause for the change, financial information related to any financial impact on the Development, information related to whether the necessity of the amendment was reasonably foreseeable at the time of application, and other information as determined to be necessary by the Department, along with any applicable fee as identified in Chapter 11, Subchapter E of this title (relating to Fee Schedule, Appeals, and other Provisions). The Department may order or require the Development Owner to order a Market Study or appraisal at the Development Owner's expense. If a Development has any uncorrected issues of non-compliance outside of the corrective action period (other than the provision being amended) or otherwise owes fees to the Department, such non-compliance or outstanding payment must be resolved to the satisfaction of the Department, before a request for amendment will be acted upon. The Department will not approve changes that would violate state or federal laws including the requirements of §42 of the Code, 24 CFR Part 92 (HOME Final Rule), 24 CFR Part 93 (NHTF Interim

Rule), Chapter 1 of this title (relating to Administrative Requirements), Chapter 11 of this title (relating to Qualified Allocation Plan), Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules), Chapter 13 of this title (relating to Multifamily Direct Loan Rule), Tex. Gov't Code, Chapter 2306, and the Fair Housing Act. For Tax-Exempt Bond Developments, compliance with their Regulatory Agreement and corresponding bond financing documents. Prior to staff taking a recommendation to the Board for consideration, the procedures described in paragraph (3) of this subsection must be followed.

(1) Non-Material LURA Amendments. The Executive Director or designee may administratively approve all LURA amendments not defined as Material LURA Amendments pursuant to paragraph (2) of this subsection. A non-material LURA amendment may include but is not limited to:

(A) HUB participation removal. Removal of a HUB participation requirement will only be processed as a non-material LURA amendment after the issuance of IRS Form(s) 8609 and requires that the Department find that:

(i) The HUB is requesting removal of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(ii) the participation by the HUB has been substantive and meaningful, or would have been substantive or meaningful had the HUB not defaulted under the organizational documents of the Development Owner, enabling it to realize not only financial benefit but to acquire skills relating to the ownership and operating of affordable housing; and

(iii) where the HUB will be replaced as a general partner or special limited partner that is not a HUB and will sell its ownership interest, an ownership transfer request must be submitted as described in §10.406 of this subchapter;

(B) A change resulting from a Department work out arrangement as recommended by the Department's Asset Management Division;

(C) A change in the Right of First Refusal period as described in amended §2306.6726 of the Tex. Gov't Code;

(D) Where the Board has approved a de minimis modification of the Unit Mix or bedroom mix of Units to increase the Development's accessibility; or

(E) A correction of error.

(2) Material LURA Amendments. Development Owners seeking LURA amendment requests that require Board approval must submit the request and all required documentation necessary for staff's review of the request to the Department at least 45 calendar days prior to the Board meeting at which the amendment is anticipated to be considered. Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and Department staff regarding the amendment will be posted to the Department's website and the Applicant will be notified of the posting. (§2306.6717(a)(4)). The Board must consider the following material LURA amendments:

(A) Reductions to the number of Low-Income Units;

(B) Changes to the income or rent restrictions;

(C) Changes to the Target Population;

(D) The removal of material participation by a Non-profit Organization as further described in §10.406 of this subchapter;

(E) The removal of material participation by a HUB prior to filing of IRS Form(s) 8609;

(F) Any amendment that affects a right enforceable by a tenant or other third party under the LURA; or

(G) Any LURA amendment deemed material by the Executive Director.

(3) Prior to staff taking a recommendation to the Board for consideration, the Development Owner must provide notice and hold a public hearing regarding the requested amendment(s) at least 20 business days prior to the scheduled Board meeting where the request will be considered. Development Owners will be required to submit a copy of the notification with the amendment request. If a LURA amendment is requested prior to issuance of IRS Form(s) 8609 by the Department, notification must be provided to the recipients described in subparagraphs (A) - (E) of this paragraph. If an amendment is requested after issuance of IRS Form(s) 8609 by the Department, notification must be provided to the recipients described in subparagraph (A) - (B) of this paragraph. Notifications include:

(A) Each tenant of the Development;

(B) The current lender(s) and investor(s);

(C) The State Senator and State Representative of the districts whose boundaries include the Development Site;

(D) The chief elected official for the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction); and

(E) The county commissioners of the county in which the Development Site is located (if the Development Site is located outside of a municipality).

(4) Contents of Notification. The notification must include, at a minimum, all of the information described in subparagraphs (A) - (D) of this paragraph:

(A) The Development Owner's name, address and an individual contact name and phone number;

(B) The Development's name, address, and city;

(C) The change(s) requested; and

(D) The date, time and location of the public hearing where the change(s) will be discussed.

(5) Verification of public hearing. Minutes of the public hearing and attendance sheet must be submitted to the Department within three business days after the date of the public hearing.

(6) Approval. Once the LURA Amendment has been approved administratively or by the Board, as applicable, Department staff will provide the Development Owner with a LURA amendment for execution and recording in the county where the Development is located.

(c) HTC Extensions. Extensions must be requested if the original deadline associated with Carryover, the 10% Test (including submission and expenditure deadlines), construction status reports, or cost certification requirements will not be met. Extension requests submitted at least 30 calendar days in advance of the applicable deadline will not be required to submit an extension fee as described in §11.901 of this title. Any extension request submitted fewer than 30 days in advance of the applicable deadline or after the applicable deadline will not be processed unless accompanied by the applicable fee. Extension requests will be approved by the Executive Director or designee, unless, at staff's discretion it warrants Board approval due to extenu-

ating circumstances stated in the request. The extension request must specify a requested extension date and the reason why such an extension is required. If the Development Owner is requesting an extension to the Carryover submission or 10% Test deadline(s), a point deduction evaluation will be completed in accordance with Tex. Gov't Code, §2306.6710(b)(2), and §11.9(g) of this title (relating to Factors Affecting Scoring and Eligibility in current and future Application Rounds). Therefore, the Development Owner must clearly describe in their request for an extension how the need for the extension was beyond the reasonable control of the Applicant/Development Owner and could not have been reasonably anticipated. Carryover extension requests will not be granted an extended deadline later than December 1st of the year the Commitment was issued.

§10.406. *Ownership Transfers (§2306.6713).*

(a) Ownership Transfer Notification. All multifamily Development Owners must provide written notice and a completed Ownership Transfer packet, if applicable, to the Department at least 45 calendar days prior to any sale, transfer, or exchange of the Development or any portion of or Controlling interest in the Development. Except as otherwise provided herein, the Executive Director's prior written approval of any such transfer is required. The Executive Director may not unreasonably withhold approval of the transfer requested in compliance with this section.

(b) Exceptions. The exceptions to the ownership transfer process in this subsection are applicable.

(1) A Development Owner shall be required to notify the Department but shall not be required to obtain Executive Director approval when the transferee is an Affiliate of the Development Owner with no new Principals or the transferee is a Related Party who does not Control the Development and the transfer is being made for estate planning purposes.

(2) Transfers that are the result of an involuntary removal of the general partner by the investment limited partner do not require advance approval but must be reported to the Department as soon as possible due to the sensitive timing and nature of this decision. In the event the investment limited partner has proposed a new general partner or will permanently replace the general partner, a full Ownership Transfer packet must be submitted.

(3) Changes to the investment limited partner, non-Controlling limited partner, or other non-Controlling partners affiliated with the investment limited partner do not require Executive Director approval. A General Partner's acquisition of the interest of the investment limited partner does not require Executive Director approval, unless some other change in ownership is occurring as part of the same overall transaction.

(4) Changes resulting from foreclosure do not require advance approval but acquiring parties must notify the Department as soon as possible of the revised ownership structure and ownership contact information.

(5) Changes resulting from a deed-in-lieu of foreclosure do not require Executive Director approval. However, advance notification must be provided to both the Department and to the tenants at least 30 days prior to finalizing the transfer. This notification must include information regarding the applicable rent/income requirements post deed in lieu of foreclosure.

(c) General Requirements.

(1) Any new Principal in the ownership of a Development must be eligible under §11.202 of Subchapter C (relating to Ineligible Applicants and Applications). In addition, Persons and Principals will be reviewed in accordance with Chapter 1, Subchapter C of this title

(relating to Previous Participation and Executive Award Review and Advisory Committee).

(2) Changes in Developers or Guarantors must be addressed as non-material amendments to the application under §10.405 of this Subchapter.

(3) To the extent an investment limited partner or its Affiliate assumes a Controlling interest in a Development Owner, such acquisition shall be subject to the Ownership Transfer requirements set forth herein. Principals of the investment limited partner or Affiliate will be considered new Principals and will be reviewed as stated under paragraph (1) of this subsection.

(4) Simultaneous transfer or concurrent offering for sale of the General Partner's and Limited Partner's control and interest will be subject to the Ownership Transfer requirements set forth herein and will trigger a Right of First Refusal, if applicable.

(5) Any initial operating, capitalized operating, or replacement reserves funded with an allocation from the HOME American Rescue Plan (HOME-ARP) and Special Reserves required by the Department must remain with the Development.

(d) Transfer Actions Warranting Debarment. If the Department determines that the transfer, involuntary removal, or replacement was due to a default by the General Partner under the Limited Partnership Agreement, or other detrimental action that put the Development at risk of failure or the Department at risk for financial exposure as a result of non-compliance, staff will refer the matter to the Enforcement Committee for debarment consideration pursuant to §2.401 of this title (relating to Enforcement, Debarment from Participation in Programs Administered by the Department). In addition, a record of transfer involving Principals in new proposed awards will be reported and may be taken into consideration in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), prior to recommending any new financing or allocation of credits.

(e) Transfers Prior to 8609 Issuance or Construction Completion. Prior to the issuance of IRS Form(s) 8609 (for Housing Tax Credits) or the completion of construction (for all Developments funded through other Department programs), an Applicant may request an amendment to its ownership structure to add Principals. The party(ies) reflected in the Application as having Control must remain in the ownership structure and retain Control, unless approved otherwise by the Executive Director. A development sponsor, General Partner or Development Owner may not sell the Development in whole or voluntarily end their Control prior to the issuance of 8609s.

(f) Nonprofit Organizations. If the ownership transfer request is to replace a nonprofit organization within the Development ownership entity, the replacement nonprofit entity must adhere to the requirements in paragraph (1) or (2) of this subsection.

(1) If the LURA requires ownership or material participation in ownership by a Qualified Nonprofit Organization, and the Development received Tax Credits pursuant to §42(h)(5) of the Code, the transferee must be a Qualified Nonprofit Organization that meets the requirements of §42(h)(5) of the Code and Tex. Gov't Code §2306.6706, if applicable, and can demonstrate planned participation in the operation of the Development on a regular, continuous, and substantial basis.

(2) If the LURA requires ownership or material participation in ownership by a nonprofit organization or CHDO, the Development Owner must show that the transferee is a nonprofit organization or CHDO, as applicable, that complies with the LURA. If the transferee has been certified as a CHDO by TDHCA prior to 2016 or has not previously been certified as a CHDO by TDHCA, a new CHDO cer-

tification package must be submitted for review. If the transferee was certified as a CHDO by TDHCA after 2016, provided no new federal guidance or rules concerning CHDO have been released and the proposed ownership structure at the time of review meets the requirements in 24 CFR Part 92, the CHDO may instead submit a CHDO Self-Certification form with the Ownership Transfer package.

(3) Exceptions to paragraphs (1) and (2) of this subsection may be made on a case by case basis if the Development (for MFDL) is past its Federal Affordability Period or (for HTC Developments) is past its Compliance Period, was not reported to the IRS as part of the Department's Nonprofit Set Aside in any HTC Award year, and follows the procedures outlined in §10.405(b)(1) - (5) of this subchapter. The Board must find that:

(A) The selling nonprofit is acting of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(B) The participation by the nonprofit was substantive and meaningful during the full term of the Compliance Period but is no longer substantive or meaningful to the operations of the Development; and

(C) The proposed purchaser is an affiliate of the current Owner or otherwise meets the Department's standards for ownership transfers.

(g) Historically Underutilized Business (HUB) Organizations. If a HUB is the general partner or special limited partner of a Development Owner and it determines to sell its ownership interest, after the issuance of IRS Form(s) 8609, the purchaser of that partnership interest or the general or special limited partner is not required to be a HUB as long as the LURA does not require it or the procedure described in §10.405(b)(1) of this chapter (relating to Non-Material LURA Amendments) has been followed and approved. The removal of a HUB requirement prior to filing of IRS Form(s) 8609 is subject to the procedure described in §10.405(b)(2) of this Chapter (relating to Material LURA Amendments).

(h) Documentation Required. A Development Owner must submit documentation requested by the Department to enable the Department to understand fully the facts and circumstances pertaining to the transfer and the effects of approval or denial. Documentation must be submitted as directed in the Post Award Activities Manual, which includes but is not limited to:

(1) A written explanation outlining the reason for the request;

(2) Ownership transfer information, including but not limited to the type of sale, terms of any new financing introduced as a result of the transfer, amount of Development reserves to transfer in the event of a property sale, and the prospective closing date;

(3) Pre and post transfer organizational charts with TINs of each organization down to the level of natural persons in the ownership structure as described in §11.204(13)(B) of Subchapter C of this title (relating to Required Documentation for Application Submission);

(4) A list of the names and contact information for transferees and Related Parties;

(5) Previous Participation information for any new Principal as described in §11.204(13)(C) of this title (relating to Required Documentation for Application Submission);

(6) Agreements among parties associated with the transfer;

(7) Owners Certifications with regard to materials submitted as further described in the Post Award Activities Manual;

(8) Detailed information describing the organizational structure, experience, and financial capacity of any party holding a controlling interest in any Principal or Controlling entity of the prospective Development Owner;

(9) Evidence and certification that the tenants in the Development have been notified in writing of the proposed transfer at least 30 calendar days prior to the date the transfer is approved by the Department. The ownership transfer approval letter will not be issued until this 30-day period has expired; and

(10) Any required exhibits and the list of exhibits related to specific circumstances of transfer or Ownership as detailed in the Post Award Activities Manual.

(i) Once the Department receives all necessary information under this section and as required under the Post Award Activities Manual, staff shall initiate a qualifications review of a transferee, in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), to determine the transferee's past compliance with all aspects of the Department's programs, LURAs and eligibility under this chapter and §11.202 of this title (relating to Ineligible Applicants and Applications).

(j) Credit Limitation. As it relates to the Housing Tax Credit amount further described in §11.4(a) of this title (relating to Tax Credit Request and Award Limits), the credit amount will not be applied in circumstances described in paragraphs (1) and (2) of this subsection:

(1) In cases of transfers in which the syndicator, investor or limited partner is taking over ownership of the Development and not merely replacing the general partner; or

(2) In cases where the general partner is being replaced if the award of credits was made at least five years prior to the transfer request date.

(k) Penalties, Past Due Fees and Underfunded Reserves. The Development Owner must comply with any additional documentation requirements as stated in Subchapter F of this chapter (relating to Compliance Monitoring) and Subchapter G of this chapter (relating to Affirmative Marketing Requirements and Written Policies and Procedures). The Development Owner on record with the Department will be liable for any penalties or fees imposed by the Department (even if such penalty can be attributable to the new Development Owner) unless an ownership transfer has been approved by the Department. In the event a transferring Development has a history of uncorrected UPCS violations, ongoing issues related to keeping housing sanitary, safe, and decent, an account balance below the annual reserve deposit amount as specified in §10.404(a) (relating to Replacement Reserve Accounts), or that appears insufficient to meet capital expenditure needs as indicated by the number or cost of repairs included in a PNA or SCR, the prospective Development Owner may be required to establish and maintain a replacement reserve account or increase the amount of regular deposits to the replacement reserve account by entering into a Reserve Agreement with the Department. The Department may also request a plan and timeline relating to needed repairs or renovations that will be completed by the departing and/or incoming Owner as a condition to approving the Transfer. A PNA or SCR may be requested if one has not already been received under §10.404 of this section (relating to Reserve Accounts).

(l) Ownership Transfer Processing Fee. The ownership transfer request must be accompanied by the corresponding ownership transfer fee as outlined in §11.901 of this title (relating to Fee Schedule).

§10.407. Right of First Refusal.

(a) General. This section applies to Development Owners that agreed to offer a Right of First Refusal (ROFR) to a Qualified Entity or as applicable a Qualified Nonprofit Organization, as memorialized in the applicable LURA. For the purposes of this section, a Qualified Nonprofit Organization also includes an entity 100% owned by a Qualified Nonprofit Organization pursuant to §42(h)(5)(C) of the Code and operated in a similar manner. The purpose of this section is to provide administrative procedures and guidance on the process and valuation of properties under the LURA. All requests for ROFR submitted to the Department, regardless of existing regulations, must adhere to this process.

(1) The Development Owner may market the Property for sale and enter into an agreement to sell the Property to a Qualified Entity, or as applicable a Qualified Nonprofit Organization without going through the ROFR process outlined in this section, unless otherwise restricted or prohibited and only in the following circumstances:

(A) The LURA includes a 90-day ROFR and the Development Owner is selling to a Qualified Nonprofit Organization;

(B) The LURA includes a two-year ROFR and the Development Owner is selling to a Qualified Nonprofit Organization that meets the definition of a Community Housing Development Organization (CHDO) under 24 CFR Part 92, as approved by the Department; or

(C) The LURA includes a 180-day ROFR, and the Development Owner is selling to a Qualified Entity that meets the definition of a CHDO under 24 CFR Part 92, or to an entity that includes a CHDO as one of its controlling members, as approved by the Department, or to the public housing authority or public facility corporation that owns the fee title to the Development Owner's leasehold estate.

(2) A ROFR request must be made in accordance with the LURA for the Development. If there is a conflict between the Development's LURA and this subchapter, every effort will be made to harmonize the provisions. If the conflict cannot be resolved, requirements in the LURA will supersede this subchapter. If there is a conflict between the Development's LURA and Tex. Gov't Code Chapter 2306, every effort will be made to harmonize the provisions. A Development Owner may request a LURA amendment to make the ROFR provisions in the LURA consistent with Tex. Gov't Code Chapter 2306 at any time.

(3) If a LURA includes the ROFR provision, the Development Owner may not request a Preliminary Qualified Contract (if such opportunity is available under the applicable LURA and §10.408 of this Subchapter) until the requirements outlined in this section have been satisfied.

(4) The Department reviews and approves all ownership transfers pursuant to §10.406 of this subchapter. Thus, if a proposed purchaser is identified by the Owner in accordance with paragraph (1) of this subsection or in the ROFR process, the Development Owner and proposed purchaser must complete the ownership transfer process. A Development Owner may not transfer a Development to a Qualified Nonprofit Organization or Qualified Entity that is considered an ineligible entity under the Department's rules. In addition, ownership transfers to a Qualified Entity or as applicable a Qualified Nonprofit Organization pursuant to the ROFR process are subject to Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee).

(5) Satisfying the ROFR requirement does not terminate the LURA or the ongoing application of the ROFR requirement to any subsequent Development Owner.

(6) If there are multiple buildings in the Development, the end of the 15th year of the Compliance Period will be based upon the

date the last building(s) began their credit period(s). For example, if five buildings in the Development began their credit periods in 2007 and one in 2008, the 15th year would be 2022. The ROFR process is triggered upon:

(A) The Development Owner's determination to sell the Development to an entity other than as permitted in paragraph (1) of this subsection; or

(B) The simultaneous transfer or concurrent offering for sale of a General Partner's and limited partner's interest in the Development Owner's ownership structure.

(7) The ROFR process is not triggered if a Development Owner seeks to transfer the Development to a newly formed entity:

(A) That is under common control with the Development Owner; and

(B) The primary purpose of the formation of which is to facilitate the financing of the rehabilitation of the Development using assistance administered through a state financing program.

(8) This section applies only to a Right of First Refusal memorialized in the Department's LURA. This section does not authorize a modification of any other agreement between the Development Owner and a Qualified Nonprofit Organization or Qualified Entity. The enforceability of a contractual agreement between the Development Owner and a Qualified Nonprofit Organization or Qualified Entity may be impacted by the Development Owner's commitments at Application and recorded LURA.

(b) Right of First Refusal Offer Price. There are two general expectations of the ROFR offer price identified in the outstanding LURAs. The descriptions in paragraphs (1) and (2) of this subsection do not alter the requirements or definitions included in the LURA but provide further clarification as applicable:

(1) Fair Market Value is established using either a current appraisal (completed within three months prior to the ROFR request and in accordance with §11.304 of this title (relating to Appraisal Rules and Guidelines)) of the Property or an executed purchase offer that the Development Owner would like to accept. In either case the documentation used to establish Fair Market Value will be part of the ROFR property listing on the Department's website. The purchase offer must contain specific language that the offer is conditioned upon satisfaction of the ROFR requirement. If a subsequent ROFR request is made within six months of the previously approved ROFR posting, the lesser of the prior ROFR posted value or new appraisal/purchase contract amount must be used in establishing Fair Market Value;

(2) Minimum Purchase Price, pursuant to §42(i)(7)(B) of the Code, is the sum of the categories listed in subparagraphs (A) and (B) of this paragraph:

(A) The principal amount of outstanding indebtedness secured by the project (other than indebtedness incurred within the five year period immediately preceding the date of said notice); and

(B) All federal, state, and local taxes incurred or payable by the Development Owner as a consequence of such sale. If the Property has a minimum Applicable Fraction of less than one, the offer must take this into account by multiplying the purchase price by the applicable fraction and the fair market value of the non-Low-Income Units. Documentation submitted to verify the Minimum Purchase Price calculation will be part of the ROFR property listing on the Department's website.

(c) Required Documentation. Upon establishing the ROFR offer price, the ROFR process is the same for all types of LURAs. To

proceed with the ROFR request, documentation must be submitted as directed in the Post Award Activities Manual, which includes:

(1) ROFR fee as identified in §11.901 of this title (relating to Fee Schedule);

(2) A notice of intent to the Department;

(3) Certification that the Development Owner has provided, to the best of their knowledge and ability, a notice of intent to all additional required persons and entities in subparagraph (A) of this paragraph and that such notice includes, at a minimum the information in subparagraph (B) of this paragraph;

(A) Copies of the letters or emailed notices provided to all persons and entities listed in clauses (i) to (vi) of this subparagraph as required by this paragraph and applicable to the Development at the time of the submission of the ROFR documentation must be attached to the Certification:

(i) All tenants and tenant organizations, if any, of the Development;

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

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

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

(v) The local housing authority, if any; and

(vi) All prospective buyers maintained on the Department's list of prospective buyers.

(B) Letters must include, at a minimum, all of the information required in clauses (i) to (vii) of this subparagraph and must not contain any statement that violates Department rules, statute, Code, or federal requirements:

(i) The Development's name, address, city, and county;

(ii) The Development Owner's name, address, individual contact name, phone number, and email address;

(iii) Information about tenants' rights to purchase the Development through the ROFR;

(iv) The length of the ROFR posting period;

(v) The ROFR offer price;

(vi) A physical description of the Development, including the total number of Units and total number of Low-Income Units; and

(vii) Contact information for the Department staff overseeing the Development's ROFR application.

(4) Documentation evidencing any contractual ROFR between the Development Owner and a Qualified Nonprofit Organization or Qualified Entity, along with evidence that such Qualified Nonprofit Organization or Qualified Entity is in good standing in the state of its organization;

(5) Documentation verifying the ROFR offer price of the Property:

(A) If the Development Owner receives an offer to purchase the Property from any buyer other than a Qualified Entity or Qualified Nonprofit Organization that the Development Owner would

like to accept, the Development Owner may execute a sales contract, conditioned upon satisfaction of the ROFR requirement, and submit the executed sales contract to establish fair market value; or

(B) If the Development Owner chooses to establish fair market value using an appraisal, the Development Owner must submit an appraisal of the Property completed during the last three months prior to the date of submission of the ROFR request, establishing a value for the Property in compliance with Chapter 11, Subchapter D of this title (relating to Underwriting and Loan Policy) in effect at the time of the request. The appraisal should take into account the existing and continuing requirements to operate the Property under the LURA and any other restrictions that may exist. Department staff will review all materials within 30 calendar days of receipt. If, after the review, the Department does not agree with the fair market value proposed in the Development Owner's appraisal, the Department may order another appraisal at the Development Owner's expense; or

(C) If the LURA requires valuation through the Minimum Purchase Price calculation, submit documentation verifying the calculation of the Minimum Purchase Price as described in subsection (b)(2) of this section regardless of any existing offer or appraised value;

(6) Description of the Property, including all amenities;

(7) Copies of all documents imposing income, rental and other restrictions (non-TDHCA), if any, applicable to the operation of the Property;

(8) A current title commitment or policy not older than six months prior to the date of submission of the ROFR request or the most recent title policy along with a title endorsement or nothing further certificate not older than six months prior to the date of submission of the ROFR request;

(9) The most recent Physical Needs Assessment, pursuant to Tex. Gov't Code §2306.186(e) conducted by a Third-Party. If the PNA/SCR identifies the need for critical repairs that significantly impact habitability and tenant safety, the identified repairs and replacements must be resolved to the satisfaction of the Department before the Development will be considered eligible to proceed with a Right of First Refusal Request;

(10) Copy of the monthly operating statements, including income statements and balance sheets for the Property for the most recent 12 consecutive months (financial statements should identify amounts held in reserves);

(11) The three most recent consecutive annual operating statements (audited would be preferred);

(12) Detailed set of photographs of the Property, including interior and exterior of representative units and buildings, and the Property's grounds;

(13) Current and complete rent roll for the Property; and

(14) If any portion of the land or improvements is leased for other than residential purposes, copies of the commercial leases.

(d) Posting and offers. Within 30 business days of receipt of all required documentation, the Department will review the submitted documents and notify the Development Owner of any deficiencies. During that time, the Department will notify any Qualified Entity or as applicable any Qualified Nonprofit Organization identified by the Development Owner as having a contractual ROFR of the Development Owner's intent to sell. Once any deficiencies are resolved and the Development Owner and Department come to an agreement on the ROFR offer price of the Property, the Department will list the Property for sale on the Department's website and notify entities registered to the email

list maintained by the Department of the availability of the Property at a price as determined under this section. The Department will notify the Development Owner when the Property has been listed. The ROFR posting period commences on the date the Property is posted for sale on the Department's website. During the ROFR posting period, a Qualified Nonprofit Organization or Qualified Entity can submit an offer to purchase as follows:

(1) if the LURA requires a 90 day ROFR posting period with no priority for any particular kind of Qualified Nonprofit Organization or tenant organization, any Qualified Nonprofit Organization or tenant organization may submit an offer to purchase the property; or

(2) If the LURA requires a two year ROFR posting period, a Qualified Nonprofit Organization may submit an offer to purchase the Property as follows:

(A) During the first six months of the ROFR posting period, only a Qualified Nonprofit Organization that is a Community Housing Development Organization (CHDO) under 24 CFR Part 92, or that is 100% owned by a CHDO, as approved by the Department, may submit an offer;

(B) During the next six months of the ROFR posting period, only a Qualified Nonprofit Organization as described by Tex. Gov't Code §2306.6706, or that is 100% owned by Qualified Nonprofit Organization as described by Tex. Gov't Code §2306.6706, or a tenant organization may submit an offer; and

(C) During the final 12 months of the ROFR posting period, any Qualified Nonprofit Organization may submit an offer; or

(3) If the LURA requires a 180-day ROFR posting period, a Qualified Entity may submit an offer to purchase the Property consistent with the subparagraphs of this paragraph.

(A) During the first 60 days of the ROFR posting period, only a Qualified Entity that is:

(i) a CHDO under 24 CFR Part 92, or to an entity that includes a CHDO as one of its controlling members or general partners, as approved by the Department, may submit an offer. In accordance with 24 CFR Part 92, Developments committed HOME CHDO funding on or after August 23, 2013, and still within the Federal Affordability Period must have a CHDO or its wholly owned entity (as applicable) as its only controlling entities and no other entities are eligible;

(ii) if the public housing authority or public facility corporation owns the fee title to the Development Owner's leasehold estate:

(I) a public housing authority; or

(II) a public facility corporation created by a public housing authority under Chapter 303, Local Government Code; or

(iii) controlled by an entity described by either clause (i) or (ii) of this subparagraph.

(B) During the second 60 days of the ROFR posting period, only a Qualified Entity as described by Tex. Gov't Code §2306.6706, or that is controlled by Qualified Entity as described by Tex. Gov't Code §2306.6706, or a tenant organization such may submit an offer.

(C) During the final 60 days of the ROFR posting period, any Qualified Entity may submit an offer.

(4) If the LURA does not specify a required ROFR posting timeframe or is unclear on the required ROFR posting timeframe

and the required ROFR value is determined by the Minimum Purchase Price method, any Development that received a tax credit allocation prior to September 1, 1997, is required to post for a 90-day ROFR period, and any Development that received a tax credit allocation on or after September 1, 1997, and until September 1, 2015, is required to post for a two year ROFR, unless the LURA is amended under §10.405(b), or after September 1, 2015, is required to post for a 180-day ROFR period as described in Tex. Gov't Code, §2306.6726.

(e) Acceptance of offers. A Development Owner may accept or reject any offer received during the ROFR posting period; provided however, that to the extent the LURA gives priority to certain classifications of Qualified Nonprofit Organizations or Qualified Entities to make offers during certain portions of the ROFR posting period, the Development Owner can only negotiate a purchase contract with such classifications of entities during their respective periods. For example, during the CHDO priority period, the Development Owner may only accept an offer from and enter into negotiations with a Qualified Nonprofit Organization or Qualified Entity in that classification. A property may not be transferred under the ROFR process for less than the Minimum Purchase Price, but if the sequential negotiation created by statute yields a higher price, the higher price is permitted.

(f) Satisfaction of ROFR.

(1) A Development Owner that has posted a Property under the ROFR process is deemed to have satisfied the ROFR requirements in the following circumstances:

(A) The Development Owner does not receive any bona fide offers at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation) from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(B) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, the failure is determined to not be the fault of the Development Owner, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(C) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Qualified Nonprofit Organization or Qualified Entity is not approved by the Department during the ownership transfer review due to issues identified during the Previous Participation Review process pursuant to Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), and the Development Owner received no other bona fide offers at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation) from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period; or

(D) An offer from a Qualified Nonprofit Organization or Qualified Entity is received at a price below the posted ROFR offer price, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period at or above the posted ROFR offer price; or

(2) A Development Owner with a LURA that identifies a specific Qualified Nonprofit Organization or Qualified Entity to be the beneficiary of the ROFR will satisfy the ROFR if:

(A) The identified beneficiary is in existence and conducting business;

(B) The Development Owner offers the Development to the identified beneficiary pursuant to the terms of the ROFR;

(C) If the ROFR includes a priority for a certain type of Qualified Entity (such as a CHDO) to have the first opportunity make an offer to acquire the Development, the identified beneficiary meets such classification; and

(D) The identified entity declines to purchase the Development in writing, and such evidence is submitted to and approved by the Department.

(g) Non-Satisfaction of ROFR. A Development Owner that has posted a Property under the ROFR process does not satisfy the ROFR requirements in the following circumstances:

(1) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), and the Development Owner does not accept the offer;

(2) The LURA identifies a specific Qualified Nonprofit Organization or Qualified Entity to be the beneficiary of the ROFR, and such entity no longer exists or is no longer conducting business and the Development Owner received other bona fide offers at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation) from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and fails to accept any of such other offers;

(3) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, the failure is determined to not be the fault of the Development Owner, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and then fails to accept any of such other offers;

(4) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, and such failure is determined to be the fault of the Development Owner;

(5) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Qualified Nonprofit Organization or Qualified Entity is not approved by the Department during the ownership transfer review due to issues identified during the Previous Participation Review process pursuant to Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and fails to accept any of such other offers; or

(6) An offer from a Qualified Nonprofit Organization or Qualified Entity is received at a price below the posted ROFR offer price, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), and the Development Owner fails to accept any of such offers.

(h) Activities Following ROFR.

(1) If a Development Owner satisfies the ROFR requirement pursuant to subsection (f)(1) - (2) of this section, it may request a Preliminary Qualified Contract (if such opportunity is available under §10.408 of this Subchapter) or proceed with the sale to an entity that is not a Qualified Nonprofit Organization or Qualified Entity at or above the ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation).

(2) Following notice that the ROFR requirement has been met, if the Development Owner does not post the Property for Qualified Contract in accordance with §10.408 of this Subchapter or sell the Property to an entity that is not a Qualified Nonprofit Organization or Qualified Entity within 24 months of the Department's written indication that the ROFR has been satisfied, the Development Owner must follow the ROFR process for any subsequent transfer.

(3) If the Department determines that the ROFR requirement has not been met during the ROFR posting period, the Owner may not re-post under this provision at a ROFR offer price that is higher than the originally posted ROFR offer price until 24 months has expired from the Department's written indication that the ROFR has not been satisfied. The Development Owner may market the Property for sale and sell the Property to a Qualified Nonprofit Organization or Qualified Entity during this 24 month period in accordance with subsection (a)(1) of this section.

(i) Sale and closing.

(1) Prior to closing a sale of the Property, the Development Owner must obtain Department approval of the transfer through the ownership transfer process in accordance with §10.406 of this Subchapter (relating to Ownership Transfers (§2306.6713)). The request should include, among other required transfer documents outlined in the Post Award Activities Manual, the final sales contract with all amendments.

(2) If the closing price is materially less than the ROFR offering price or the terms and conditions of the sale change materially from what was submitted in the ROFR posting, in the Department's sole determination, the Development Owner must go through the ROFR process again with a revised ROFR offering price equal to the reduced closing price or adjusted terms and conditions based upon the revised terms, before disposing of the Property.

(j) Appeals. A Development Owner may appeal a staff decision in accordance with §11.902 of this title (relating to Appeals Process).

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 12, 2023.

TRD-202300141

Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Effective date: February 1, 2023
Proposal publication date: October 28, 2022
For further information, please call: (512) 475-3959

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS

**SUBCHAPTER EE. COMMISSIONER'S RULES
ON REPORTING CHILD ABUSE OR NEGLECT,
INCLUDING TRAFFICKING OF A CHILD**

19 TAC §61.1053

The Texas Education Agency (TEA) adopts new §61.1053, concerning reporting child abuse or neglect, including trafficking of a child. The new section is adopted without changes to the proposed text as published in the July 15, 2022 issue of the *Texas Register* (47 TexReg 4049) and will not be republished. The adopted new section implements Senate Bill (SB) 1831 and House Bill (HB) 1540, 87th Texas Legislature, Regular Session, 2021, by specifying signage requirements for posting the offenses of human trafficking on public and private school premises.

REASONED JUSTIFICATION: SB 1831 and HB 1540, 87th Texas Legislature, Regular Session, 2021, added Texas Education Code (TEC), §37.086, requiring TEA to develop rules around signage requirements for posting the penal offenses of human trafficking on public and private school premises.

Adopted new §61.1053 implements statute by specifying the penalties under Texas Penal Code, §20A.02(b-1), that must be included on each warning sign. The adopted new rule also provides definitions and the required locations for warning signs in alignment with TEC, §37.086.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began July 15, 2022, and ended August 15, 2022. A public hearing was held on August 10, 2022. Following is a summary of public comments received and agency responses.

Comment: Thirty-six private school administrators commented that the proposed rule should not apply to private schools.

Response: This comment falls outside the scope of the proposed rulemaking and is related to the requirements of statute under TEC, §37.086, as added by SB 1831 and HB 1540, 87th Texas Legislature, Regular Session, 2021.

Comment: A commenter requested that the agency provide schools and districts with the actual signage necessary to meet this requirement.

Response: The agency disagrees. TEA is unable to provide signs; however, the agency is providing templates for the required signage on the TEA website for public and private school use.

Comment: The Texas Association of School Boards (TASB) commented that the proposed rule does little to clarify the

ambiguities in the statute or ease the financial burden placed on school districts. TASB further commented that (1) the agency should provide signs so that school districts experience no fiscal impact; (2) since no funds were appropriated, the agency should exercise discretion permitted in the statute; (3) the rule does not clarify the locations where signs must be posted and results in a massive unfunded mandate; (4) the rule should help clarify where signs are required rather than simply restating what is in the statute; and (5) the rule does not provide approved wording for the sign, which will result in extra expenses for school districts. TASB additionally commented that the proposed rule is flawed because it does not resolve issues with the underlying legislation that are within the agency's authority to resolve through rulemaking, and TASB suggested holding these rules until after the next legislative session, during which the agency can advocate for clarifications to the law and secure funding for all mandatory signs.

Response: The agency disagrees. TEA is unable to provide signs, as the agency was not provided funding to support this aspect of implementation; however, the agency is providing templates for the required signage on the TEA website for public and private school use. Relating to the comments about location, the rule provides information on where the signs are to be posted, while also providing public and private schools with discretion to meet the unique and individual needs and features of their respective campuses. In addition, TEC, §37.086 is very prescriptive regarding the location of the required signage. Finally, TEA is moving forward with the adoption of the rule per the statutory requirements under TEC, §37.086, and will make adjustments to the rule in alignment with any future legislative changes, as necessary.

Comment: The executive director of the Texas Private Schools Association commented in opposition to proposed new §61.1053, stating that TEA's interpretation of the rule to apply to private schools was not the legislative intent; that the impact on private schools is detrimental; and that TEA was to prioritize high crime areas in their distribution of these signs.

Response: The agency disagrees and provides the following clarification. TEA is responsible for implementing the legislation as written in TEC, §37.086, which includes provisions affecting private schools. Therefore, the rule's impact on private schools is outside the scope of the proposed rulemaking. Although TEA had flexibility to prioritize the distribution of signs based on reports of criminal activity, because there were no funds appropriated for that purpose, the agency did not have the ability to print or distribute signs to schools in specific areas with higher reports of crime.

Comment: The Legislative Counsel at the Texas Catholic Conference of Bishops commented in opposition to proposed new §61.1053, stating that the guidance removes parental control and imposes an unfunded mandate on private schools.

Response: The agency disagrees and notes that the comment about parental controls falls outside the scope of the rulemaking process. Regarding the comment that this rule imposes an unfunded mandate, the agency clarifies that TEA did not receive legislative funding for the requirements of this rule and is, therefore, unable to distribute signs or provide funding to support public and private schools with the statutory requirements included in the rule.

STATUTORY AUTHORITY. The new section is adopted under Texas Education Code (TEC), §37.086, as added by Senate Bill

1831 and House Bill 1540, 87th Texas Legislature, Regular Session, 2021, which requires Texas Education Agency to adopt rules regarding the placement, installation, design, size, wording, and maintenance procedures for the warning signs required under TEC, §37.086.

CROSS REFERENCE TO STATUTE. The new section implements Texas Education Code, §37.086.

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 13, 2023.

TRD-202300152

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Effective date: February 2, 2023

Proposal publication date: July 15, 2022

For further information, please call: (512) 475-1497



TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 259. COMMUNITY LIVING ASSISTANCE AND SUPPORT SERVICES (CLASS) PROGRAM AND COMMUNITY FIRST CHOICE (CFC) SERVICES

The Texas Health and Human Services Commission (HHSC) adopts Title 26, Part 1, new Chapter 259, Community Living Assistance and Support Services (CLASS) Program and Community First Choice (CFC) Services, consisting of Subchapters A - J, comprised of §§259.5, 259.7, 259.9, 259.51, 259.53, 259.55, 259.57, 259.59, 259.61, 259.63, 259.65, 259.67, 259.69, 259.71, 259.73, 259.75, 259.77, 259.79, 259.81, 259.83, 259.85, 259.87, 259.89, 259.101, 259.103, 259.151, 259.153, 259.155, 259.157, 259.159, 259.161, 259.163, 259.165, 259.167, 259.169, 259.171, 259.201, 259.203, 259.205, 259.207, 259.209, 259.211, 259.213, 259.215, 259.217, 259.251, 259.253, 259.255, 259.257, 259.259, 259.261, 259.263, 259.265, 259.267, 259.271, 259.273, 259.275, 259.277, 259.279, 259.281, 259.283, 259.285, 259.287, 259.289, 259.301, 259.303, 259.305, 259.307, 259.309, 259.311, 259.313, 259.315, 259.317, 259.319, 259.321, 259.351, 259.353, 259.355, 259.357, 259.359 - 259.361, 259.363, 259.365, 259.367, 259.369, 259.371, 259.373, 259.401, and 259.451.

Sections 259.5, 259.7, 259.51, 259.57, 259.59, 259.61, 259.201, 259.203, 259.205, 259.207, 259.209, 259.211, 259.213, 259.215, 259.289, 259.311, and 259.355 are adopted with changes to the proposed text as published in the September 2, 2022, issue of the *Texas Register* (47 TexReg 5236). These rules will be republished.

Sections 259.9, 259.53, 259.55, 259.63, 259.65, 259.67, 259.69, 259.71, 259.73, 259.75, 259.77, 259.79, 259.81,

259.83, 259.85, 259.87, 259.89, 259.101, 259.103, 259.151, 259.153, 259.155, 259.157, 259.159, 259.161, 259.163, 259.165, 259.167, 259.169, 259.171, 259.217, 259.251, 259.253, 259.255, 259.257, 259.259, 259.261, 259.263, 259.265, 259.267, 259.271, 259.273, 259.275, 259.277, 259.279, 259.281, 259.283, 259.285, 259.287, 259.301, 259.303, 259.305, 259.307, 259.309, 259.313, 259.315, 259.317, 259.319, 259.321, 259.351, 259.353, 259.357, 259.359, 259.360, 259.361, 259.363, 259.365, 259.367, 259.369, 259.371, 259.373, 259.401, and 259.451. are adopted without changes to the proposed text as published in the September 2, 2022, issue of the *Texas Register* (47 TexReg 5236). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The Community Living Assistance and Support Services (CLASS) Program is a Medicaid waiver program approved by the Centers for Medicare & Medicaid Services (CMS) under §1915(c) of the Social Security Act. This waiver program provides community-based services and supports to eligible individuals as an alternative to services provided in an institutional setting. In the CLASS Program there are two types of program providers. One is the case management agency (CMA) and the other is the direct services agency (DSA).

The adopted rules move the CLASS Program rules from 40 TAC, Chapter 45 to 26 TAC, Chapter 259. The repeal of 40 TAC, Chapter 45, is adopted elsewhere in this issue of the *Texas Register*.

The adopted rules ensure that the CLASS Program complies with the requirements in Title 42, Code of Federal Regulations (42 CFR), Chapter IV, Subchapter C, Part 441, Subpart G, Section 441.301(c)(1) - (5). In 2014, CMS amended this regulation to establish new requirements for Medicaid Home and Community-Based Services (HCBS) waiver programs, including requirements for HCBS program settings and person-centered planning. The deadline for compliance with the requirements in Section 441.301(c)(1) - (5) is March 17, 2023. The adopted rules ensure compliance with these federal requirements for all services available in the CLASS Program.

The adopted rules implement Texas Government Code §531.02161(b)(4) which requires HHSC to ensure that, if cost effective, clinically effective, and allowed by federal law, a Medicaid recipient has the option to receive certain services, including occupational therapy, physical therapy, and speech and language pathology as a telehealth service.

The adopted rules require program providers to submit a translation of non-English documentation submitted to HHSC. The adopted rule helps ensure that HHSC's reviews of documentation are efficient.

The adopted rules provide that HHSC may allow program providers to use one or more of the exceptions specified in the rule while an executive order or proclamation declaring a state of disaster under Texas Government Code §418.014 is in effect. This provision is adopted to help ensure that providers are able to operate and provide services effectively during a disaster.

COMMENTS

The 31-day comment period ended October 3, 2022.

During the comment period and the public hearing held on September 26, 2022, HHSC received comments regarding the proposed rules from 10 commenters, including Families for

Effective Autism Treatment-Houston; Empowered Parent Advocate Bootcamp; LTO Ventures; Texas Association for Home Care & Hospice; Texas Parent to Parent; and one individual. A summary of comments relating to the rules and HHSC's responses follows.

Comment: One commenter requested that proposed §259.57(b) be revised to further define the qualifications of the individual assigned to lead the person-centered planning process, such as including whether the individual is an employee of the agency.

Response: Proposed §259.57(b) requires that a program provider ensure the person-centered planning process is led by an individual. An "individual," as defined in proposed §259.5, is a person seeking to enroll or who is enrolled in the CLASS Program and is not a person employed by the agency. HHSC revised §259.57(b) and (d)(1) to use "the individual" instead of "an individual" for clarity.

Comment: Several commenters requested that proposed §259.59(a)(2)(D) be revised to require that a home and community-based setting allows individuals to receive services in the community to the same degree of access as individuals not receiving Medicaid HCBS, that a setting be selected by the individual among setting options as defined and documented in the person-centered service plan, and that a setting facilitates individual choice regarding services and supports and service providers.

Response: HHSC agrees with the requested changes and revised proposed §259.59(a) to be in compliance with 42 CFR §441.301(c)(4). The revisions include specifying that subsection (a) describes the qualities of a "home and community-based setting." HHSC also revised §259.59(a) to use the term "home and community-based setting." HHSC changed the title of §259.59 from "Requirements for Service Settings" to "Requirements for Home and Community-Based Settings" so that the section title more accurately reflects the contents of the section. Because of the change made in the title of §259.59, HHSC changed the title of Division 2, in Subchapter B, from "ENROLLMENT PROCESS, PERSON-CENTERED SERVICE PLANNING, AND REQUIREMENTS FOR SERVICE SETTINGS" to "ENROLLMENT PROCESS, PERSON-CENTERED SERVICE PLANNING, AND REQUIREMENTS FOR HOME AND COMMUNITY-BASED SETTINGS."

Comment: Several commenters expressed appreciation that HHSC included language in proposed §259.59 regarding settings that are presumed to have the qualities of an institution and a heightened-scrutiny review of those settings conducted by CMS.

Response: HHSC appreciates the commenters' support for the proposed rule.

Comment: A commenter asked how providers will be required to show proof of the oral explanation required in proposed §259.61.

Response: Currently, a program provider may demonstrate the provision of the required oral explanation by documenting that the oral explanation was provided. HHSC did not make changes in response to this comment. HHSC will update the CLASS Provider Manual to clarify that the CMA must document in the service plan that an oral explanation was provided.

Comment: A commenter requested that proposed §259.57(d)(3) regarding "time and location convenient to the individual and the LAR" be revised to protect all parties should the individual choose a time and location that is not appropriate.

Response: HHSC is unclear what the commenter means by "not appropriate." Proposed §259.57(d)(3) is written to comply with 42 CFR §441.301(c)(1)(iii). HHSC declines to make changes in response to the comment because revising §259.57 would require additional information and analysis to ensure continued compliance with 42 CFR §441.301(c)(1)(iii).

Comment: Two commenters expressed concerns that the rates adopted for the CLASS Program are not adequate.

Response: HHSC declines to make changes in response to the comments. The comments are outside the scope of this project because the rate methodologies for CLASS Program services are not addressed in this rule project.

Comment: A commenter recommended that more telehealth opportunities be allowed for comprehensive nurse assessments.

Response: HHSC believes that conducting nursing assessments in person, as described in proposed §259.61(h)(3) and proposed §259.75(a)(1)(b), is necessary to ensure the clinical effectiveness of these assessments. Therefore, HHSC declines to make changes in response to the comment.

Comment: A commenter suggested that the requirement for a DSA and CMA to translate non-English documentation to English in proposed §259.321 and §259.373 is not feasible. The commenter stated that many providers do not have extra funds for non-essential processes due to staffing shortages. The commenter requested that alternative methods be discussed with stakeholders prior to implementation and a workgroup be created to come up with a method for implementation.

Response: proposed §259.321 and §259.373 requires a CMA and DSA to provide HHSC a translation of information in English to help ensure that HHSC staff can perform utilization review functions timely, accurately, and efficiently. HHSC believes that it is the DSA's and CMA's responsibility to provide documentation to HHSC that does not require translation by HHSC. HHSC did not make changes in response to the comment.

Comment: A commenter asked when the CMA person-centered planning training, required by proposed §259.309(a)(3), and the DSA training, required by proposed §259.357(a)(2), will be made available by HHSC and if it will be available online with no associated cost to the provider.

Response: HHSC did not make changes in response to this comment. An online comprehensive non-introductory person-centered service planning training, as described in §259.309(a)(3), and HHSC's web-based Introductory Training, as described in §259.357(a)(2), are currently available at: <https://www.hhs.texas.gov/services/disability/person-centered-planning/person-centered-planning-waiver-program-providers/person-centered-practices-training-providers>

Comment: A commenter agreed with proposed §259.360 which allows physical therapy, occupational therapy, and speech and language pathology be provided as a telehealth service in certain situations.

Response: HHSC appreciates the commenter's support for the proposed rule.

Comment: A commenter agreed with proposed §259.451(f) which allows a registered nurse to complete an annual nursing assessment by videoconferencing in the event of a declaration of disaster.

Response: HHSC appreciates the commenter's support for the proposed rule.

Comment: A commenter requested that proposed §259.451(a)(2) be revised to specify how HHSC will notify program providers of the date that an exception in §259.451 will no longer be used.

Response: HHSC currently uses GovDelivery notices, information letters, and provider alerts to communicate with program providers. However, because methods of communication may change over time, HHSC declines to make changes in response to the comment.

Comment: A commenter requested that individualized skills and socialization be an available service in the CLASS waiver program.

Response: HHSC declines to make changes in response to the comment. The Texas Legislature authorized funding for the provision of individualized skills and socialization to replace the current day habilitation service only in waiver programs where day habilitation is offered: the Home and Community-based Services, Texas Home Living, and Deaf Blind with Multiple Disabilities Programs. Making the requested change would require additional analysis and funding.

In addition to the changes made to the rules in response to comments, HHSC made changes to the rules that are not in response to comments.

In proposed §259.5, HHSC removed the definition of "continued family services" and replaced it with a new definition of "CFS--Continued family services," to establish an acronym for the term for use throughout the chapter. The new definition is different from the proposed definition of "continued family services" because it does not include the eligibility requirements for CFS or the references to §259.215 and §259.217. HHSC replaced these references with a reference to "Subchapter E" for the description of CFS. HHSC added a new subsection (b) in proposed §259.203 with the eligibility requirements for CFS to replace the eligibility requirements in the proposed definition of "continued family services." In addition, HHSC renumbered the definitions.

Because HHSC renumbered the definitions in §259.5, HHSC revised proposed §259.7(d) and proposed §259.61(2)(A)(x)(I) to correct the reference to the definition of "habilitation."

In proposed §259.5, HHSC revised the definition of "support family services" by changing the term to "SFS--Support family services," to establish an acronym for the term for use throughout the chapter and by removing the eligibility requirement to be under 18 years of age to receive SFS and the references to §259.215 and §259.217. The eligibility requirement is removed because this requirement is in proposed §259.203(a). HHSC replaced the references to §259.215 and §259.217 with a reference to "Subchapter E" for the description of SFS.

HHSC revised the definitions of "direct services" and "respite" in proposed §259.5 to replace "continued family services" with the acronym "CFS."

HHSC revised proposed §259.7(c)(20) and (21); proposed §259.51(b)(3); proposed §259.289(a)(1); and proposed §259.355(d)(22) to replace "support family services" and "continued family services" with the acronyms "SFS" and "CFS." HHSC revised proposed §259.61(f) to replace "support family services" with "SFS."

Based on direction from CMS that a group setting in which prevocational services are provided is a provider-owned or controlled setting, HHSC revised proposed §259.59 by adding a new subsection (b) to ensure that these group settings are in compliance with 42 CFR §441.301(c)(4)(vi)(C) - (E). HHSC also added a new subsection (c) to comply with 42 CFR §441.301(c)(4)(vi)(F). Specifically, HHSC added new subsection (b) to proposed §259.59 to require a DSA to ensure that a group setting in which prevocational services are provided (1) allows an individual to control the individual's schedule and activities related to prevocational services; have access to the individual's food at any time; and receive visitors of the individual's choosing at any time; and (2) is physically accessible and free of hazards to an individual to provide that a residence in which SFS or CFS is provided is free of hazards in addition to being physically accessible to help ensure an individual's health and safety in the residence. New subsection (c) was added to proposed §259.59 to require a DSA to notify the case manager and provide specified information to the case manager if the DSA becomes aware that a modification to certain conditions of the setting is needed based on a specific assessed need. In addition, new subsection (c) requires a case manager to, if notified of a needed modification, convene a service planning team meeting to update the individual's individual program plan (IPP) to include certain information, including a description of the specific and individualized assessed need that justifies the modification; a description of any less intrusive methods of meeting the need that were tried but did not work; a description of how data will be routinely collected and reviewed to measure the ongoing effectiveness of the modification; and the individual's or LAR's signature on the IPP evidencing informed consent to the modification. Further, new subsection (c) allows a DSA to implement a modification only after the service planning team updates the IPP as required. HHSC also renumbered the remaining subsections in the section as subsections (d) and (e).

Based on direction from CMS regarding the heightened scrutiny process, HHSC revised proposed §259.59(b), renumbered as subsection (d), to include descriptions of additional settings that are presumed to have the qualities of an institution, including a setting located in a building in which a certified ICF/IID operated by a local intellectual and developmental disability authority (LIDDA) or state supported living center is located but is distinct from the ICF/IID and a setting located in a building in which a licensed private ICF/IID, a hospital, a nursing facility, or other institution is located but is distinct from the ICF/IID, hospital, nursing facility, or other institution.

Because the term "group setting" is used in §259.59, new subsection (b), HHSC added a definition for this term in §295.5(55). Because the term "LIDDA" is used in §259.59, new subsection (d), HHSC added a definition for this term in §295.5(79). In proposed §259.5(61), renumbered as paragraph (62), HHSC revised the definition of "ICF/IID" to make the definition consistent with its definition in the Home and Community-based Services (HCS) Program rules being adopted in this same issue of the *Texas Register*. In proposed §259.5(103), renumbered as paragraph (105), HHSC revised the definition of "prevocational services" to specify that transportation is provided between the individual's place of residence and a "group setting" instead of "work site" because a work site does not accurately describe the setting in which prevocational services are provided. HHSC also renumbered the definitions in proposed §259.5 and revised references.

Currently there are no individuals in the CLASS Program who receive CFS and SFS. However, CMS informed HHSC that a setting in which CFS or SFS is provided is a provider-controlled residential setting and, therefore, must be in compliance with 42 CFR §441.301(c)(4)(vi). Accordingly, HHSC revised proposed §259.201 and §259.205 to ensure that SFS and CFS settings are in compliance with the federal regulation. Specifically, HHSC revised proposed §259.201 to describe a support family agency and continued family agency because SFS is provided by a support family agency and CFS is provided by a continued family agency. HHSC revised proposed §259.205 to require a case manager to provide certain information to an individual or LAR if the individual is interested in receiving SFS or CFS, including that if the individual or LAR selects SFS or CFS, the individual or LAR will be responsible for paying room and board in accordance with a residential agreement and that if the individual or LAR does not pay room or board as required by a residential agreement, the individual's support family may evict the individual. HHSC also revised proposed §259.205 to require a support family agency or continued family agency to ensure that an individual receiving SFS or CFS has a written residential agreement with the support family and to require that the residential agreement contain certain provisions such as the physical address of the residence; the amount the individual or LAR is paying for room and board; and that the individual may furnish and decorate the individual's bedroom to be consistent with the residential agreement requirements in the HCS Program.

Further, HHSC revised proposed §259.205 to require a support family agency or continued family agency to notify the case manager and provide specified information to the case manager if the agency becomes aware that a modification to the provision in the residential agreement that the individual may furnish and decorate the individual's bedroom is needed based on a specific assessed need of the individual.

HHSC also revised proposed §259.205 to require that an SFS or CFS setting meets certain conditions, including that an individual has the option not to share a bedroom with a roommate; that a lock is installed on the individual's bedroom door at no cost to the individual; that an individual has access to food at any time; and that an individual may have visitors of the individual's choosing at any time. Proposed §259.205 was revised to require a support family agency or continued family agency to notify the case manager and provide specified information to the case manager if the agency becomes aware that a modification to certain conditions of the setting is needed based on a specific assessed need. In addition, HHSC revised proposed §259.205 to require a case manager to, if notified of a needed modification, convene a service planning team meeting to update the individual's IPP to include certain information, including a description of the specific and individualized assessed need that justifies the modification; a description of any less intrusive methods of meeting the need that were tried but did not work; a description of how data will be routinely collected and reviewed to measure the ongoing effectiveness of the modification; and the individual's or LAR's signature on the IPP evidencing informed consent to the modification. Further, HHSC revised proposed §259.205 allow a support family to implement a modification only after the service planning team updates the IPP as required.

HHSC also changed the title of §259.201 from "Contracting Requirements" to "General Requirements" because the contract requirements for a support family agency and continued family agency are in 40 TAC Chapter 49.

HHSC revised the definition of "LAR-Legally authorized representative" in §259.5(76) to add "a representative payee appointed by the Social Security Administration" and "an agent appointed under a power of attorney" as examples of an LAR. This revision was made to be consistent with the definition of "LAR" in the proposed HCS Program rules and because "representative payee" is used in new §259.205(e)(2). HHSC changed the title of §259.205 from "Support Family Agency Functions" to "Residential Agreements, Requirements for Provider-Controlled Residential Settings, and Support Family Agency and Continued Family Agency Functions" so the section title accurately reflects the contents of the section.

HHSC added new subsection (i) in proposed §259.311 to require a CMA to ensure an individual's case manager complies with the requirements in new §259.205(a) - (n).

HHSC changed the title of Subchapter E from "SUPPORT FAMILY SERVICES" to "SUPPORT FAMILY SERVICES AND CONTINUED FAMILY SERVICES" and the title of Subchapter E, Division 2 from "SUPPORT FAMILY AGENCY" to "SUPPORT FAMILY AGENCY AND CONTINUED FAMILY AGENCY." HHSC also revised proposed §§259.203, 259.207, 259.209, 259.211, 259.213, 259.215, 259.289, and 259.355 to ensure that a continued family agency is required to perform the same activities as a support family agency, when applicable, and to replace "support family services" with "SFS."

In proposed §259.211, regarding ongoing support, HHSC removed paragraph (1) that requires compliance with §259.201 because this requirement is addressed in §259.201 and is not a requirement for ongoing support. HHSC also renumbered the remaining paragraphs in §259.211. Because the section is renumbered, HHSC corrected the reference to §259.211 in proposed §259.205(p)(7).

HHSC revised proposed §259.211(5)(A), reformatted as paragraph (4)(A), to require a support family agency or a continued family agency to provide monthly progress notes to the case manager, including monthly summaries of the activities described in §259.217 regarding support family duties, instead of monthly summaries of Community First Choice personal assistance services/habilitation (CFC PAS/HAB) activities. This change is made because an individual receiving CFS or SFS is not eligible to receive CFC PAS/HAB.

SUBCHAPTER A. DEFINITIONS, DESCRIPTION OF SERVICES, AND EXCLUDED SERVICES

26 TAC §§259.5, 259.7, 259.9

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

§259.5. Definitions.

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

(1) Abuse--

- (A) physical abuse;

- (B) sexual abuse; or

- (C) verbal or emotional abuse.

(2) Actively involved--Significant, ongoing, and supportive involvement with an individual by a person, as determined by the individual, based on the person's:

- (A) interactions with the individual;

(B) availability to the individual for assistance or support when needed; and

(C) knowledge of, sensitivity to, and advocacy for the individual's needs, preferences, values, and beliefs.

(3) Adaptive aids--A Community Living Assistance and Support Services (CLASS) Program service that:

(A) enables an individual to retain or increase the ability to perform activities of daily living (ADLs) or perceive, control, or communicate with the environment in which the individual lives; and

- (B) meets one of the following criteria:

(i) is an item included in the list of adaptive aids in the *Community Living Assistance and Support Services Provider Manual*; or

(ii) is the repair or maintenance of an item on the list of adaptive aids in the *Community Living Assistance and Support Services Provider Manual* that is not covered by a warranty.

(4) Adaptive behavior--The effectiveness with or degree to which an individual meets the standards of personal independence and social responsibility expected of the individual's age and cultural group as assessed by an adaptive behavior screening assessment.

(5) Adaptive behavior level--The categorization of an individual's functioning level based on a standardized measure of adaptive behavior. There are four adaptive behavior levels ranging from mild limitations in adaptive skills (I) through profound limitations in adaptive skills (IV).

(6) Adaptive behavior screening assessment--A standardized assessment used to determine an individual's adaptive behavior level, and conducted using the current version of one of the following assessment instruments:

(A) American Association of Intellectual and Developmental Disabilities (AAIDD) Adaptive Behavior Scales (ABS);

- (B) Inventory for Client and Agency Planning (ICAP);

- (C) Scales of Independent Behavior; or

- (D) Vineland Adaptive Behavior Scales.

(7) ADLs--Activities of daily living. Basic personal everyday activities, including tasks such as eating, toileting, grooming, dressing, bathing, and transferring.

(8) Agency foster home--This term has the meaning set forth in Texas Human Resources Code §42.002.

(9) Alarm call--A signal transmitted from an individual's Community First Choice emergency response services (CFC ERS) equipment to the CFC ERS response center indicating that the individual needs immediate assistance.

(10) ALF--Assisted living facility. A facility licensed in accordance with Texas Health and Safety Code (THSC), Chapter 247, Assisted Living Facilities.

(11) Alleged perpetrator--A person alleged to have committed an act of abuse, neglect, or exploitation of an individual.

(12) Aquatic therapy--A specialized therapy that involves a low-risk exercise method performed in water to improve an individual's range of motion, flexibility, muscular strengthening and toning, cardiovascular endurance, fitness, and mobility.

(13) Audio-only--An interactive, two-way audio communication platform that only uses sound.

(14) Auditory integration training/auditory enhancement training--A CLASS Program service that provides specialized training to assist an individual to cope with hearing dysfunction or over-sensitivity to certain frequency ranges of sound by facilitating auditory processing skills and exercising the middle ear and auditory nervous system.

(15) Auxiliary aid--A service or device that enables an individual with impaired sensory, manual, or speaking skills to participate in the person-centered planning process. An auxiliary aid includes interpreter services, transcription services, and a text telephone.

(16) Behavior support plan--A comprehensive, individualized written plan based on a current functional behavior assessment that includes specific outcomes and behavioral techniques designed to teach or increase adaptive skills and decrease or eliminate target behaviors.

(17) Behavioral support--A CLASS Program service that provides specialized interventions to assist an individual in increasing adaptive behaviors and replacing or modifying behaviors that prevent or interfere with the individual's inclusion in the community and which consist of the following activities:

(A) conducting a functional behavior assessment;

(B) developing an individualized behavior support plan;

(C) training and consulting with an individual, family member, or other persons involved in the individual's care regarding the implementation of the behavior support plan;

(D) monitoring and evaluating the effectiveness of the behavior support plan;

(E) modifying, as necessary, the behavior support plan based on monitoring and evaluating the plan's effectiveness; and

(F) counseling and educating an individual, family members, or other persons involved in the individual's care about the techniques to use in assisting the individual to control challenging or socially unacceptable behaviors.

(18) Business day--Any day except a Saturday, a Sunday, or a national or state holiday listed in Texas Government Code §662.003(a) or (b).

(19) Calendar day--Any day, including weekends and holidays.

(20) Case management--A CLASS Program service that assists an individual in the following:

(A) assessing the individual's needs;

(B) enrolling into the CLASS Program;

(C) developing the individual's individual plan of care (IPC);

(D) coordinating the provision of CLASS Program services and CFC services;

(E) monitoring the effectiveness of the CLASS Program services and CFC services and the individual's progress toward achieving the outcomes identified for the individual;

(F) revising the individual's IPC, as appropriate;

(G) accessing non-CLASS Program services and non-CFC services;

(H) resolving a crisis that occurs regarding the individual; and

(I) advocating for the individual's needs.

(21) Case manager--A service provider of case management.

(22) Catchment area--As determined by the Texas Health and Human Services Commission (HHSC), a geographic area composed of multiple Texas counties.

(23) CDS option--Consumer directed services option. A service delivery option defined in 40 TAC §41.103 (relating to Definitions).

(24) CFC--Community First Choice.

(25) CFC ERS--CFC emergency response services. A CFC service that provides backup systems and supports used to ensure continuity of services and supports. CFC ERS includes electronic devices and an array of available technology, personal emergency response systems, and other mobile communication devices.

(26) CFC ERS provider--The entity directly providing CFC ERS to an individual, which may be the DSA or a contractor of the DSA.

(27) CFC FMS--CFC financial management services. A CFC service provided to an individual who receives only CFC PAS/HAB through the CDS option.

(28) CFC PAS/HAB--CFC personal assistance services/habilitation. A CFC service:

(A) that consists of:

(i) personal assistance services, which provides assistance to an individual in performing ADLs and instrumental activities of daily living (IADLs) based on the individual's person-centered service plan, including:

(I) non-skilled assistance with the performance of the ADLs and IADLs;

(II) household chores necessary to maintain the home in a clean, sanitary, and safe environment;

(III) escort services, which consist of accompanying and assisting an individual to access services or activities in the community, but do not include transporting an individual; and

(IV) assistance with health-related tasks; and

(ii) habilitation, which provides assistance to an individual in acquiring, retaining, and improving self-help, socialization, and daily living skills and training the individual on ADLs, IADLs, and health-related tasks, including:

(I) self-care;

(II) personal hygiene;

(III) household tasks;

(IV) mobility;

- (V) money management;
- (VI) community integration, including how to get around in the community;
- (VII) use of adaptive equipment;
- (VIII) personal decision making;
- (IX) reduction of challenging behaviors to allow individuals to accomplish ADLs, IADLs, and health-related tasks; and
- (X) self-administration of medication; and

(B) does not include transporting the individual, which means driving the individual from one location to another.

(29) CFC support consultation--A CFC service that provides support consultation to an individual who receives only CFC PAS/HAB through the CDS option.

(30) CFC support management--A CFC service that provides training on how to select, manage, and dismiss an unlicensed service provider of CFC PAS/HAB.

(31) CFR--Code of Federal Regulations.

(32) CFS--Continued family services. A CLASS Program service described in Subchapter E of this chapter (relating to Support Family Services and Continued Family Services).

(33) CLASS Program--The Community Living Assistance and Support Services Program.

(34) CMA--Case management agency. A program provider that has a contract with HHSC to provide case management.

(35) CMS--The Centers for Medicare & Medicaid Services. CMS is the agency within the United States Department of Health and Human Services that administers Medicare and Medicaid programs.

(36) Cognitive rehabilitation therapy--A CLASS Program service that:

(A) assists an individual in learning or relearning cognitive skills that have been lost or altered as a result of damage to brain cells or brain chemistry in order to enable the individual to compensate for lost cognitive functions; and

(B) includes reinforcing, strengthening, or reestablishing previously learned patterns of behavior, or establishing new patterns of cognitive activity or compensatory mechanisms for impaired neurological systems.

(37) Competitive employment--Employment that pays an individual at least the minimum wage if the individual is not self-employed.

(38) Contract--A provisional contract that HHSC enters into in accordance with 40 TAC §49.208 (relating to Provisional Contract Application Approval) that has a term of no more than 3 years, not including any extension agreed to in accordance with 40 TAC §49.208(e) or a standard contract that HHSC enters into in accordance with 40 TAC §49.209 (relating to Standard Contract) that has a term of no more than five years, not including any extension agreed to in accordance with 40 TAC §49.209(d).

(39) Controlling person--A person who:

(A) has an ownership interest in a program provider;

(B) is an officer or director of a corporation that is a program provider;

(C) is a partner in a partnership that is a program provider;

(D) is a member or manager in a limited liability company that is a program provider;

(E) is a trustee or trust manager of a trust that is a program provider; or

(F) because of a personal, familial, or other relationship with a program provider, is in a position of actual control or authority with respect to the program provider, regardless of the person's title.

(40) Denial--An action taken by HHSC that:

(A) rejects an individual's request for enrollment into the CLASS Program;

(B) disallows a CLASS Program service or a CFC service requested on an IPC that was not authorized on the prior IPC; or

(C) disallows a portion of the amount or level of a CLASS Program service or a CFC service requested on an IPC that was not authorized on the prior IPC.

(41) Dental treatment--A CLASS Program service that:

(A) consists of the following:

(i) emergency dental treatments, which are procedures necessary to control bleeding, relieve pain, and eliminate acute infection; operative procedures that are required to prevent the imminent loss of teeth; and treatment of injuries to the teeth or supporting structures;

(ii) routine preventative dental treatments, which are examinations, x-rays, cleanings, sealants, oral prophylaxes, and topical fluoride applications;

(iii) therapeutic dental treatments, which include fillings, scaling, extractions, crowns, pulp therapy for permanent and primary teeth; restoration of carious permanent and primary teeth; maintenance of space; and limited provision of removable prostheses when masticatory function is impaired, when an existing prosthesis is unserviceable, or when aesthetic considerations interfere with employment or social development;

(iv) orthodontic dental treatments, which are procedures that include treatment of retained deciduous teeth; cross-bite therapy; facial accidents involving severe traumatic deviations; cleft palates with gross malocclusion that will benefit from early treatment; and severe, handicapping malocclusions affecting permanent dentition with a minimum score of 26 as measured on the Handicapping Labiolingual Deviation Index; and

(v) dental sedation, which is sedation necessary to perform dental treatment including non-routine anesthesia, (for example, intravenous sedation, general anesthesia, or sedative therapy prior to routine procedures) but not including administration of routine local anesthesia only; and

(B) does not include cosmetic orthodontia.

(42) DFPS--The Texas Department of Family and Protective Services.

(43) Dietary services--A CLASS Program service that provides nutrition services, as defined in Texas Occupations Code §701.002.

(44) Direct services--Includes the following services:

(A) CLASS Program services other than case management, FMS, support consultation, support family services, CFS, and TAS;

(B) CFC PAS/HAB;

(C) CFC ERS; and

(D) CFC support management.

(45) DSA--Direct services agency. A program provider that has a contract with HHSC to provide direct services.

(46) Employment assistance--A CLASS Program service that provides assistance to an individual to help the individual locate competitive employment in the community to the same degree of access as individuals not receiving CLASS Program services.

(47) Enrollment IPC--The first individual plan of care (IPC) for an individual developed before the individual's enrollment into the CLASS Program.

(48) Enrollment IPP--The first individual program plan (IPP) for an individual developed before the individual's enrollment into the CLASS Program in accordance with §259.67 of this chapter (relating to Development of IPPs).

(49) Exploitation--The illegal or improper act or process of using, or attempting to use, an individual or the resources of an individual for monetary or personal benefit, profit, or gain.

(50) FMS--Financial management services. A CLASS Program service that is defined in 40 TAC §41.103 and is provided to an individual participating in the CDS option.

(51) FMSA--Financial management services agency. An entity, as defined in 40 TAC §41.103, that provides FMS.

(52) Former military member--A person who served in the United States Army, Navy, Air Force, Marine Corps, Coast Guard, or Space Force:

(A) who declared and maintained Texas as the person's state of legal residence in the manner provided by the applicable military branch while on active duty; and

(B) who was killed in action or died while in service, or whose active duty otherwise ended.

(53) Functional behavior assessment--An evaluation that is used to determine the underlying function or purpose of an individual's behavior, so an effective behavior support plan can be developed.

(54) Good cause--As determined by HHSC, a reason outside the control of a CFC ERS provider that is an acceptable reason for the CFC ERS provider's failure to comply.

(55) Group setting--A setting, other than an individual's residence, in which more than one individual or other person is receiving pre-vocational services or a similar service.

(56) Habilitation--A CLASS Program service that allows an individual to reside successfully in a community setting by training the individual to acquire, retain, and improve self-help, socialization, and daily living skills or assisting the individual with ADLs. Habilitation services consist of the following:

(A) habilitation training, which is interacting in person with an individual who is awake to train the individual in the following activities:

(i) self-care;

(ii) personal hygiene;

(iii) household tasks;

(iv) mobility;

(v) money management;

(vi) community integration;

(vii) use of adaptive equipment;

(viii) management of caregivers;

(ix) personal decision making;

(x) interpersonal communication;

(xi) reduction of challenging behaviors;

(xii) socialization and the development of relationships;

(xiii) participating in leisure and recreational activities;

(xiv) use of natural supports and typical community services available to the public;

(xv) self-administration of medication; and

(xvi) strategies to restore or compensate for reduced cognitive skills;

(B) habilitation ADLs, which are:

(i) interacting in person with an individual who is awake to assist the individual in the following activities:

(I) self-care;

(II) personal hygiene;

(III) ambulation and mobility;

(IV) money management;

(V) community integration;

(VI) use of adaptive equipment;

(VII) self-administration of medication;

(VIII) reinforce any therapeutic goal of the individual;

(IX) provide transportation to the individual; and

(X) protect the individual's health, safety and security;

(ii) interacting in person or by telephone with an individual or an involved person regarding an incident that directly affects the individual's health or safety; and

(iii) performing one of the following activities that does not involve interacting in person with an individual:

(I) shopping for the individual;

(II) planning or preparing meals for the individual;

(III) housekeeping for the individual;

(IV) procuring or preparing the individual's medication; or

(V) arranging transportation for the individual;

and

(C) habilitation delegated, which is tasks delegated by a registered nurse (RN) to a service provider of habilitation in accordance

with 22 TAC Chapter 224 (relating to Delegation of Nursing Tasks By Registered Professional Nurses to Unlicensed Personnel For Clients With Acute Conditions Or In Acute Care Environments) or Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegations In Independent Living Environments For Clients With Stable and Predictable Conditions).

(57) Health-related tasks--Specific tasks related to the needs of an individual that can be delegated or assigned by a licensed health care professional under state law to be performed by a service provider of CFC PAS/HAB. These include:

(A) tasks delegated by a registered nurse (RN);

(B) health maintenance activities, as defined in 22 TAC §225.4 (relating to Definitions), that may not require delegation; and

(C) activities assigned to a service provider of CFC PAS/HAB by a licensed physical therapist, occupational therapist, or speech-language pathologist.

(58) HHSC--The Texas Health and Human Services Commission.

(59) Hippotherapy--A specialized therapy that:

(A) involves an individual interacting with and riding on horses;

(B) is designed to improve the balance, coordination, focus, independence, confidence, and motor and social skills of the individual; and

(C) is provided by two service providers at the same time, as described in §259.355(d)(11) of this chapter (relating to Qualifications of DSA Staff Persons).

(60) Hospital--A public or private institution that is licensed or is exempt from licensure in accordance with THSC Chapters 13, 241, 261, or 552.

(61) IADLs--Instrumental activities of daily living. Activities related to living independently in the community, including meal planning and preparation; managing finances; shopping for food, clothing, and other essential items; performing essential household chores; communicating by phone or other media; and traveling around and participating in the community.

(62) ICF/IID--Intermediate care facility for individuals with an intellectual disability or related conditions. An ICF/IID is a facility in which ICF/IID Program Services are provided and that is:

(A) licensed in accordance with THSC Chapter 252; or

(B) certified by HHSC, including a state supported living center.

(63) ICF/IID Program--The Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions Program, which provides Medicaid-funded residential services to individuals with an intellectual disability or related conditions.

(64) ID/RC Assessment--Intellectual Disability/Related Conditions Assessment. An HHSC form used to determine the level of care (LOC) for an individual.

(65) Individual--A person seeking to enroll or who is enrolled in the CLASS Program.

(66) Individual transportation plan--A written plan developed by an individual's service planning team and documented on the HHSC individual transportation plan form. An individual transportation plan describes how transportation as a habilitation activity will be

delivered to support an individual's desired goals and outcomes identified in the IPP.

(67) Inpatient chemical dependency treatment facility--A facility licensed in accordance with THSC Chapter 464, Facilities Treating Persons with a Chemical Dependency.

(68) In person or in-person--Within the physical presence of another person. In person or in-person does not include using videoconferencing or a telephone.

(69) Institution for mental diseases--Has the meaning set forth in 42 CFR §435.1010.

(70) Institutional services--Medicaid-funded services provided in a nursing facility or in an ICF/IID.

(71) Intellectual disability--Consistent with THSC §591.003, significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.

(72) IPC--Individual plan of care. A written plan developed by an individual's service planning team and documented on the HHSC Individual Plan of Care form. An IPC:

(A) documents:

(i) the type and amount of each CLASS Program service and each CFC service, except for CFC support management, to be provided to the individual during an IPC year; and

(ii) if an individual will receive CFC support management; and

(B) is authorized by HHSC.

(73) IPC cost--Estimated annual cost for CLASS Program services on an IPC.

(74) IPC period--The effective period of an enrollment IPC and a renewal IPC as follows:

(A) for an enrollment IPC, the period of time from the effective date of the enrollment IPC, as described in §259.65(g) of this chapter (relating to Development of an Enrollment IPC), through the last calendar day of the 11th month after the month in which enrollment occurred; and

(B) for a renewal IPC, a 12-month period of time starting on the effective date of the renewal IPC, as described in §259.77(b) of this chapter (relating to Renewal IPC and Requirement for Authorization to Continue Services).

(75) IPP--Individual program plan. A written plan developed in accordance with §259.67 of this chapter (relating to Development of IPPs) and documented on an HHSC Individual Program Plan form.

(76) LAR--Legally authorized representative. A person authorized by law to act on behalf of an individual with regard to a matter described in this chapter, including a parent, guardian, or managing conservator of a minor; a guardian of an adult; an agent appointed under a power of attorney; or a representative payee appointed by the Social Security Administration. An LAR, such as an agent appointed under a power of attorney or representative payee appointed by the Social Security Administration, may have limited authority to act on behalf of a person.

(77) Licensed vocational nurse--A person licensed to provide vocational nursing in accordance with Texas Occupations Code Chapter 301.

(78) Licensed vocational nursing--A CLASS Program service that provides vocational nursing, as defined in Texas Occupations Code §301.002.

(79) LIDDA--Local intellectual and developmental disability authority. An entity designated by the executive commissioner of HHSC, in accordance with THSC §533A.035.

(80) LOC--Level of care. A determination given to an individual as part of the eligibility determination process based on data on the ID/RC Assessment.

(81) Managed care organization--This term has the meaning set forth in Texas Government Code §536.001.

(82) MAO Medicaid--Medical Assistance Only Medicaid. A type of Medicaid by which an individual qualifies financially for Medicaid assistance but does not receive Supplemental Security Income (SSI) benefits.

(83) Massage therapy--A specialized therapy defined in Texas Occupations Code §455.001.

(84) Medicaid--A program administered by CMS and funded jointly by the states and the federal government that pays for health care to eligible groups of low-income people.

(85) Medicaid HCBS--Medicaid home and community-based services. Medicaid services provided to an individual in an individual's home and community, rather than in a facility.

(86) Mental health facility--A facility licensed in accordance with THSC Chapter 577.

(87) MESAV--Medicaid Eligibility Service Authorization Verification. The automated system that contains information regarding an individual's Medicaid eligibility and service authorizations.

(88) Military family member--A person who is the spouse or child, regardless of age, of:

- (A) a military member; or
- (B) a former military member.

(89) Military member--A member of the United States military serving in the Army, Navy, Air Force, Marine Corps, Coast Guard, or Space Force on active duty who has declared and maintains Texas as the member's state of legal residence in the manner provided by the applicable military branch.

(90) Minor home modifications--A CLASS Program service that:

(A) makes a physical adaptation to an individual's residence that:

(i) is necessary to address the individual's specific needs; and

(ii) enables the individual to function with greater independence in the individual's residence or to control his or her environment; and

(B) meets one of the following criteria:

(i) is included on the list of minor home modifications in the *Community Living Assistance and Support Services Provider Manual*; or

(ii) is the repair or maintenance of a minor home modification purchased through the CLASS Program that:

(I) is needed after one year has elapsed from the date the minor home modification is complete;

(II) is needed for a reason other than the minor home modification was intentionally damaged, as described in §259.285(c) of this chapter (relating to Repair or Replacement of Minor Home Modification); and

(III) is not covered by a warranty.

(91) Music therapy--A specialized therapy that uses musical or rhythmic interventions to restore, maintain, or improve an individual's social or emotional functioning, mental processing, or physical health.

(92) Natural supports--Unpaid persons, including family members, volunteers, neighbors, and friends, who assist and sustain an individual.

(93) Neglect--A negligent act or omission that caused physical or emotional injury or death to an individual or placed an individual at risk of physical or emotional injury or death.

(94) Nursing--One or more of the following CLASS Program services:

- (A) licensed vocational nursing;
- (B) registered nursing;
- (C) specialized licensed vocational nursing; and
- (D) specialized registered nursing.

(95) Nursing facility--A facility that is licensed or is exempt from licensure in accordance with THSC Chapter 242.

(96) Occupational therapy--A CLASS Program service that provides occupational therapy, as described in Texas Occupations Code §454.006.

(97) Own home or family home--A residence that is not:

- (A) an ICF/IID;
- (B) a nursing facility;
- (C) an ALF;
- (D) a residential child-care facility unless it is an agency foster home;
- (E) a hospital;
- (F) a mental health facility;
- (G) an inpatient chemical dependency treatment facility;
- (H) a residential facility operated by the Texas Workforce Commission;
- (I) a residential facility operated by the Texas Juvenile Justice Department;
- (J) a jail; or
- (K) a prison.

(98) PAS/HAB plan--Personal Assistance Services/Habilitation Plan. A written plan developed by an individual's service planning team and documented on the HHSC Personal Assistance Services (PAS)/Habilitation Plan form that describes the type and frequency of CFC PAS/HAB activities to be performed by a service provider.

(99) Person--A corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, natural person, or any other legal entity that can function legally, sue or be sued, and make decisions through agents.

(100) Person-centered planning process--The process described in §259.57 of this chapter (relating to Person-Centered Planning Process).

(101) Physical abuse--Any of the following:

(A) an act or failure to act performed knowingly, recklessly, or intentionally, including incitement to act, that caused physical injury or death to an individual or placed an individual at risk of physical injury or death;

(B) an act of inappropriate or excessive force or corporal punishment, regardless of whether the act results in a physical injury to an individual;

(C) the use of a restraint on an individual not in compliance with federal and state laws, rules, and regulations; or

(D) seclusion.

(102) Physical therapy--A CLASS Program service that provides physical therapy, as defined in Texas Occupations Code §453.001.

(103) Physician--Consistent with §558.2 of this title (relating to Definitions), a person who is:

(A) licensed in Texas to practice medicine or osteopathy in accordance with Texas Occupations Code Chapter 155;

(B) licensed in Arkansas, Louisiana, New Mexico, or Oklahoma to practice medicine, who is the treating physician of an individual, and orders home health or hospice services for the individual in accordance with Texas Occupations Code §151.056(b)(4); or

(C) a commissioned or contract physician or surgeon who serves in the United States uniformed services or Public Health Service, if the person is not engaged in private practice, in accordance with the Texas Occupations Code §151.052(a)(8).

(104) Platform--This term has the meaning set forth in Texas Government Code §531.001(4-d).

(105) Prevocational services--A CLASS Program service that provides services that are not job-task oriented and are provided to an individual whose service planning team does not expect to be employed, without receiving supported employment, within one year after the date prevocational services begin. Prevocational services prepare an individual for competitive employment and consist of:

(A) assessment of vocational skills an individual needs to develop or improve upon;

(B) individual and group instruction regarding barriers to employment;

(C) training in skills:

(i) that are not job-task oriented;

(ii) that are related to goals identified in the individual's IPP for prevocational services;

(iii) that are essential to obtaining and retaining competitive employment, such as the effective use of community resources, transportation, and mobility training; and

(iv) for which an individual is not compensated more than 50 percent of the federal minimum wage or industry standard, whichever is greater;

(D) training in the use of adaptive equipment necessary to obtain and retain competitive employment; and

(E) transportation between the individual's place of residence and a group setting in which prevocational services are provided when other forms of transportation are unavailable or inaccessible.

(106) Program provider--A person that has a contract with HHSC to provide CLASS Program services, excluding an FMISA. In the CLASS Program, there are two types of program providers, a DSA and a CMA.

(107) Public emergency personnel--Personnel of a sheriff's department, police department, emergency medical service, or fire department.

(108) Recreational therapy--A specialized therapy that provides recreational or leisure activities that assist an individual to restore, remediate, or habilitate the individual's level of functioning and independence in life activities; promote health and wellness; and reduce or eliminate the activity limitations caused by an illness or disabling condition.

(109) Reduction--An action taken by HHSC as a result of a review of a revised IPC or renewal IPC that decreases the amount or level of a service authorized by HHSC on the prior IPC.

(110) Registered nursing--A CLASS Program service that provides professional nursing, as defined in Texas Occupations Code §301.002.

(111) Related condition--As defined in 42 CFR §435.1010, a severe and chronic disability that:

(A) is attributed to:

(i) cerebral palsy or epilepsy; or

(ii) any other condition, other than mental illness, found to be closely related to an intellectual disability because the condition results in impairment of general intellectual functioning or adaptive behavior similar to that of individuals with an intellectual disability, and requires treatment or services similar to those required for individuals with an intellectual disability;

(B) is manifested before the individual reaches 22 years of age;

(C) is likely to continue indefinitely; and

(D) results in substantial functional limitation in at least three of the following areas of major life activity:

(i) self-care;

(ii) understanding and use of language;

(iii) learning;

(iv) mobility;

(v) self-direction; and

(vi) capacity for independent living.

(112) Relative--A person related to another person within the fourth degree of consanguinity or within the second degree of affinity. A more detailed explanation of this term is included in the *Community Living Assistance and Support Services Provider Manual*.

(113) Renewal IPC--An IPC developed in accordance with §259.79 of this chapter (relating to Renewal and Revision of an IPC).

(114) Residential child-care facility--The term has the meaning set forth in Texas Human Resources Code §42.002.

(115) Respite--A CLASS Program service that provides temporary assistance and support with an individual's ADLs if the in-

dividual has the same residence as a person who routinely provides the assistance and support to the individual, and the person is temporarily unavailable to provide such assistance and support.

(A) If the person who routinely provides assistance and support, resides with the individual, and is temporarily unavailable to provide assistance and support, is a service provider of transportation as a habilitation activity or CFC PAS/HAB or an employee in the CDS option of transportation as a habilitation activity or CFC PAS/HAB, HHSC does not approve respite unless:

(i) the service provider or employee routinely provides unpaid assistance and support with ADLs to the individual;

(ii) the amount of respite does not exceed the amount of unpaid assistance and support routinely provided; and

(iii) the service provider of respite or employee in the CDS option of respite does not have the same residence as the individual.

(B) If the person who routinely provides assistance and support, resides with the individual, and is temporarily unavailable to provide assistance and support, is a service provider of support family services or CFS, HHSC does not approve respite unless:

(i) for an individual receiving support family services, the individual does not receive respite on the same day the individual receives support family services;

(ii) for an individual receiving CFS, the individual does not receive respite on the same day the individual receives CFS; and

(iii) the service provider of respite or employee in the CDS option of respite does not have the same residence as the individual.

(C) Respite consists of the following:

(i) interacting in person with an individual who is awake to assist the individual in the following activities:

- (I) self-care;
- (II) personal hygiene;
- (III) ambulation and mobility;
- (IV) money management;
- (V) community integration;
- (VI) use of adaptive equipment;
- (VII) self-administration of medication;
- (VIII) reinforce any therapeutic goal of the individual;

(IX) provide transportation to the individual; and
(X) protect the individual's health, safety, and security;

(ii) interacting in person or by telephone with an individual or an involved person regarding an incident that directly affects the individual's health or safety; and

(iii) performing one of the following activities, which may not involve interacting in person with an individual:

- (I) shopping for the individual;
- (II) planning or preparing meals for the individual;

(III) housekeeping for the individual;

(IV) procuring or preparing the individual's medication;

(V) arranging transportation for the individual; or

(VI) protecting the individual's health, safety, and security while the individual is asleep.

(116) Responder--A person designated to respond to an alarm call activated by an individual.

(117) Revised IPC--An enrollment IPC or a renewal IPC that is revised during an IPC period in accordance with §259.79 of this chapter to add a new CLASS Program service or CFC service or change the amount of an existing service.

(118) RN--Registered nurse. A person licensed to provide professional nursing in accordance with Texas Occupations Code Chapter 301.

(119) Seclusion--The involuntary placement of an individual alone in an area from which the individual is prevented from leaving.

(120) Service backup plan--A written plan developed in accordance with §259.89 of this chapter (relating to Service Backup Plans) to ensure continuity of critical program services if service delivery is interrupted.

(121) Service planning team--A team consisting of:

(A) the individual;

(B) if applicable, the individual's LAR or actively involved person;

(C) the individual's case manager;

(D) a representative of the DSA;

(E) other persons whose inclusion is requested by the individual, LAR, or actively involved person, including an managed care organization service coordinator, a family member, a friend, and a teacher; and

(F) a person selected by the DSA, with the approval of the individual and LAR, who is:

(i) professionally qualified by certification or licensure and has special training and experience in the diagnosis and habilitation of persons with the individual's related condition; or

(ii) directly involved in the delivery of services and supports to the individual.

(122) Service provider--A person who is an employee or contractor of a DSA who provides a direct service.

(123) Sexual abuse--Any of the following:

(A) sexual exploitation of an individual;

(B) non-consensual or unwelcomed sexual activity with an individual; or

(C) consensual sexual activity between an individual and a service provider, staff person, volunteer, or controlling person, unless a consensual sexual relationship with an adult individual existed before the service provider, staff person, volunteer, or controlling person became a service provider, staff person, volunteer, or controlling person.

(124) Sexual activity--An activity that is sexual in nature, including kissing, hugging, stroking, or fondling with sexual intent.

(125) Sexual exploitation--A pattern, practice, or scheme of conduct against an individual that can reasonably be construed as being for the purposes of sexual arousal or gratification of any person:

(A) which may include sexual contact; and

(B) does not include obtaining information about an individual's sexual history within standard accepted clinical practice.

(126) Specialized licensed vocational nursing--A CLASS Program service that provides licensed vocational nursing to an individual who has a tracheostomy or is dependent on a ventilator.

(127) Specialized registered nursing--A CLASS Program service that provides registered nursing to an individual who has a tracheostomy or is dependent on a ventilator.

(128) Specialized therapies--A CLASS Program service that promotes skills development, maintains skills, decreases inappropriate behaviors, facilitates emotional well-being, creates opportunities for socialization, or improves physical and medical status and consists of:

(A) aquatic therapy;

(B) hippotherapy;

(C) massage therapy;

(D) music therapy;

(E) recreational therapy; and

(F) therapeutic horseback riding.

(129) Speech and language pathology--A CLASS Program service that provides speech-language pathology, as defined in Texas Occupations Code §401.001.

(130) Staff person--A full-time or part-time employee of a program provider.

(131) State supported living center--A state-supported and structured residential facility operated by HHSC to provide to persons with an intellectual disability a variety of services, including medical treatment, specialized therapy, and training in the acquisition of personal, social, and vocational skills, but does not include a community-based facility owned by HHSC.

(132) Store and forward technology--This term has the meaning set forth in Texas Occupations Code §111.001(2).

(133) Support consultation--A CLASS Program service that is defined in 40 TAC §41.103 and may be provided to an individual who chooses to participate in the CDS option.

(134) SFS--Support family services. A CLASS Program service that is described in Subchapter E of this chapter.

(135) Supported employment--A CLASS Program service that provides assistance to sustain competitive employment to an individual who, because of a disability, requires intensive, ongoing support to be self-employed, work from home, or perform in a work setting at which individuals without disabilities are employed.

(136) Synchronous audio-visual--An interactive, two-way audio and video communication platform that:

(A) allows a service to be provided to an individual in real time; and

(B) conforms to the privacy requirements under the Health Insurance Portability and Accountability Act.

(137) System check--A test of the CFC ERS equipment to determine if:

(A) the individual can successfully activate an alarm call; and

(B) the equipment is working properly.

(138) TAC--Texas Administrative Code. A compilation of state agency rules published by the Texas State Secretary of State in accordance with Texas Government Code, Chapter 2002, Subchapter C.

(139) Target behavior--A behavior identified in a behavior support plan for reduction or elimination.

(140) TAS--Transition assistance services. A CLASS Program service provided in accordance with Chapter 272 of this title (related to Transition Assistance Services) to an individual who is receiving institutional services and is eligible for and enrolling into the CLASS Program.

(141) Telehealth services--This term has the meaning set forth in Texas Occupations Code §111.001.

(142) Texas Workforce Commission--The state agency established under Texas Labor Code Chapter 301.

(143) Therapeutic horseback riding--A specialized therapy that:

(A) involves an individual interacting with and riding on horses; and

(B) is designed to improve the balance, coordination, focus, independence, confidence, and motor and social skills of the individual.

(144) THSC--Texas Health and Safety Code. Texas statutes relating to health and safety.

(145) Verbal or emotional abuse--Any act or use of verbal or other communication, including gestures:

(A) to:

(i) harass, intimidate, humiliate, or degrade an individual; or

(ii) threaten an individual with physical or emotional harm; and

(B) that:

(i) results in observable distress or harm to the individual; or

(ii) is of such a serious nature that a reasonable person would consider it harmful or a cause of distress.

(146) Videoconferencing--An interactive, two-way audio and video communication:

(A) used to conduct a meeting between two or more persons who are in different locations; and

(B) that conforms to the privacy requirements under the Health Insurance Portability and Accountability Act.

(147) Volunteer--A person who works for a program provider without compensation, other than reimbursement for actual expenses.

§259.7. *Description of the CLASS Program and CFC Option.*

(a) The CLASS Program is a Medicaid waiver program approved by CMS and operated by HHSC pursuant to §1915(c) of the Social Security Act. It provides community-based services and supports to an eligible individual as an alternative to the ICF/IID Program. CLASS Program services are intended to:

- (1) enhance the individual's integration into the community;
- (2) maintain or improve the individual's independent functioning; and
- (3) prevent the individual's admission to an institution.

(b) HHSC limits the enrollment in the CLASS Program to the number of individuals approved by CMS or by available funding from the state.

(c) The CLASS Program offers the following services approved by CMS:

- (1) adaptive aids;
- (2) auditory integration training/auditory enhancement training;
- (3) behavioral support;
- (4) case management;
- (5) cognitive rehabilitation therapy;
- (6) dental treatment;
- (7) habilitation;
- (8) licensed vocational nursing;
- (9) minor home modifications;
- (10) dietary services;
- (11) occupational therapy;
- (12) physical therapy;
- (13) prevocational services;
- (14) registered nursing;
- (15) respite, which consists of:
 - (A) in-home respite; and
 - (B) out-of-home respite;
- (16) speech and language pathology;
- (17) specialized licensed vocational nursing;
- (18) specialized registered nursing;
- (19) specialized therapies, which consist of:
 - (A) aquatic therapy;
 - (B) hippotherapy;
 - (C) massage therapy;
 - (D) music therapy;
 - (E) recreational therapy; and
 - (F) therapeutic horseback riding;
- (20) SFS;
- (21) CFS;
- (22) employment assistance;

(23) supported employment;

(24) TAS; and

(25) if the individual's IPC includes at least one CLASS Program service to be delivered through the CDS option:

(A) FMS; and

(B) support consultation.

(d) A DSA may only provide and bill for habilitation if the activity provided is transportation, as described in §259.5(56)(B)(i)(IX) of this subchapter (relating to Definitions).

(e) CFC is a state plan option governed by 42 CFR, Part 441, Subpart K, regarding Home and Community-Based Attendant Services and Supports State Plan Option (Community First Choice) that provides the following services to individuals:

(1) CFC PAS/HAB;

(2) CFC ERS; and

(3) CFC support management for an individual receiving CFC PAS/HAB.

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 10, 2023.

TRD-202300076

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Health and Human Services Commission

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077



**SUBCHAPTER B. ELIGIBILITY,
ENROLLMENT, AND REVIEW
DIVISION 1. ELIGIBILITY AND
MAINTENANCE OF THE CLASS INTEREST
LIST**

26 TAC §259.51, §259.53

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

§259.51. *Eligibility Criteria for CLASS Program Services and CFC Services.*

(a) An individual is eligible for CLASS Program services if:

(1) the individual meets the financial eligibility criteria described in Appendix B of the CLASS Program waiver application approved by CMS and available on the HHSC website;

(2) the individual is determined by HHSC to meet the LOC VIII criteria described in §261.239 of this title (relating to ICF/MR Level of Care VIII Criteria);

(3) the individual demonstrates a need for CFC PAS/HAB;

(4) the individual's IPC has an IPC cost for CLASS Program services at or below \$114,736.07;

(5) the individual is not enrolled in another waiver program or receiving a service that may not be received if the individual is enrolled in the CLASS Program, as identified in the Mutually Exclusive Services table in Appendix III of the Community Living Assistance and Support Services Provider Manual available on the HHSC website;

(6) the individual resides in the individual's own home or family home; and

(7) the individual requires the provision of:

(A) at least one CLASS Program service per month or a monthly monitoring by a case manager; and

(B) at least one CLASS Program service during an IPC period.

(b) Except as provided in subsection (c) of this section, an individual is eligible for a CFC service under this chapter if the individual:

(1) meets the criteria described in subsection (a) of this section;

(2) requires the provision of the CFC service; and

(3) is not receiving SFS or CFS.

(c) To be eligible for a CFC service under this chapter, an individual receiving MAO Medicaid must, in addition to meeting the eligibility criteria described in subsection (b) of this section, receive a CLASS Program service at least monthly, as required by 42 CFR §441.510(d).

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 10, 2023.

TRD-202300077

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Effective date: January 30, 2023

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DIVISION 2. ENROLLMENT PROCESS, PERSON-CENTERED SERVICE PLANNING, AND REQUIREMENTS FOR HOME AND COMMUNITY-BASED SETTINGS

26 TAC §§259.55, 259.57, 259.59, 259.61, 259.63, 259.65,
259.67, 259.69, 259.71, 259.73

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

§259.57. *Person-Centered Planning Process.*

(a) Person-centered planning is a process that empowers an individual to plan the individual's services and supports to achieve desired outcomes.

(b) A program provider must ensure the person-centered planning process is led by the individual to the maximum extent possible. The individual's LAR has a participatory role, as needed and as defined by the individual, unless State law confers decision-making authority to the LAR.

(c) The person-centered planning process must be used to develop an IPP, an HHSC IPP Addendum, a PAS/HAB plan, an enrollment IPC, a renewal IPC, a revised IPC, a service backup plan, and an individual transportation plan.

(d) The person-centered planning process must:

(1) include people chosen by the individual or LAR;

(2) provide the information and support that the individual needs to lead the planning process and make informed choices and decisions;

(3) occur at a time and location convenient to the individual and LAR;

(4) consider the individual's cultural preferences;

(5) provide information in plain language to the individual and in a manner that is accessible to the individual:

(A) through the provision of auxiliary aids and services at no cost to the individual in accordance with the Americans with Disabilities Act and section 504 of the Rehabilitation Act, if the individual requires such aids or services to communicate; and

(B) through the provision of language services at no cost to the individual, including oral interpretation and written translations, if the individual has limited English proficiency;

(6) use strategies for solving conflict or disagreement within the person-centered planning process;

(7) provide information to the individual or LAR to allow the individual or LAR to make informed decisions, including decisions about CLASS Program and CFC services, the settings in which the individual receives a CLASS Program service or a CFC service, and service providers; and

(8) inform the individual or LAR that the individual or LAR may request revisions to an IPP, a PAS/HAB plan, an enrollment IPC, a renewal IPC, a revised IPC, a service backup plan, or an individual transportation plan at any time by communicating the request to the CMA or DSA.

§259.59. *Requirements for Home and Community-Based Settings.*

(a) A home and community-based setting is a setting in which an individual receives CLASS Program services or CFC services. A home and community-based setting must have all of the following qualities based on the needs of the individual as documented in the individual's person-centered service plan.

(1) A home and community-based setting is integrated in and supports the individual's access to the greater community to the same degree as a person not enrolled in a Medicaid waiver program, including opportunities for the individual to:

- (A) seek employment and work in a competitive integrated setting;
- (B) engage in community life;
- (C) control personal resources; and
- (D) receive services in the community.

(2) A home and community-based setting is selected by an individual from among setting options, including non-disability specific settings and an option for a private unit in a setting in which SFS or CFS is provided. The setting options are identified and documented in an individual's IPP and are based on the individual's needs, preferences, and, for settings in which SFS or CFS is provided, resources available for room and board.

(3) A home and community-based setting ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint.

(4) A home and community-based setting optimizes, not regiments, individual initiative, autonomy, and independence in making life choices, including choices regarding daily activities, physical environment, and with whom to interact.

(5) A home and community-based setting facilitates individual choice regarding services and supports, and the service providers who provide the services and supports.

(b) In addition to the requirements in subsection (a) of this section, a DSA must ensure that a group setting in which prevocational services are provided:

(1) allows an individual to:

- (A) control the individual's schedule and activities related to prevocational services;
- (B) have access to the individual's food at any time; and
- (C) receive visitors of the individual's choosing at any time; and

(2) is physically accessible and free of hazards to an individual.

(c) If a DSA becomes aware that a modification to a requirement described in subsection (b)(1) of this section is needed based on a specific assessed need of an individual:

(1) the DSA must:

- (A) notify the case manager of the needed modification; and
- (B) provide the case manager with the information described in paragraph (2)(A) of this subsection as requested by the case manager; and

(2) the case manager must, if notified by the DSA of a needed modification, convene a service planning team meeting in person or by videoconferencing to update the individual's IPP to include the following:

- (A) a description of the specific and individualized assessed need that justifies the modification;
- (B) a description of the positive interventions and supports that were tried but did not work;

(C) a description of the less intrusive methods of meeting the need that were tried but did not work;

(D) a description of the condition that is directly proportionate to the specific assessed need;

(E) a description of how data will be routinely collected and reviewed to measure the ongoing effectiveness of the modification;

(F) the established time limits for periodic reviews to determine if the modification is still necessary or can be terminated;

(G) the individual's or LAR's signature evidencing informed consent to the modification; and

(H) the DSA's assurance that the modification will cause no harm to the individual; and

(3) the DSA may implement the modification after the service planning team updates the IPP as required by paragraph (2) of this subsection.

(d) Except as provided in subsection (e) of this section, a program provider must ensure that CLASS Program services and CFC services are not provided in a setting that is presumed to have the qualities of an institution. A setting is presumed to have the qualities of an institution if the setting:

(1) is located in a building in which a certified ICF/IID operated by a LIDDA or state supported living center is located but is distinct from the ICF/IID;

(2) is located in a building on the grounds of, or immediately adjacent to a certified ICF/IID operated by a LIDDA or state supported living center;

(3) is located in a building in which a licensed private ICF/IID, a hospital, a nursing facility, or other institution is located but is distinct from the ICF/IID, hospital, nursing facility, or other institution;

(4) is located in a building on the grounds of, or immediately adjacent to, a hospital, a nursing facility, or other institution except for a licensed private ICF/IID; or

(5) has the effect of isolating individuals from the broader community of persons not receiving Medicaid HCBS.

(e) A program provider may provide a CLASS Program service or a CFC service to an individual in a setting that is presumed to have the qualities of an institution as described in subsection (d) of this section, if CMS determines through a heightened scrutiny review that the setting:

(1) does not have the qualities of an institution; and

(2) does have the qualities of home and community-based settings.

§259.61. *Process for Enrollment of an Individual.*

(a) After HHSC notifies a CMA, as described in §259.55(c) of this division (relating to Written Offer of CLASS Program Services), that an individual selected the CMA, the CMA must assign a case manager to perform the following functions as soon as possible, but no later than 14 calendar days after HHSC's notification:

(1) verify that the individual resides in the catchment area for which the individual's selected CMA and DSA have a contract;

(2) conduct an initial in-person visit in the individual's residence with the individual and LAR or actively involved person at a time convenient to the individual and LAR to:

(A) provide an oral and written explanation of the following to the individual and LAR or actively involved person:

(i) CLASS Program services, including TAS if the individual is receiving institutional services;

(ii) CFC services;

(iii) the mandatory participation requirements of an individual described in §259.103 of this chapter (relating to Mandatory Participation Requirements of an Individual);

(iv) the CDS option described in §259.71 of this division (relating to CDS Option);

(v) the right to request a fair hearing in accordance with §259.101 of this chapter (relating to Individual's Right to a Fair Hearing);

(vi) that the individual, LAR, or actively involved person may report an allegation of abuse, neglect, or exploitation to DFPS by calling the toll-free telephone number at 1-800-252-5400;

(vii) the process by which the individual, LAR, or actively involved person may file a complaint regarding case management as required by 40 TAC §49.309 (relating to Complaint Process);

(viii) that the HHSC Office of the Ombudsman toll-free telephone number at 1-877-787-8999 may be used to file a complaint regarding the CMA;

(ix) voter registration, if the individual is 18 years of age or older;

(x) that, while the individual is staying at a location outside the catchment area in which the individual resides but within the state of Texas for a period of no more than 60 consecutive days, the individual and LAR or actively involved person may request that the DSA provide:

(I) transportation as a habilitation activity, as described in §259.5(56)(B)(i)(IX) of this subchapter (relating to Definitions);

(II) out-of-home respite in a camp described in §259.361(b)(2)(D) of this chapter (relating to Respite and Dental Treatment);

(III) adaptive aids;

(IV) nursing; and

(V) CFC PAS/HAB;

(xi) the use of electronic visit verification, as required by 1 TAC Chapter 354, Subchapter O; and

(xii) how to contact the individual's case manager;

(B) use the HHSC Understanding Program Eligibility - CLASS/DBMD form to provide an oral and written explanation to the individual or LAR, and obtain the individual's or LAR's signature and date on the form, to acknowledge understanding of:

(i) the eligibility requirements for:

(I) CLASS Program services, as described in §259.51(a) of this subchapter (relating to Eligibility Criteria for CLASS Program Services and CFC Services);

(II) CFC services for individuals who do not receive MAO Medicaid, as described in §259.51(b) of this subchapter; and

(III) CFC services for individuals who receive MAO Medicaid, as described in §259.51(c) of this subchapter;

(ii) the reasons CLASS Program services and CFC services may be suspended, as described in §259.157 of this chapter (relating to Suspension of CLASS Program Services or CFC Services); and

(iii) that CLASS Program services and CFC services may be terminated as described in §§259.161, 259.163, 259.165, and 259.167 of this chapter (relating to Termination of CLASS Program Services and CFC Services With Advance Notice for Reasons Other Than Non-compliance with Mandatory Participation Requirements; Termination of CLASS Program Services and CFC Services With Advance Notice Because of Non-compliance With Mandatory Participation Requirements; Termination of CLASS Program Services and CFC Services Without Advance Notice for Reasons Other Than Behavior Causing Immediate Jeopardy; and Termination of CLASS Program Services and CFC Services Without Advance Notice Because of Behavior Causing Immediate Jeopardy); and

(C) educate the individual, LAR, and actively involved person about protecting the individual from abuse, neglect, and exploitation; and

(3) give the individual or LAR the HHSC Waiver Program Verification of Freedom of Choice form to document the individual's or LAR's choice regarding the CLASS Program or the ICF/IID Program.

(b) A CMA must:

(1) as soon as possible, but no later than two business days after the case manager's initial in-person visit required by subsection (a)(2) of this section:

(A) collect the information necessary for the CMA and DSA to process the individual's request for enrollment into the CLASS Program in accordance with the *Community Living Assistance and Support Services Provider Manual*; and

(B) provide the individual's selected DSA with the information collected in accordance with subparagraph (A) of this paragraph;

(2) assist the individual or LAR in completing and submitting an application for Medicaid financial eligibility, as required by §259.103(1) of this chapter; and

(3) ensure that the case manager documents in the individual's record the progress toward completing a Medicaid application and enrolling into the CLASS Program.

(c) If an individual or LAR does not submit a Medicaid application to HHSC within 30 calendar days after the case manager's initial in-person visit, as required by §259.103(1) of this chapter, but is making good faith efforts to complete the application, the CMA:

(1) may extend, in 30-calendar day increments, the time frame in which the application must be submitted to HHSC, except as provided in paragraph (2) of this subsection;

(2) must not grant an extension that results in a time period of more than 365 calendar days from the date of the case manager's initial in-person visit; and

(3) must ensure that the case manager documents each extension in the individual's record.

(d) If an individual or LAR does not submit a Medicaid application to HHSC within 30 calendar days after the case manager's initial in-person visit, as required by §259.103(1) of this chapter, and is not making good faith efforts to complete the application, a CMA must re-

quest, in writing, that HHSC withdraw the offer of enrollment made to the individual in accordance with §259.55(d)(2) of this division.

(e) If a DSA serving the catchment area in which an individual resides is not willing to provide CLASS Program services or CFC services to the individual because the DSA has determined that it cannot ensure the individual's health and safety, the CMA must provide to HHSC, in writing, the specific reasons the DSA has determined that it cannot ensure the individual's health and safety.

(f) During the initial in-person visit described in subsection (a)(1) of the section, the case manager must determine whether an individual meets the following criteria:

- (1) the individual is being discharged from a nursing facility or an ICF/IID;
- (2) the individual has not previously received TAS;
- (3) the individual's proposed enrollment IPC will not include SFS; and
- (4) the individual anticipates needing TAS.

(g) If a case manager determines that an individual meets the criteria described in subsection (f) of this section, the case manager must:

(1) provide the individual or LAR with a list of TAS providers in the catchment area in which the individual will reside;

(2) complete, with the individual or LAR, the HHSC Transition Assistance Services (TAS) Assessment and Authorization form found on the HHSC website in accordance with the form's instructions, which includes:

(A) identifying the items and services described in §272.5(e) of this title (relating to Service Description) that the individual needs;

(B) estimating the monetary amount for the items and services identified on the form, which must be within the service limit described in §259.73(a)(4) of this division (relating to Service Limits); and

(C) documenting the individual's or LAR's choice of TAS provider;

(3) submit the completed form to HHSC for authorization;

(4) if HHSC authorizes the form, send the form to the TAS provider chosen by the individual or LAR; and

(5) include TAS and the monetary amount authorized by HHSC on the individual's proposed enrollment IPC.

(h) A DSA must ensure that the following functions are performed during an in-person visit in the individual's residence at a time convenient to the individual and LAR as soon as possible, but no later than 14 calendar days after the CMA provides information to the DSA as required by subsection (b)(1)(B) of this section:

(1) a DSA staff person must:

(A) inform the individual and LAR or actively involved person, orally and in writing:

(i) that the individual, LAR, or actively involved person may report an allegation of abuse, neglect, or exploitation to DFPS by calling the toll-free telephone number at 1-800-252-5400;

(ii) the process by which the individual, LAR, or actively involved person may file a complaint regarding CLASS Program

services or CFC services provided by the DSA as required by 40 TAC §49.309; and

(iii) that the HHSC Complaint and Incident Intake toll-free telephone number at 1-800-458-9858 may be used to file a complaint regarding the DSA; and

(B) educate the individual and LAR or actively involved person about protecting the individual from abuse, neglect, and exploitation;

(2) an appropriate professional must complete an adaptive behavior screening assessment in accordance with the assessment instructions; and

(3) an RN, in accordance with the Community Living Assistance and Support Services Provider Manual, must complete:

(A) a nursing assessment, using the HHSC CLASS/DBMD Nursing Assessment form;

(B) the HHSC Related Conditions Eligibility Screening Instrument form; and

(C) the ID/RC Assessment.

(i) A DSA must:

(1) ensure that the primary diagnosis of the individual documented on the ID/RC Assessment is approved by a physician;

(2) submit the following documentation to HHSC for HHSC's determination of whether the individual meets the LOC VIII criteria required by §259.51(a)(2) of this subchapter:

(A) the completed adaptive behavior screening assessment;

(B) the completed HHSC Related Conditions Eligibility Screening Instrument form; and

(C) the completed ID/RC Assessment; and

(3) send the completed HHSC CLASS/DBMD Nursing Assessment form described in subsection (h)(3)(A) of this section to the CMA.

(j) In accordance with §259.63(a)(1) of this division (relating to Determination by HHSC of Whether an Individual Meets LOC VIII Criteria), HHSC reviews the documentation described in subsection (i)(2) of this section.

(k) If a DSA receives written notice from HHSC in accordance with §259.63(c)(1) of this division that an individual meets the LOC VIII criteria, the DSA must notify the individual's CMA of HHSC's decision as soon as possible, but no later than one business day after receiving the notice from HHSC.

(l) If HHSC determines that an individual does not meet the LOC VIII criteria, HHSC sends written notice of the denial of the individual's request for enrollment into the CLASS Program:

(1) to the individual or LAR in accordance with §259.153(b) of this chapter (relating to Denial of a Request for Enrollment into the CLASS Program); and

(2) to the individual's DSA and CMA in accordance with §259.63(d) of this division.

(m) If a CMA receives notice from a DSA, as described in subsection (k) of this section, that HHSC determined that an individual meets the LOC VIII criteria, the case manager must:

(1) ensure that the service planning team meets in person or by videoconferencing to develop:

(A) a proposed enrollment IPC, a PAS/HAB plan, IPPs, and an HHSC IPP Addendum form for the individual in accordance with §259.65 of this division (relating to Development of an Enrollment IPC); and

(B) an individual transportation plan, if transportation as a habilitation activity or as an adaptive aid is included on the proposed enrollment IPC; and

(2) submit the documents described in paragraph (1) of this subsection to HHSC for review in accordance with §259.65 of this division.

(n) HHSC reviews a proposed enrollment IPC in accordance with §259.69 of this division (relating to HHSC's Review of a Proposed Enrollment IPC) to determine if:

(1) the proposed enrollment IPC has an IPC cost at or below the amount in §259.51(a)(4) of this subchapter; and

(2) the CLASS Program services and CFC services specified in the proposed enrollment IPC meet the requirements described in §259.65(a)(1)(E)(iii) or (iv) and §259.65(b) of this division.

(o) A CMA and DSA must not provide a CLASS Program service or CFC service to an individual before HHSC notifies the CMA, in accordance with §259.69(c)(1) of this division, that the individual's request for enrollment into the CLASS Program has been approved. If a CMA or DSA provides CLASS Program services or CFC services to an individual before the effective date of the individual's enrollment IPC authorized by HHSC, HHSC does not reimburse the CMA or DSA for those services.

(p) If HHSC notifies a CMA in accordance with §259.69(c)(1) of this division that an individual's request for enrollment is approved:

(1) the CMA must ensure the case manager complies with §259.69(c)(2) of this division; and

(2) the CMA and DSA must comply with §259.69(g) of this division.

(q) If HHSC notifies a CMA in accordance with §259.69(e) of this division that an individual's request for enrollment into the CLASS Program is approved, but action is being taken by HHSC to deny a CLASS Program service or CFC service and modify the proposed enrollment IPC:

(1) the CMA must comply with §259.69(f) of this division; and

(2) the CMA and DSA must comply with §259.69(g) of this division.

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 10, 2023.

TRD-202300078

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Health and Human Services Commission

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077



DIVISION 3. REVIEWS

26 TAC §§259.75, 259.77, 259.79, 259.81, 259.83, 259.85, 259.87

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

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 10, 2023.

TRD-202300079

Karen Ray

Chief Counsel

Health and Human Services Commission

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077



DIVISION 4. SERVICE BACKUP PLANS

26 TAC §259.89

STATUTORY AUTHORITY

The new section is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

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 10, 2023.

TRD-202300080

Karen Ray

Chief Counsel

Health and Human Services Commission

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077



SUBCHAPTER C. RIGHTS AND RESPONSIBILITIES OF AN INDIVIDUAL

26 TAC §§259.101, §259.103

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

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 10, 2023.

TRD-202300081

Karen Ray

Chief Counsel

Health and Human Services Commission

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077



SUBCHAPTER D. TRANSFER, DENIAL, SUSPENSION, REDUCTION, AND TERMINATION OF SERVICES

26 TAC §§259.151, 259.153, 259.155, 259.157, 259.159, 259.161, 259.163, 259.165, 259.167, 259.169, 259.171

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

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 10, 2023.

TRD-202300083

Karen Ray

Chief Counsel

Health and Human Services Commission

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077



SUBCHAPTER E. SUPPORT FAMILY SERVICES AND CONTINUED FAMILY SERVICES

DIVISION 1. INTRODUCTION

26 TAC §259.201, §259.203

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

§259.201. General Requirements.

In this subchapter:

(1) a support family agency is the entity that contracts with HHSC to provide SFS in accordance with 40 TAC Chapter 49 (relating to Contracting for Community Services); and

(2) a continued family agency is the entity that contracts with HHSC to provide CFS in accordance with 40 TAC Chapter 49.

§259.203. Eligibility.

(a) To receive SFS, an individual must be under 18 years of age.

(b) To receive CFS, an individual must:

(1) be 18 years of age or older;

(2) reside with a support family; and

(3) receive SFS immediately before receiving CFS.

(c) An individual who receives SFS or CFS must not receive:

(1) CFC PAS/HAB;

(2) CFC ERS; or

(3) transportation as a habilitation activity or as an adaptive aid.

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 10, 2023.

TRD-202300084

Karen Ray

Chief Counsel

Health and Human Services Commission

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077



DIVISION 2. SUPPORT FAMILY AGENCY AND CONTINUED FAMILY AGENCY

26 TAC §§259.205, 259.207, 259.209, 259.211, 259.213

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas

Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

§259.205. *Residential Agreements, Requirements for Provider-Controlled Residential Settings, and Support Family Agency and Continued Family Agency Functions.*

(a) During a service planning team meeting to develop an enrollment, a revised, or a renewal IPC and IPP, a case manager must inform an individual or LAR of the following if the individual is interested in receiving SFS or CFS:

(1) that if the individual or LAR selects SFS or CFS, the individual or LAR will be responsible for paying room and board in accordance with a residential agreement described in subsections (b) and (c) of this section;

(2) that if the individual or LAR does not pay room or board as required by a residential agreement, the individual's support family may evict the individual in accordance with the residential agreement and state law; and

(3) that if the individual is evicted by a support family and the individual or LAR has not paid the delinquent room or board, HHSC will deny the individual SFS or CFS until the individual or LAR pays the delinquent room or board.

(b) An individual's support family agency or continued family agency must ensure that an individual receiving SFS or CFS has a written residential agreement with the support family.

(c) The residential agreement required by subsection (b) of this section must include:

- (1) the physical address of the residence;
- (2) the name of the individual;
- (3) the name of the support family;
- (4) the beginning date of the residential agreement;
- (5) the date the residential agreement expires;
- (6) a provision that:

(A) the support family and the individual or LAR agree that the residential agreement is a "lease," as defined in Texas Property Code Chapter 92 and that they are subject to state law governing residential tenancies, including Texas Property Code Chapters 24, 91, and 92 and Texas Rules of Civil Procedure Rule 510; and

(B) to the extent allowed by law, in the event of a conflict or inconsistency between any provision of the residential agreement and any provision of state statutory law, including Texas Property Code Chapters 91 and 92, the provision in the residential agreement governs;

(C) the individual or LAR is not waiving any right or remedy provided to tenants under state law, including the Texas Fair Housing Act in Texas Property Code Chapter 301, and is not agreeing to any notice period that is shorter than the notice period to which tenants are entitled under state law;

(D) allows the individual or LAR to terminate the residential agreement before its expiration date without any obligation under the residential agreement except an obligation that accrued before the date of termination, if the individual permanently moves from the residence for any reason, including transferring to a different support family agency or continued family agency;

(E) the support family agrees to refund to the individual or LAR an amount for room and board paid to the support family

for the days that the individual was away from the residence because the individual permanently moved from the residence using the following formula to determine the daily amount for room and board (the monthly amount for room and board divided by the number of days in the month);

(F) the individual may furnish and decorate the individual's bedroom;

(G) the support family agrees to be responsible for all repairs to the residence of the support family, including the support family's real property or personal property, resulting from normal wear and tear, as defined in Texas Property Code §92.001;

(H) that allows eviction of the individual only if:

(i) the individual or LAR fails to pay room or board, which does not include any late fee; or

(ii) the individual's CLASS Program services are terminated;

(I) the support family will, before giving the individual or LAR a notice to vacate, give the individual or LAR a notice of proposed eviction that allows the individual or LAR at least 60 calendar days to pay the delinquent room or board;

(J) if the individual or LAR pays the delinquent room or board within the period required by subparagraph (I) of this paragraph, the support family will not give the individual or LAR a notice to vacate or otherwise proceed to evict the individual; and

(K) the support family will not accelerate the entire balance of the unpaid room or board owed under the remainder of the term of the residential agreement if the individual or LAR violates the residential agreement and the violation does not result in an eviction;

(7) the amount the individual or LAR is paying for room and board;

(8) the day of the month that the amount for room and board is due, which will not be before the day of the month that an individual receives a primary source of income, such as supplemental security income and social security disability insurance;

(9) the amount of a late fee, if any, which may be charged only once per month and will not exceed 10 percent of the amount for room and board, that the support family may charge the individual or LAR if room and board is not paid by the third day after it is due;

(10) the signature of the support family; and

(11) the signature of the individual or the LAR.

(d) A support family must:

(1) give the individual or LAR at least three calendar days to review, request changes, and sign the residential agreement;

(2) ensure the residential agreement is fully executed before the individual begins living in a residence in which SFS or CFS is provided, except that an individual may begin living in one of these residences before a residential agreement is fully executed in the event of an emergency;

(3) if an individual begins living in a residence in which SFS or CFS is provided before a residential agreement is fully executed because of an emergency, as allowed by paragraph (2) of this subsection:

(A) document the details of the emergency; and

(B) ensure the residential agreement is fully executed within seven calendar days after the individual begins living in the residence; and

(4) provide one copy of the residential agreement to the individual or LAR within three business days after the date the residential agreement is fully executed.

(e) If a support family agency or continued family agency becomes aware that a modification to the provision in the residential agreement that the individual may furnish and decorate the individual's bedroom is needed based on a specific assessed need of the individual, the support family agency or continued family agency must:

(1) notify the case manager of the needed modification; and

(2) provide the case manager with the information described in subsection (n) of this section as requested by the case manager.

(f) If an individual or LAR is delinquent in payment of room or board and the support family wants to evict the individual, the support family agency or continued family agency must:

(1) notify the case manager that the individual or LAR is delinquent in the payment of room or board under the residential agreement and that the support family wants to evict the individual;

(2) after providing the notification required by paragraph (1) of this subsection, meet with the individual or LAR, including the representative payee if one has been appointed by the Social Security Administration, and the case manager to discuss the alleged non-payment of room or board and options to prevent an eviction; and

(3) if the support family intends to proceed to evict the individual at the meeting required by paragraph (2) of this subsection:

(A) give the individual or LAR a written notice of proposed eviction that allows the individual or LAR at least 60 calendar days to pay the delinquent room or board; and

(B) provide the case manager with a copy of the written notice of proposed eviction.

(g) If an individual or LAR pays the delinquent room or board within the period required by subsection (f)(3) of this section, the support family must not give the individual or LAR a notice to vacate or otherwise proceed to evict the individual.

(h) If an individual or LAR does not pay the delinquent room or board within the period required by subsection (f)(3) of this section, the support family agency or continued family agency:

(1) must report the failure to pay to one of the following, as appropriate:

(A) the Social Security Administration;

(B) the probate court that appointed the individual's guardian; or

(C) DFPS as an allegation of the LAR's exploitation or neglect of the individual;

(2) must meet with the individual or LAR and the case manager to discuss alternative living settings for the individual; and

(3) if the support family wants to proceed to evict the individual, the support family must:

(A) give the individual or LAR a written notice to vacate the residence in accordance with the residential agreement and state law; and

(B) send a copy of the written notice described in subparagraph (A) of this paragraph to the individual's case manager within one business day after the individual or LAR is given the notice.

(i) If an individual is evicted by a support family and the individual or LAR has not paid the delinquent room or board, the case manager must convene a meeting or meetings to update the IPC and IPP as described in §259.79(c) or (d) of this chapter (relating to Renewal and Revision of an IPC). If the individual or LAR wants to keep SFS or CFS on the individual's IPC, the case manager must inform the individual or LAR at the meeting or meetings that HHSC will deny CFS and SFS, if included on the individual's IPC, until the individual pays the delinquent room or board.

(j) If a support family evicts an individual who has an LAR and the LAR fails to arrange an alternative living setting for the individual, the support family agency or continued family agency must report the LAR's failure to DFPS as neglect of the individual and notify the case manager that such a report was made.

(k) If an individual pays the delinquent room or board, a support family agency or continued family agency must, within one business day after the payment, notify the individual's case manager that the individual is no longer delinquent.

(l) In each residence in which a support family agency provides SFS or a continued family agency provides CFS, the support family agency or the continued family agency must ensure that, except as provided in subsection (m) of this section:

(1) an individual has privacy in the individual's bedroom;

(2) an individual has the option not to share a bedroom with a roommate;

(3) an individual sharing a bedroom has a choice of roommates;

(4) a lock is installed on the individual's bedroom door at no cost to the individual and that:

(A) the lock is operable by the individual; and

(B) only the individual, a roommate of the individual, and the support family has keys to the individual's bedroom door;

(5) an individual can furnish and decorate the individual's bedroom;

(6) while in the residence, an individual has the freedom and support:

(A) to control the individual's schedule and activities that are not part of the implementation plan; and

(B) to have access to food at any time;

(7) an individual may have visitors of the individual's choosing at any time; and

(8) the residence is physically accessible and free of hazards to the individual.

(m) If a support family agency or continued family agency becomes aware that a modification to a requirement described in subsection (l)(1) - (7) of this section is needed based on a specific assessed need of an individual, the support family agency or continued family agency must:

(1) notify the case manager of the needed modification; and

(2) provide the case manager with the information described in subsection (n) of this section as requested by the case manager.

(n) A case manager must, if notified in accordance with subsection (e)(1) or (m)(1) of this section, convene a service planning team meeting to update the individual's IPP to include the following:

- (1) a description of the specific and individualized assessed need that justifies the modification;
- (2) a description of any positive interventions and supports that have been tried but did not work;
- (3) a description of any less intrusive methods of meeting the need that have been tried but did not work;
- (4) a description of the condition that is directly proportionate to the specific assessed need;
- (5) a description of how data will be routinely collected and reviewed to measure the ongoing effectiveness of the modification;
- (6) the established time limits for periodic reviews to determine if the modification is still necessary or can be terminated;
- (7) the individual's or LAR's signature on the IPP evidencing informed consent to the modification; and
- (8) the support family agency or continued family agency's assurance that the modification will cause the individual no harm.

(o) After the service planning team updates the IPP as required by subsection (n) of this section, the support family may implement the modification.

(p) A support family agency or a continued family agency must provide ongoing recruitment, support, training, and monitoring of SFS or CFS, including:

- (1) ensuring that a support family is available to serve an eligible individual;
- (2) helping an individual transition from institutional services to SFS;
- (3) supporting an individual living with a support family to prevent placement breakdown or admission to an institution;
- (4) providing an alternative support family when an individual's placement with a support family is no longer available or appropriate;
- (5) establishing a safe and permanent placement for an individual as approved by the service planning team;
- (6) training the support family to provide the SFS or CFS the service planning team assigns and as documented on the individual's IPC and IPP; and
- (7) monitoring and reporting to the case manager about the individual's placement, as often as needed but at least monthly, as described in §259.211(4) of this division (relating to Ongoing Support) and §259.213 of this division (relating to Monthly Monitoring).

§259.207. *Pre-Placement Activities.*

(a) After receiving a referral from an individual's case manager for SFS or CFS, a support family agency or continued family agency must:

- (1) meet with the individual and LAR;
- (2) identify the SFS or CFS individual needs;
- (3) obtain any evaluations, written records, or other necessary information about the individual;
- (4) determine the criteria for a support family that will meet the specific needs of the individual;

(5) locate a support family; and

(6) keep the case manager informed of placement progress.

(b) Before placement, a support family agency or continued family agency must:

- (1) ensure that a support family is verified by a child-placing agency licensed by HHSC;
- (2) provide orientation, to the support family on the SFS or CFS the support family agency or continued family agency identified the individual will need;
- (3) introduce the individual and LAR to the support family in person; and
- (4) obtain the LAR's agreement to the placement.

(c) A support family agency or a continued family agency must facilitate the completion of written agreements and authorizations between the individual's LAR, the support family, and the support family agency or continued family agency. The written documents must include:

- (1) designation of who will participate in decisions about services, including any necessary delegation of authority for decisions by the LAR;
- (2) a description of how visits between the individual and the LAR will be arranged;
- (3) designation of who has the authority to make health care decisions for the individual, such as consenting to medical treatment, including any necessary delegation of this authority by the person with the legal responsibility to make health care decisions;
- (4) preferences agreed upon for:
 - (A) religious issues;
 - (B) cultural practices;
 - (C) problem resolution processes; and
 - (D) the type and amount of involvement by the LAR;
- (5) plans for routine and emergency communication and information exchange, including both oral and written communication; and
- (6) documentation of the financial responsibilities of all parties.

§259.209. *Placement.*

After completion of the authorizations and agreements described in §259.207(c) of this division (relating to Pre-Placement Activities), a support family, an LAR, and the support family agency or continued family agency must:

- (1) participate in the service planning team meeting described in §259.65(a)(1) of this chapter (relating to Development of an Enrollment IPC) in which the service planning team:
 - (A) develops a transition plan;
 - (B) includes SFS or CFS on the proposed enrollment IPC; and
 - (C) develops an IPP for SFS or CFS;
- (2) provide copies of the agreements and authorizations listed in §259.207(c) of this division to the case manager;
- (3) train the support family to provide SFS or CFS as described on the IPP; and

(4) assume the responsibility for moving the individual and the individual's possessions into the support family home.

§259.211. Ongoing Support.

After an individual is placed with a support family, a support family agency or continued family agency must:

(1) provide the support family with information on how to contact the support family agency or continued family agency staff at any time;

(2) ensure accurate documentation of service delivery in accordance with the IPC and IPP;

(3) assist the support family and the individual in accessing school and preschool services;

(4) provide monthly progress notes to the case manager, including monthly summaries of:

(A) the activities described in §259.217 of this division (relating to Support Family Duties);

(B) socialization activities;

(C) the use of non-waiver services; and

(D) other services included on the IPP;

(5) provide additional training to the support family as identified by the service planning team;

(6) participate in the service planning team meetings as requested by the case manager, the LAR, the support family agency, or the DSA; and

(7) provide to the case manager documentation of any changes to the agreements or authorizations described in §259.207(c) of this division (relating to Pre-Placement Activities) within seven calendar days after the change occurs.

§259.213. Monthly Monitoring.

(a) A support family agency or continued family agency must visit a support family's home at least once a month to determine if:

(1) placement remains beneficial to the individual;

(2) the environment remains healthy and safe; and

(3) the rights of the individual are being protected.

(b) To ensure that the individual's rights are being protected, during a visit described in subsection (a) of this section, a support family agency or continued family agency must determine if:

(1) there is no evidence of abuse, neglect, or exploitation of the individual;

(2) the individual participates in community functions;

(3) the individual has adequate personal belongings; and

(4) there are no restrictions on the individual's personal property, including money.

(c) A support family agency or continued family agency must document each monthly visit, including verification of each item listed in subsections (a) and (b) of this section, and submit the documentation to the case manager no later than seven calendar days after the visit.

(d) A support family agency or continued family agency must inform the case manager of any changes needed to an individual's IPP no later than five calendar days after the date the support family agency or continued family agency became aware of the need for a change.

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 10, 2023.

TRD-202300085

Karen Ray

Chief Counsel

Health and Human Services Commission

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077



DIVISION 3. SUPPORT FAMILIES

26 TAC §259.215, §259.217

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

§259.215. Support Family Requirements.

(a) A support family must be:

(1) an agency foster home verified by a child-placing agency licensed by HHSC; and

(2) a contractor of the support family agency or continued family agency who places an individual with the support family.

(b) A support family must not provide services to more than three unrelated individuals at any one time in their home.

(c) A support family must ensure that:

(1) an individual participates in age-appropriate community activities; and

(2) the support family home environment is healthy and safe for the individual.

(d) A support family must provide services in a residence that the support family owns or leases. The residence must be a typical residence in a neighborhood and meet the needs of an individual and LAR.

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 10, 2023.

TRD-202300086

Karen Ray

Chief Counsel

Health and Human Services Commission

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077

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SUBCHAPTER F. ADAPTIVE AIDS, MINOR HOME MODIFICATIONS, AND CFC ERS

DIVISION 1. ADAPTIVE AIDS

26 TAC §§259.251, 259.253, 259.255, 259.257, 259.259, 259.261, 259.263, 259.265, 259.267

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

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 10, 2023.

TRD-202300087

Karen Ray

Chief Counsel

Health and Human Services Commission

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077

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DIVISION 2. MINOR HOME MODIFICATIONS

26 TAC §§259.271, 259.273, 259.275, 259.277, 259.279, 259.281, 259.283, 259.285, 259.287

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

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 10, 2023.

TRD-202300088

Karen Ray

Chief Counsel

Health and Human Services Commission

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077

DIVISION 3. CFC ERS

26 TAC §259.289

STATUTORY AUTHORITY

The new section is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

§259.289. CFC ERS.

(a) Eligibility for CFC ERS. A DSA must ensure that CFC ERS is provided only to an individual:

- (1) who is not receiving SFS or CFS; and
- (2) who:

(A) lives alone, who is alone for significant parts of the day, or has no regular caregiver for extended periods of time; and

(B) would otherwise require extensive routine supervision.

(b) Installing equipment.

(1) A DSA must ensure that CFC ERS equipment is installed no later than 14 business days after one of the following dates, whichever is later:

(A) the date HHSC approves the proposed IPC that includes CFC ERS; or

(B) the effective date of the individual's IPC as determined by the service planning team.

(2) At the time CFC ERS equipment is installed, a DSA must ensure that:

(A) the equipment is installed in accordance with the manufacturer's installation instructions;

(B) an initial test of the equipment is made;

(C) the equipment has an alternate power source in the event of a power failure;

(D) the individual is trained on the use of the equipment, including:

- (i) demonstrating how the equipment works; and
- (ii) having the individual activate an alarm call;

(E) an explanation is given to the individual that the individual must:

- (i) participate in a system check each month; and
- (ii) contact the CFC ERS provider if:

(I) the individual's telephone number or address changes; or

(II) one or more of the individual's responders change; and

(F) the individual is informed that a responder, in response to an alarm call, may forcibly enter the individual's home if necessary.

(3) A DSA must ensure that the date and time of the CFC ERS equipment installation and compliance with the requirements in

paragraphs (1) and (2) of this subsection are documented in the individual's record.

(c) Securing responders. A DSA must ensure that, on or before the date CFC ERS equipment is installed:

(1) an attempt is made to obtain from an individual, the names and telephone numbers of at least two responders, such as a relative or neighbor;

(2) public emergency personnel:

(A) is designated as a second responder if the individual provides the name of only one responder; or

(B) is designated as the sole responder if the individual does not provide the names of any responders; and

(3) the name and telephone number of each responder is documented in the individual's record.

(d) Conducting a system check.

(1) At least once during each calendar month a DSA must ensure that a system check is conducted on a date and time agreed to by an individual.

(2) A DSA must ensure that the date, time, and result of the system check is documented in the individual's record.

(3) If, as a result of the system check:

(A) the equipment is working properly but the individual is unable to successfully activate an alarm call, the DSA must ensure that a request is made of the case manager to convene a service planning team meeting to determine if CFC ERS meets the individual's needs; or

(B) the equipment is not working properly, the DSA must ensure that, no later than three calendar days after the date of the system check, the equipment is repaired or replaced.

(e) Failing to complete a system check. If a system check is not conducted in accordance with subsection (d)(1) of this section, a DSA must ensure that:

(1) the failure to comply is because of good cause; and

(2) the good cause is documented in an individual's record.

(f) Alarm call.

(1) A DSA must ensure that an alarm call is responded to 24 hours a day, seven days a week.

(2) A DSA must ensure that, if an alarm call is made, a CFC ERS provider:

(A) within 60 seconds of the alarm call, attempts to contact an individual to determine if an emergency exists;

(B) immediately contacts a responder, if as a result of attempting to contact the individual:

(i) the CFC ERS provider confirms there is an emergency; or

(ii) the CFC ERS provider is unable to communicate with the individual; and

(C) documents the following information in the individual's record when the information becomes available:

(i) the name of the individual;

(ii) the date and time of the alarm call, recorded in hours, minutes, and seconds;

(iii) the response time, recorded in seconds;

(iv) the time the individual is called in response to the alarm call, recorded in hours, minutes, and seconds;

(v) the name of the contacted responder, if applicable;

(vi) a brief description of the reason for the alarm call; and

(vii) if the reason for the alarm call is an emergency, a statement of how the emergency was resolved.

(3) If an alarm call results in a responder being dispatched to an individual's home for an emergency, the DSA must ensure that:

(A) the case manager receives written notice of the alarm call within one business day after the date of the alarm call;

(B) if the CFC ERS provider is a contracted provider, the DSA receives written notice from the contracted provider within one business day after the alarm call; and

(C) the written notices required by subparagraphs (A) and (B) of this paragraph are maintained in the individual's record.

(g) Equipment failure.

(1) A DSA must ensure that, if an equipment failure occurs, other than during a system check required by subsection (d)(1) of this section:

(A) the individual is informed of the equipment failure; and

(B) the equipment is replaced within one business day after the failure becomes known by the CFC ERS provider.

(2) If an individual is not informed of the equipment failure or the equipment is not replaced in compliance with paragraph (1) of this subsection, a DSA must:

(A) determine whether the failure to inform the individual or replace the equipment was because of good cause; and

(B) as soon as possible, ensure that the individual is informed of the equipment failure and the equipment is replaced.

(h) Low battery.

(1) A DSA must ensure that, if the ERS equipment registers five or more "low battery" signals in a 72-hour period:

(A) a visit to an individual's home is made to conduct a system check no later than five business days after the low battery signals occur; and

(B) if the battery is defective, the battery is replaced during the visit.

(2) If a system check or battery replacement is not made in accordance with paragraph (1) of this subsection, a DSA must:

(A) determine whether the failure to conduct a system check or replace a defective battery was because of good cause; and

(B) as soon as possible, conduct a system check and replace a defective battery.

(i) Documenting equipment failure or low battery. A DSA must ensure that the following information is documented in an individual's record:

(1) the date the equipment failure or low battery signal became known by the CFC ERS provider;

- (2) the equipment or subscriber number;
- (3) a description of the problem;
- (4) the date the equipment or battery was repaired or replaced; and
- (5) the good cause for failure to comply with subsections (g)(2)(A) and (h)(2)(A) of this section.

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

Filed with the Office of the Secretary of State on January 10, 2023.

TRD-202300089
 Karen Ray
 Chief Counsel
 Health and Human Services Commission
 Effective date: January 30, 2023
 Proposal publication date: September 2, 2022
 For further information, please call: (512) 438-5077



SUBCHAPTER G. ADDITIONAL CMA REQUIREMENTS

26 TAC §§259.301, 259.303, 259.305, 259.307, 259.309, 259.311, 259.313, 259.315, 259.317, 259.319, 259.321

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

§259.311. *CMA Service Delivery.*

- (a) A CMA must ensure that:
 - (1) a full-time case manager is assigned to provide case management to no more than 50 individuals at one time;
 - (2) a part-time case manager is assigned to provide case management to no more than 25 individuals at one time; and
 - (3) for a month in which a case manager does not meet with an individual or LAR as required by §259.79(a) of this chapter (relating to Renewal and Revision of an IPC), the case manager has an in-person or telephone contact with the individual or LAR or other persons acting on behalf of the individual, such as an advocate or family member, to provide case management.
- (b) In determining the number of individuals to which a case manager will be assigned, a CMA must consider:
 - (1) the intensity of an individual's needs;
 - (2) the frequency and duration of contacts the case manager will need to make with the individual; and
 - (3) the amount of travel time involved in making such contacts.
- (c) A CMA must have:

(1) an adequate number of case managers available to ensure the provision of case management to an individual at all times; and

(2) a written process that ensures that case managers are or can readily become familiar with individuals to whom they are not ordinarily assigned but to whom they may be required to provide case management.

(d) A CMA must ensure that a case manager participates as a member of an individual's service planning team and uses the person-centered planning process when developing or revising required documentation in accordance with this chapter and the *Community Living Assistance and Support Services Provider Manual*.

(e) A CMA must ensure that case management is provided to an individual in accordance with the individual's IPC.

(f) A CMA must submit an IPC to HHSC within the time periods required by §259.65 of this chapter (relating to Development of an Enrollment IPC) and §259.79(g)(2)(A) and (g)(3)(A) of this chapter to ensure that a DSA receives reimbursement for the provision of CLASS Program services and CFC services.

(g) A CMA must follow the process for requesting authorization to purchase dental treatment, as described in the *Community Living Assistance and Support Services Provider Manual*.

(h) If an individual may need cognitive rehabilitation therapy, a case manager must assist the individual in obtaining, in accordance with the Medicaid State Plan, a neurobehavioral or neuropsychological assessment and plan of care from a qualified professional as a non-CLASS Program service.

(i) A CMA must ensure that an individual's case manager complies with §259.205 of this chapter (relating to Residential Agreements, Requirements for Provider-Controlled Residential Settings, and Support Family Agency and Continued Family Agency Functions).

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 10, 2023.

TRD-202300090
 Karen Ray
 Chief Counsel
 Health and Human Services Commission
 Effective date: January 30, 2023
 Proposal publication date: September 2, 2022
 For further information, please call: (512) 438-5077



SUBCHAPTER H. ADDITIONAL DSA REQUIREMENTS

26 TAC §§259.351, 259.353, 259.355, 259.357, 259.359 - 259.361, 259.363, 259.365, 259.367, 259.369, 259.371, 259.373

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Exec-

utive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

§259.355. *Qualifications of DSA Staff Persons.*

(a) A DSA must ensure that a staff person meets the requirements of this section.

(b) A service provider for a direct service must meet the qualifications in this subsection and in subsection (d) of this section.

(1) A service provider for a direct service:

(A) must be at least 18 years of age; and

(B) except as provided by paragraphs (2) and (3) of this subsection, may not be a relative or guardian of the individual to whom the service provider is providing the direct service.

(2) A service provider of transportation as a habilitation activity, prevocational services, respite, employment assistance, supported employment, or CFC PAS/HAB may be a relative or guardian of the individual unless prohibited by subsection (d)(21) of this section.

(3) A service provider of minor home modifications may be a relative or guardian of the individual.

(c) A DSA must have a full-time or part-time program director who:

(1) manages and oversees the DSA's operations including the provision of CLASS Program services and CFC services to individuals enrolled with the DSA and has:

(A) a bachelor's degree in a health and human services field and two years' work experience in the delivery of services and supports to persons with related conditions or similar disabilities; or

(B) one of the following:

(i) a high school diploma and four years' work experience in the delivery of services and supports to persons with related conditions or similar disabilities; or

(ii) a high school equivalency certificate issued in accordance with the law of the issuing state and four years' work experience in the delivery of services and supports to persons with related conditions or similar disabilities;

(2) is at least 18 years of age;

(3) is an employee of the DSA; and

(4) is not a relative of an individual being served by the DSA.

(d) A DSA must ensure that CLASS Program services and CFC services are provided by qualified service providers in accordance with this subsection.

(1) A service provider of registered nursing and of specialized registered nursing must be an RN.

(2) A service provider of licensed vocational nursing and of specialized licensed vocational nursing must be a licensed vocational nurse.

(3) A service provider of occupational therapy must be an occupational therapist or an occupational therapy assistant licensed in accordance with Texas Occupations Code Chapter 454.

(4) A service provider of physical therapy must be a physical therapist or physical therapist assistant licensed in accordance with Texas Occupations Code Chapter 453.

(5) A service provider of speech and language pathology must be a speech-language pathologist or a licensed assistant in speech-language pathology licensed in accordance with Texas Occupations Code Chapter 401.

(6) A service provider of auditory integration training/auditory enhancement training must be an audiologist or a licensed assistant in audiology licensed in accordance with Texas Occupations Code Chapter 401.

(7) A service provider of dental treatment must be a person licensed to practice dentistry, dental surgery, or dental hygiene in accordance with Texas Occupations Code Chapter 256.

(8) A service provider of dietary services must be a dietitian licensed in accordance with Texas Occupations Code Chapter 701.

(9) A service provider of massage therapy must be a massage therapist licensed in accordance with Texas Occupations Code Chapter 455.

(10) A service provider of therapeutic horseback riding must be a person certified by the Professional Association of Therapeutic Horsemanship International as a therapeutic riding instructor.

(11) Hippotherapy must be provided by the following two service providers:

(A) a service provider who is certified by the Professional Association of Therapeutic Horsemanship International as a therapeutic riding instructor; and

(B) a service provider who is:

(i) an occupational therapist licensed in accordance with Texas Occupations Code Chapter 454;

(ii) an occupational therapy assistant licensed in accordance with Texas Occupations Code Chapter 454;

(iii) a physical therapist licensed in accordance with Texas Occupations Code Chapter 453; or

(iv) a physical therapist assistant licensed in accordance with Texas Occupations Code Chapter 453.

(12) A service provider of recreational therapy must be a person:

(A) who holds a credential as a certified therapeutic recreation specialist awarded by the National Council of Therapeutic Recreation Certification; or

(B) who is certified as a therapeutic recreation specialist by the Consortium for Therapeutic Recreation/Activities Certification, Inc.

(13) A service provider of music therapy is a person who holds a credential as a board certified music therapist awarded by the Certification Board for Music Therapists.

(14) A service provider of aquatic therapy must:

(A) be:

(i) a massage therapist licensed in accordance with Texas Occupations Code Chapter 455;

(ii) a person who holds a credential as a certified therapeutic recreation specialist awarded by the National Council of Therapeutic Recreation Certification; or

(iii) a person who is certified as a therapeutic recreation specialist by the Consortium for Therapeutic Recreation/Activities Certification, Inc.; and

(B) hold a certificate of completion of the "Basic Water Rescue" course from the American Red Cross or be certified by the American Red Cross as a lifeguard.

(15) A service provider of behavioral support must:

(A) be one of the following:

(i) a psychologist licensed in accordance with Texas Occupations Code Chapter 501;

(ii) a provisional license holder licensed in accordance with Texas Occupations Code Chapter 501;

(iii) a psychological associate licensed in accordance with Texas Occupations Code Chapter 501;

(iv) a clinical social worker licensed in accordance with Texas Occupations Code Chapter 505;

(v) a licensed professional counselor licensed in accordance with Texas Occupations Code Chapter 503; or

(vi) a behavior analyst certified by the Behavior Analyst Certification Board, Inc.; and

(B) have received training in behavioral support or have experience in providing behavioral support.

(16) A service provider of cognitive rehabilitation therapy must be:

(A) a psychologist licensed in accordance with Texas Occupations Code Chapter 501;

(B) a speech-language pathologist licensed in accordance with Texas Occupations Code Chapter 401; or

(C) an occupational therapist licensed in accordance with Texas Occupations Code Chapter 454.

(17) A service provider of prevocational services must have:

(A) a bachelor's degree in a health and human services field, and two years' work experience in the delivery of services and supports to persons with related conditions or similar disabilities; or

(B) one of the following:

(i) a high school diploma and four years' work experience in the delivery of services and supports to persons with related conditions or similar disabilities; or

(ii) a high school equivalency certificate issued in accordance with the law of the issuing state and four years' work experience in the delivery of services and supports to persons with related conditions or similar disabilities.

(18) A service provider of employment assistance and a service provider of supported employment must have:

(A) a bachelor's degree in rehabilitation, business, marketing, or a related human services field with six months of paid or unpaid experience providing services to people with disabilities;

(B) an associate's degree in rehabilitation, business, marketing, or a related human services field with one year of paid or unpaid experience providing services to people with disabilities; or

(C) a high school diploma or a certificate recognized by a state as the equivalent of a high school diploma, with two years of paid or unpaid experience providing services to people with disabilities.

(19) Documentation of the experience required by paragraph (18) of this subsection must include:

(A) for paid experience, a written statement from a person who paid for the service or supervised the provision of the service; and

(B) for unpaid experience, a written statement from a person who has personal knowledge of the experience.

(20) A service provider of transportation as a habilitation activity or respite who is hired on or after July 1, 2015 must have:

(A) a high school diploma;

(B) a certificate recognized by a state as the equivalent of a high school diploma; or

(C) both of the following:

(i) a successfully completed written competency-based assessment demonstrating the service provider's ability to assist with ADLs and IADLs required for the individual to whom the service provider will provide transportation as a habilitation activity or respite; and

(ii) at least three written personal references from persons who are not relatives of the service provider that evidence the service provider's ability to provide a safe and healthy environment for the individual.

(21) A service provider of transportation as a habilitation activity, prevocational services, respite, employment assistance, supported employment, or CFC PAS/HAB may not be:

(A) the parent of the individual if the individual is under 18 years of age; or

(B) the spouse of the individual.

(22) A service provider of SFS or CFS must meet the requirements described in §259.215(a) of this chapter (relating to Support Family Requirements).

(23) A service provider of CFC PAS/HAB must:

(A) have:

(i) a high school diploma;

(ii) a certificate recognized by a state as the equivalent of a high school diploma; or

(iii) both of the following:

(I) a successfully completed written competency-based assessment demonstrating the service provider's ability to perform CFC PAS/HAB tasks, including an ability to perform CFC PAS/HAB tasks required for the individual to whom the service provider will provide CFC PAS/HAB; and

(II) at least three written personal references from persons not related by blood that evidence the service provider's ability to provide a safe and healthy environment for the individual; and

(B) meet any other qualifications requested by the individual or LAR based on the individual's needs and preferences.

(e) A DSA may not contract with or employ a service provider who is employed by or contracting with a CMA to provide case management to an individual served by the DSA.

(f) A DSA must ensure that a staff person who transports an individual in a vehicle has:

(1) a current Texas driver's license; and

(2) vehicle liability insurance in accordance with state law.

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 10, 2023.

TRD-202300091

Karen Ray

Chief Counsel

Health and Human Services Commission

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077



SUBCHAPTER I. FISCAL MONITORING

26 TAC §259.401

STATUTORY AUTHORITY

The new section is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

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 10, 2023.

TRD-202300093

Karen Ray

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Health and Human Services Commission

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077



SUBCHAPTER J. DECLARATION OF DISASTER

26 TAC §259.451

STATUTORY AUTHORITY

The new section is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

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 10, 2023.

TRD-202300094

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Effective date: January 30, 2023

Proposal publication date: September 2, 2022

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

34 TAC §3.334

The Comptroller of Public Accounts adopts amendments to §3.334, concerning local sales and use taxes, with changes to the proposed text as published in the September 23, 2022, issue of the *Texas Register* (47 TexReg 6158). The rule will be republished.

Procedural Background.

The comptroller originally published a notice of proposed rule-making in the January 3, 2020, issue of the *Texas Register* (45 TexReg 98). After publication, the comptroller extended the 30-day public comment period to 90 days. In addition, the comptroller held a public hearing on February 4, 2020. The comptroller scrutinized the comments, made some changes, and rejected others. The comptroller published a final rule in the May 22, 2020, issue of the *Texas Register* (45 TexReg 3499).

The Cities of Round Rock, Coppell, DeSoto, Humble, Carrollton, and Farmers Branch filed a lawsuit challenging the validity of the comptroller's interpretation and application of the statutory term "place of business." The litigation has been consolidated and is pending in Cause No. D-1-GN-21-003198, *City of Coppell, Texas, et al. v. Glenn Hegar*, in the 201st District Court of Travis County Texas.

The district court found that the comptroller failed to substantially comply with one or more of the procedural requirements for the notice of proposed rule (Government Code, §2001.024) when the comptroller proposed §3.334(b)(5). The court remanded §3.334(b)(5) to give the comptroller the opportunity to either revise or readopt it through established procedure. Accordingly, on September 23, 2022, the comptroller published a notice of proposed rule amendment that revised §3.334(b)(5) and other portions of the rule, with an explanation to augment the explanations in the notice of proposed rulemaking published on January 3, 2020, and the order adopting amendments to §3.334 published on May 22, 2020 (47 TexReg 6158).

The comptroller also held a public hearing on October 17, 2022.

Amendments.

The comptroller adopts the proposed amendment to subsection (a)(9):

"(9) Fulfill--To complete an order by transferring possession of a taxable item to a purchaser, or to ship or deliver a taxable item to a location designated by the purchaser. The term does not include receiving or tracking an order, determining shipping costs, managing inventory, or other activities that do not involve the transfer, shipment, or delivery of a taxable item to the purchaser or to a location designated by the purchaser."

The amendment is intended to make the language more consistent with Tax Code, §321.203(c-1). The comptroller received no comments regarding this proposed amendment.

The comptroller adopts the proposed amendment to the definition of "place of business of the seller" in subsection (a)(16), with the addition of the word "usually" (italicized in the preamble to show the change from the proposed rule):

"(16) Place of business of the seller - general definition--A place of business of the seller must be an established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items from persons other than employees, independent contractors, and natural persons affiliated with the seller. An "established outlet, office, or location" *usually* requires staffing by one or more sales personnel. The term does not include a computer server, Internet protocol address, domain name, website, or software application. The "purpose" element of the definition may be established by proof that sales personnel of the seller receive three or more orders for taxable items at the facility during the calendar year. ..."

The comptroller adds the word "usually" to clarify that the presence of sales personnel is not an absolute requirement, but rather, an important factor that will often determine whether an outlet, office, or location is a "place of business." The comptroller received comments regarding subsection (a)(16) during the public comment period; however, the comptroller disagrees with the objections to the amendment and rejects the suggested alternative language.

The comptroller adopts the proposed amendment to subsection (b)(1)(A) regarding distribution centers, manufacturing plants, storage yards, warehouses, or similar facilities. The amendment adds the sentence: "Forwarding previously received orders to the facility for fulfillment does not make the facility a place of business." The comptroller received comments regarding subsection (b)(1)(A) during the public comment period; however, the comptroller does not agree to make any further revisions.

The comptroller adopts the proposed amendment to subsection (b)(4):

"(4) An order that is received by a salesperson who is not at a place of business of the seller when the salesperson receives the order is treated as being received at the location from which the salesperson operates. Examples include orders that a salesperson receives by mail, telephone, including Voice over Internet Protocol and cellular phone calls, facsimile, and email while traveling. The location from which the salesperson operates is the principal fixed location where the salesperson conducts work-related activities. The location from which a salesperson operates will be a place of business of the seller only if the location meets the definition of a "place of business of a seller" in subsection (a)(16) of this section on its own, without regard to the orders imputed to that location by this paragraph."

The comptroller adopts the proposed amendment to subsection (b)(5) with revised examples and additional examples (italicized in the preamble to show the change from the proposed rule):

"(5) *A facility without sales personnel is usually not a "place of business of the seller." A vending machine is not "an established outlet, office, or location," and does not constitute a "place of business of the seller." Instead, a vending machine sale is treated as a sale by an itinerant vendor. See subsections (a)(10) and (c)(6). However, a walk-in retail outlet with a stock of goods available for immediate purchase through a cashier-less point of sale terminal at the outlet would be "an established outlet, office, or location" so as to constitute a "place of business of the seller" even though sales personnel are not required for every sale. A computer that operates an automated shopping cart software program is not "an established outlet, office, or location," and does not constitute a "place of business of the seller." A computer that operates an automated telephone ordering system is not "an established outlet, office, or location," and does not constitute a "place of business of the seller."*

The new text adds additional examples in response to the comments received by the comptroller; however, the comptroller otherwise declines to make any other revisions to subsection (b)(5).

The comptroller makes minor, nonsubstantive changes to subsection (c) by replacing the phrase "in this state" with "in Texas."

The comptroller adopts the proposed amendment to subsection (c)(2)(B)(ii):

"(ii) Order not fulfilled in Texas. When an order is received by a seller at a location that is not a place of business of the seller in Texas, and is fulfilled from a location outside of Texas, the sale is not consummated in Texas. However, a use is consummated at the first point in Texas where the item is stored, used, or consumed after the interstate transit has ceased. A taxable item delivered to a point in Texas is presumed to be for storage, use, or consumption at that point until the contrary is established. Local use tax should be collected as provided in subsection (d) of this section. Except as provided in subsection (i)(3) of this section, a remote seller required to collect state use tax under §3.286(b)(2) of this title must also collect local use tax."

The amendment makes the language more consistent with Tax Code, §321.205(c). The comptroller received no comments regarding this proposed amendment.

Summary of the comments.

The comptroller received oral or written comments from the following persons:

1. Jim Harrison, Assistant Finance Director, City of Bellaire (for)
2. Oscar Trevino, Mayor, City of North Richland Hills (for)
3. Steve Eggleston, City Manager, City of Andrews (for)
4. Blake Margolis, Mayor, City of Rowlett (for)
5. David Billings, Mayor, City of Fate (for)
6. Annie Spillman, Director, NFIB (against)
7. Bruce Bryan, Bryan Technical Services (against)
8. Casey Swanson, Swanson Construction Systems, LLC (against)
9. Brad and Charlie Williams, Omahas Surplus (against)

10. Kathryn Albin, Vice President, Albin Exterminating, Inc. (against)
11. Sunni Petty, Owner, Petty Family Floors (against)
12. Lisa Harrington, CEO & Founder, Abiding Strategy (against)
13. Joe Cruz, Chair, Collin County GOP Precinct 198 (against)
14. Larry Sanders (against)
15. Leenell Roach, President, Allied Compliance Services (against)
16. Curtis Wilcott, Owner, Barnes Sign Company (against)
17. Ruben Jacobo II, Superman Electric (against)
18. Liz Branigan, Mayor, City of Liberty Hill (against)
19. Carrell P. Bearden, President, Texas Motor Sports (against)
20. Stan Treider, Treider Hardware & Supply (against)
21. John Schroeder, Mayor, City of Georgetown (against)
22. D'Ann Swain, J&D Parts, LLC (against)
23. Wes Mays, Mayor, City of Coppell (against)
24. Steve Babick, Mayor, and Andrew Palacios, Mayor Pro Tem, City of Carrollton (against)
25. Craig Morgan, Mayor, City of Round Rock (against)
26. Steve Sheets, City Attorney, City of Round Rock (against)
27. Texas State Representatives Senfronia Thompson and Tom Craddock (against)
28. Jim Harris, Attorney, CASTLE (against)
29. Robert Deuell (against)
30. Bill Lindley, Town Administrator, Town of Highland Park (requested that the comptroller assess the fiscal impact of the rule on the Town; commented that a loss of sales tax may require an increase in its property tax rate triggering a vote of the citizens under Senate Bill 2, 86th Legislature, 2019; and stated that if the comptroller prevails in the rule amendment, the legislature should allow cities to amend property tax rates without the burden of Senate Bill 2)
31. Ray Wilson, Legislative Staff, Senator Bryan Hughes Office (forwarded a comment from Gregg County Judge Bill Stout expressing his concerns on the rule amendments effect on county revenue sources in addition to the effects of Senate Bill 2)
32. Jane Gray, Owner, The Paperback Shop (commented that states to which her business ships orders could benefit from sales tax money which creates problems for local governments in Texas and leaves Texas with less funds to support government infrastructure and that small businesses will face undue burdens of time and resources from having to pay tax to other states)
33. Brian Pannell, North America Tax Director, Dell Inc. (requested that the rule amendments in subsections (b)(4) and (b)(5) be changed because they conflict with the statute and because they create an overwhelming burden on Texas sellers wishing to fully comply with the rule and provide unclear application guidance)
34. John Kroll, Partner, HMWK (suggested that the comptroller solely adopt language necessary to implement House Bills 1525 and 2153, 86th Legislature, 2019, because the rule amendment is not supported by statute and is not needed to implement the

recent legislation, and the policy issues are better left to the legislature)

35. David Bristol, Mayor, Town of Prosper (commented that the Town understands that the amendment could help curb abusive Chapter 380 agreements that concentrate and redistribute local sales tax from across the state to a limited number of local jurisdictions in exchange for significant rebates to corporations, but advocate for retaining historical origin-based sourcing)

36. Kyle Kasner, Managing Member, Texas City Services (requested definitions for the terms "retailer's agent," "order received," "salesperson," and "sales office"; requested that the comptroller address the "one place of business" reporting requirement for e-commerce businesses using third-party fulfillment services, and commented on purported significant costs to businesses, local governments, and the comptroller for implementation)

37. TJ Gilmore, Mayor, City of Lewisville (requested that the comptroller perform a study on the potential impacts of the rule amendment that addresses creating a competitive disadvantage for economic development and the estimated revenue loss associated with the rule amendment; addresses the impacts of current and emerging technology; and addresses causing unwarranted economic hardship for certain cities, including Lewisville)

38. John Christian, Director - Controversy Resolution, Ryan LLC (commented that the rule amendment improperly conflates "receipt" of an order with communicating, transmitting, or routing an order through a computer server, software program, or automated telephone ordering system thereby improperly sourcing local sales tax without regard to where the seller actually "received" the order by accessing and accepting it)

39. Dan Butcher, Clark Hill (requested that the rule amendment except sales subject to economic development agreements entered into prior to the effective date of the rule for the remaining term of those agreements)

Summary of the Factual Bases for the Rule.

In 2018, the United States Supreme Court decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (June 21, 2018) expanded the states' authority to impose use tax collection obligations on sellers, even if the sellers have no physical presence in a jurisdiction. The rule expands the local tax collection obligations of such sellers.

In 2019, the legislature adopted sales and use tax legislation regarding remote sellers and marketplace sellers. House Bill 1525 and House Bill 2153. The rule incorporates these new provisions.

Over the years, the comptroller issued interpretations that were not adequately articulated in the rule. In addition, the comptroller received inquiries regarding the tax treatment of various business structures that were not adequately addressed in the rule. The rule more explicitly addresses these matters in the revisions to the definition of "place of business of the seller" in subsection (a)(16), and the application of that definition in subsections (b)(1), (b)(4), and (b)(5).

The factual bases for the specific revisions are stated in the concise statement of reasons for and against, and in the reasons why the comptroller disagrees with party submissions and proposals.

Concise Statement of Reasons For and Against.

Pursuant to Government Code, §2001.030, Mr. Harris requested a concise statement of the principal reasons for and against the adoption of the rule and an agency statement of its reasons for overruling the considerations urged against adoption. This concise summary is followed by a more detailed explanation.

The comments against adoption of the rule focused on the comptroller's definition of "place of business" in subsection (a)(16) and its application in subsections (b)(1), (b)(4), and (b)(5). The commenters' principal reasons against adoption were:

The rule is inconsistent with the comptroller's prior interpretations.

There is no legitimate reason to justify changing the rule.

The rule is inconsistent with the statute.

The comptroller misinterpreted the legislative history.

The comptroller misinterpreted or disregarded its own precedent.

The rule will create confusion.

A fulfillment warehouse is inherently a "place of business."

The rule will have a negative fiscal impact on individual jurisdictions and in the aggregate.

The proposed rule will increase compliance costs, particularly for small businesses.

The comptroller should study the economic impact before changing the rule.

The proposed rule will impair economic development agreements and will place Texas at a competitive disadvantage.

The rule conflicts with the Internet Tax Freedom Act.

The commenters supporting adoption of the rule expressed the need to address businesses that have been organized to channel local sales tax revenue to select cities in exchange for agreements with the cities to share tax revenue, at the expense of other cities.

The comptroller's principal reason for adoption is that the rule accurately states the intent of the legislature and more clearly states the comptroller's interpretation of the statutes. For this reason, the comptroller is moving forward with adoption.

Under the statutory language, not every business location is a "place of business of the retailer," and the legislature could not have intended that a computer server or software program would be "an established outlet, office, or location operated by the retailer or the retailer's agent or employee." Instead, the statutory language contemplates a facility with sales personnel who are authorized to receive orders. That is why the statute requires each "place of business" to have a sales tax permit.

This interpretation is supported by the legislative history of the 1979 statute that adopted the definition of "place of business," and the subsequent 1981 legislation. The legislature intended to reverse the result of the *Dunigan Tool* litigation, in which the court had found that a fulfillment warehouse was a place of business. The comptroller articulated this interpretation in a 1985 hearing decision and applied the reasoning in subsequent rulings. Consistent with the legislative history, the legislative intent, and comptroller precedent, the rule recognizes that a fulfillment warehouse is not automatically a "place of business of the retailer."

The rule does not prevent economic development agreements between cities and fulfillment warehouses. The statute allows local tax to be sourced to the fulfillment location, provided that the fulfillment location is a "place of business." The only effect of the rule is to more clearly state the requirements for a fulfillment warehouse to be a "place of business."

Some commenters stated that the rule does not fully recognize that a "single place of business" in the state is entitled to source all local sales tax to that location. Under that interpretation, a business could set up a subsidiary with a single place of business and source all local sales tax to that location, even if the location had no involvement with the transactions. The comptroller declined to follow that interpretation when it amended the rule in 2014, and it carries forward the amendment into the current rule.

The comptroller also received comments that the rule will prevent small businesses from sourcing all sales to their single places of business. However, a small business may continue to source its sales to its single place of business if the order is received at that location, the order is fulfilled at that location, or the order is delivered to the customer at that location.

The potential conflict between the commenters and the other comments disputing the legislative intent, legislative history, and comptroller precedent are all reasons for the rulemaking. The comptroller's interpretation needs to be clearly stated in the rule. If the interpretation is disputed, it can then be challenged in court.

Many of the commenters for and against the rule based their comments on whether their jurisdictions will gain or lose tax revenue. As will be explained, the comptroller does not have enough data on the business operations of each business to quantify the effect on each jurisdiction. However, the existence of revenue winners and losers does not affect the validity of the rule. The validity of the rule depends on whether the rule is a proper interpretation of the statute.

Similarly, many taxpayers commented that compliance with the rule will be harder than their current practice. However, difficulty of compliance does not affect the validity of the rule. The validity of the rule depends on whether the rule is a proper interpretation of the statute.

Finally, the rule does not violate the Internet Tax Freedom Act because it does not discriminate against the Internet.

Reasons Why the Comptroller Disagrees With Party Submissions and Proposals.

The comptroller disagrees with the parties' submissions and proposals for the following reasons:

The amended rule is not shifting from origin sourcing to destination sourcing.

Some comments mistakenly alleged that the proposed rule would result in a wholesale policy change from origin sourcing to destination sourcing. There cannot be a wholesale change because the consummation statutes have never been origin-based. From 1979 to the present, there have been four sourcing possibilities. Local taxes may be sourced to the point where the order was received, the point from which the order was shipped or delivered, the point to which the order was shipped or delivered, or the first point in the state where the item is stored, used, or consumed. See 66th Legislature, 1979, Ch. 624; Tax Code, §321.203 and §321.205. Even the expression "origin" sourcing is something of a misnomer, since local taxes

have never been based on the point where a product was designed, developed, or manufactured.

Explanation of the definition of "place of business of the seller."

The rule uses "place of business of the seller," while the statute uses "place of business of the retailer." See Tax Code, §321.002(3)(A). Either term can be used because the terms "seller" and "retailer" are synonymous for sales and use tax purposes. See Tax Code, §151.008. However, use of the term "retailer" could be confusing. In ordinary usage, the term might exclude wholesalers. But, for sales and use tax, the term "retailer" is statutorily defined to include both retailers and wholesalers. Tax Code, §151.008. Therefore, to avoid potential confusion, the rule uses "place of business of the seller."

The definition of "place of business of the seller" in subsection (a)(16) comes into play in determining where a local sale or use is consummated. The location of the consummation can be affected by whether an order is received at a "place of business of the seller" in Texas and whether the seller ships or delivers the item from a "place of business of the seller" in Texas.

The first sentence of subsection (a)(16) states: "A place of business of the seller must be an established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items from persons other than employees, independent contractors, and natural persons affiliated with the seller." This definition tracks the statutory definition, but adds a qualifier from the prior rule, which would allow a facility to make in-house courtesy sales without becoming a place of business.

In the *City of Webster* litigation, the court of appeals stated: "we do not determine whether a place of business must be 'an established outlet, office, or location operated by the retailer or the retailer's agent or employee,' see *id.*, as appellees do not raise this issue." *Combs v. City of Webster*, 311 S.W.3d 85, 96 at n. 7 (Tex. App.-Austin 2009, pet. denied). The first sentence of the definition is worded in the imperative to clearly answer that unanswered question. The comptroller interprets the statute to mean that a place of business of the seller must be an established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items.

Some commenters asserted that a "place of business" does not have to be operated for the purpose of receiving orders for taxable items. According to the comments submitted by Mr. Harris:

"The statutory definition of 'place of business,' Tax Code, §321.002(3)(A), describes five different place of business categories: established outlets; established offices; established locations operated by the retailer or the retailer's agent or employee for the purpose of receiving orders for taxable items; any location at which three or more orders are received by the retailer during a calendar year; and warehouses, storage yards, or manufacturing plants that receive three or more orders in a calendar year. Tax Code, §321.002(a)(3)(A). The first two categories need not have as a purpose receipt of orders and do not need to receive orders to be a place of business."

Mr. Harris further commented that the function of an "established office" is "business." This interpretation would mean that any facility operated by a seller for a business purpose would be a "place of business" -- executive offices, administrative offices, research and development laboratories, maintenance facilities, vehicle garages, etc. The comptroller rejects this interpretation as unreasonable. The 1979 legislation, which adopted the definition of "place of business," required each "place of business"

to have a sales tax permit. See 66th Legislature, 1979, Ch. 624, §3. That requirement is now in Tax Code, §321.303. It is unreasonable to think that the legislature intended that a maintenance facility would be required to have a sales tax permit. A more reasonable interpretation is that a "place of business," whether it is an outlet, office, or location, "must be operated by a seller for the purpose of receiving orders for taxable items," as the rule requires.

Mr. Harris' interpretation may be incompatible with the commenters who claim the right to source all their sales to their "single place of business." If every taxpayer facility with a business purpose is in fact a "place of business," many of these commenters may have multiple places of businesses.

Commenters also alleged that there is no reason for the comptroller to amend its rule. But the alternative interpretation proposed by Mr. Harris, regarding the application of the "purpose" requirement, illustrates the need. The adopted rule provides a clearer statement of the comptroller's interpretation, which can be challenged in court by those who disagree.

Mr. Kroll commented on the portion of the definition of "place of business" that excludes orders from "employees, independent contractors, and natural persons affiliated with the seller." He commented that the language seemed to contradict the statutory language and would impact captive purchasing companies. The comptroller disagrees. The language has been in the rule since 2014. It allows a facility to make in-house courtesy sales to workers at the facility without the facility becoming a place of business. Courtesy sales to workers are insufficient to conclude that a facility was established for the purpose of receiving orders. And, the exclusion of staff purchases from a facility should not affect the purchase of items for that facility by a captive purchasing company.

The second sentence of the definition of "place of business of the seller" in subsection (a)(16) states: "An 'established outlet, office, or location' usually requires staffing by one or more sales personnel."

The comptroller adds the word "usually" to clarify that the presence of sales personnel is not an absolute requirement, but rather, an important factor that will often determine whether an outlet, office, or location is a "place of business." In subsequent subsections of the rule, the comptroller describes some examples.

Commenters observed that the statutory definition of "place of business" does not mention sales personnel. However, an agency rule need not be limited to parroting the words of the statute. The courts have said that a rule may not impose additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions. *State Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Tex.*, 131 S.W.3d 314, 321 (Tex. App.-Austin 2004, pet. denied). The implication of that statement is that a rule may impose additional burdens, conditions, or restrictions that are consistent with the relevant statutory provisions. E.g., *id.* at 342 (court approved "formulaic means" not specified in the statute). Previous tax cases have approved comptroller rules that articulated requirements that were not explicitly stated in the statute. *Perry Homes v. Strayhorn*, 108 S.W.3d 444, 448 (Tex. App.-Austin 2003, no pet.); *DuPont Photomasks, Inc. v. Strayhorn*, 219 S.W.3d 414, 422 (Tex. App.-Austin 2006, pet. denied).

In this case, the comptroller is adding the sales personnel language to provide an objective criterion for buyers, sellers, and

auditors to consider. Does a facility have sales personnel? If it does, it is likely a "place of business" -- an established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items. If the facility does not have sales personnel, it is likely not a "place of business."

Mr. Kasner and Mr. Kroll commented that the rule does not define "sales personnel." While the comptroller understands the desire for definite definitions, there are too many variables in the business world surrounding this term. Therefore, the comptroller declines to define the term. The comptroller expects that in many situations, it will be clear that a facility has sales personnel, and in other situations, it will be clear that a facility does not have sales personnel. In those instances where it is clear, the reference to sales personnel will be a good rule-of-thumb, and in the remaining instances, the rule will be no more uncertain than the statute.

The statute uses 82 words to define "place of business of the retailer":

"Place of business of the retailer' means an established outlet, office, or location operated by the retailer or the retailer's agent or employee for the purpose of receiving orders for taxable items and includes any location at which three or more orders are received by the retailer during a calendar year. A warehouse, storage yard, or manufacturing plant is not a 'place of business of the retailer' unless at least three orders are received by the retailer during the calendar year at the warehouse, storage yard, or manufacturing plant."

The definition is narrower than the ordinary meaning of the phrase "place of business." The definition includes the concept of receiving orders for taxable items, which excludes locations ordinarily considered to be places of business, such as executive offices. Additionally, a location is not a "place of business" simply because it receives orders. If that were the case, the legislature could have defined the phrase with those very few words, which can be counted on one hand.

Ultimately, the statutory test is a combination of elements -- whether a facility is an established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items. The statutory references to an "established outlet, office, or location," operation "by the retailer or the retailer's agent or employee," and "receiving orders for taxable items" all suggest that the presence of sales personnel is a reasonable criterion for evaluating whether a facility is a "place of business."

The reference to sales personnel is also consistent with the general objectives of the local tax statute. "It is a fundamental principle of statutory construction and indeed of language itself that words' meanings cannot be determined in isolation but must be drawn from the context in which they are used." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011). The context for the "place of business" definition is not limited to the consummation statutes. It also extends to the sales tax permit requirement. The requirement of a sales tax permit for each "place of business" suggests that presence of sales personnel is a reasonable factor to consider.

The reference to sales personnel is also supported by legislative history. The Texas legislature added the definition of "place of business of the retailer" in 1979. Senate Bill 582, 66th Legislature, 1979, Ch. 624, Art. 1, §3. Mr. Harris commented: "Nothing in those documents suggests even remotely that the definition was intended to require the presence of sales personnel at a place of business." The comptroller disagrees.

During the 1979 session of the legislature, a House Study Group analysis stated that the "bill is necessary to protect the state from possible consequences of the pending court suits." The analysis specifically referenced "*Dunigan Tool and Supply v. Bullock*" as one of those suits. The analysis is available at the Legislative Reference Library website at <https://lrl.texas.gov/scanned/hro-BillAnalyses/66-0/SB582.pdf>.

In the *Dunigan* litigation, sales personnel took orders that were forwarded to pipe storage facilities where the orders were fulfilled. The district court and the court of appeals sourced the transactions to the pipe storage facilities even though the facilities had no sales personnel. *Bullock v. Dunigan Tool & Supply Co.*, 588 S.W.2d 633 (Tex. Civ. App. - Austin, Sept. 6, 1979, writ ref'd n.r.e.).

The 1979 House Study Group bill analysis states that the bill was intended to protect the state from the consequences of the *Dunigan* litigation. Thus, the legislative intent was that a fulfillment warehouse without sales personnel would not be a "place of business."

Mr. Harris commented that the "mentions of salesmen in the opinion were purely incidental." But the legislature did not think so. In a subsequent October 2, 1980, Interim Report of the House Ways and Means Committee, the committee considered whether to allow the recently adopted statutory definition of "place of business" to expire. The committee described the consequence: "The location of sale would no longer be tied to permitted outlets, salesmen's locations, or sales offices." Interim Report at 20. The references to salesmen's locations and sales offices were not incidental. They confirm the comptroller's interpretation that the presence of sales personnel is relevant to determine whether a location is a "place of business." "Location" was intended to mean "salesmen's locations" and "office" was intended to mean "sales office."

In the subsequent legislative session, the legislature did not allow the "place of business" definition to expire, and instead, made it permanent. House Bill 1838, 67th Legislature, 1979, Ch. 838, §1. The 1979 definition and its legislative history remain in place today.

Several commenters asserted that the comptroller has never before stated that the presence of sales personnel should be a factor in determining whether a location was an established "place of business." The comptroller rejects the suggestion that the agency cannot adopt a rule unless the content of the rule has been previously published by the agency. Moreover, the reference to sales personnel is a logical extension of prior comptroller statements, including statements regarding fulfillment warehouses and computer servers.

The comptroller's treatment of fulfillment warehouses goes as far back as Comptroller's Decision No. 15,654 (1985), which stated (emphasis added):

"But it seems to the administrative law judge that the legislature was amending the law if not entirely in reaction to the then-pending case of *Bullock v. Dunigan Tool & Supply Co.*, 588 S.W.2d 633 (Tex. Civ. App.-Texarkana, writ ref'd n.r.e.), at least partly in reaction to that case. And if that be so, then the legislature did not want warehousing and storage facilities (many of which are outside city limits) to be the places where sales were consummated for local sales tax purposes unless orders were actually received there by personnel working there, but wanted the office location out of which the *salesman* operated to be the place where the sales were consummated."

The 2014 version of §3.334 (39 TexReg 9597 at 9605) (STAR Accession No. 201501004R) discussed fulfillment warehouses:

"(2) Distribution centers, manufacturing plants, storage yards, warehouses, and similar facilities.

(A) A distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller at which the seller receives three or more orders for taxable items during the calendar year is a place of business.

(B) If a salesperson who receives three or more orders for taxable items within a calendar year is assigned to work from, or to work at, a distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller, then the facility is a place of business.

(C) If a location that is a place of business of the seller, such as a sales office, is in the same building as a distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller, then the entire facility is a place of business of the seller."

In 2016, STAR Accession No. 201606995L (June 1, 2016) also discussed fulfillment warehouses:

"The warehouse from which the person ships those items is not a place of business, unless the warehouse separately qualifies as a place of business."

And, in 2019, STAR Accession No. 201906015L (June 13, 2019) discussed fulfillment warehouses:

"Scenario One: Taxpayer Retailer operates fulfillment centers in Texas that are not open to the public. ... When an order is received at a location that is not a place or business and is fulfilled in Texas at a location that is not a place of business, the sale is consummated at the location in Texas to which the order is shipped. See Rule 3.334(h)(3)(D). For Scenario One, local sales and use tax is due based on the location where the order is delivered."

Each of these documents, which the comptroller indexed and made available for public inspection on its State Tax Automated Research (STAR) System, is consistent with the statement in the rule that an established outlet, office, or location usually requires staffing by one or more sales personnel.

Representative Senfronia Thompson, Representative Tom Craddick, and former Senator Robert Deuell commented that the rule changes the intention or language of the 2009 legislative amendment to the local tax consummation statutes. However, the 2009 legislation did not alter the language at issue or change the comptroller's existing interpretation of that language. See Acts 81st, Legislature, 2009, Ch. 1360, Sec. 4, effective September 1, 2009.

The third sentence in the definition of "place of business" in subsection (a)(16) states: "The term does not include a computer server, Internet protocol address, domain name, website, or software application." This sentence is consistent with the concept that a "place of business" usually requires the presence of personnel to receive the order. Even a broad, every-day usage of the term "place of business" does not include computer servers, Internet protocol addresses, and websites. Many sellers house their computer servers at a co-location facility or rent computer server space at a managed hosting site. An ordinary person would not consider the physical locations of these computer servers to be places of business of the seller. Similarly, an ordinary person would not perceive an Internet protocol ad-

dress, a domain name, or a website as an "established outlet, office, or location" so as to constitute a place of business in ordinary usage. And, in this statutory context, which is narrower than ordinary usage, the comptroller has concluded that the legislature could not have intended that the receipt of an order by an automated mechanical device would make the device an "established outlet, office or location operated by the retailer."

While the discussion of computer servers was added to the rule in 2020, the comptroller previously advised taxpayers that the location of the server does not create a "place of business" for purposes of the local tax collection and that orders placed on a website or through applications and processed and routed by servers are not "received at" a place of business. See STAR Accession Nos. 200510723L (October 6, 2005), 200605592L (May 17, 2006), and 201906015L (June 13, 2019).

Each of these documents, which the comptroller indexed and made available for public inspection on its STAR System, is consistent with the language in the rule that an established outlet, office, or location usually requires staffing by one or more sales personnel.

In addition to being a reasonable interpretation of the statute and consistent with precedent, the comptroller's interpretation that computer servers and the software applications that run on the servers are not places of business, is a practical interpretation that will facilitate uniformity and ease of administration for taxpayers and auditors. Website orders can be received at multiple physical addresses - any locations that have Internet access. A website order is sent to an Internet protocol (IP) address. An IP address is not a permanent physical address. It is a series of numbers assigned to a device, such as a computer server. Websites may use dynamic IP addresses that are assigned by the network upon connection and that change over time. The public IP address of a website may simply be routing orders to different, private IP addresses. Load balancers may change the IP addresses that communicate with customers. Conversely, multiple websites may be hosted at a single IP address.

The computer server receiving an order may belong to the seller or it may belong to a third party. The computer server may be situated on the seller's premises, it may be situated at a co-location facility operated by a third party, or it may be situated at a web hosting facility operated by a third party. The computer server may be one of multiple servers that serve the same website from different physical addresses as part of a cloud distribution network. The computer server may route the order to multiple other servers for load balancing purposes. Conversely, a single computer server may serve multiple websites. Also, the seller may or may not know the physical address of the server receiving the order. The physical locations of computer servers that receive website orders are often random, variable, and uncertain. The best way to treat computer servers consistently and coherently is to uniformly recognize that they are not "established" places of business of the seller.

The fourth sentence of the definition of "place of business of the seller" in subsection (a)(16) states: "The 'purpose' element of the definition may be established by proof that sales personnel of the seller received three or more orders for taxable items at the facility during the calendar year." Mr. Harris takes issue with this sentence based on the *City of Webster* opinion, which states that "a location at which a retailer received three or more orders during a calendar year can be a place of business even without separate evidence that it is a location established 'for the purpose of' receiving orders for taxable items." See *Combs v. City*

of *Webster*, 311 S.W.3d 85, 96 (Tex. App.-Austin 2009, pet. denied). The comptroller does not understand the conflict. If the "purpose" element of the definition may be established by proof that sales personnel of the seller received three or more orders for taxable items at the facility during the calendar year, as stated in the rule, then a location at which a retailer received three or more orders during a calendar year can be a place of business even without separate evidence that it is a location established "for the purpose of" receiving orders for taxable items, as stated in the *City of Webster* opinion.

In conclusion, regarding the definition of "place of business of the seller," the comptroller is under no illusions that the definition will eliminate all ambiguities. In many instances, the determination of whether or not particular facilities have "sales personnel" will have to be made on a case-by-case basis. But in many instances, it will be clear. And, the rule also makes clear that mere hardware installations are not "places of business of the seller." To that extent, the rule will help taxpayers understand how the comptroller interprets and intends to apply the statute.

Fulfillment warehouses and similar facilities.

The comptroller amends subsection (b)(1)(A) regarding distribution centers, manufacturing plants, storage yards, warehouses, or similar facilities to add the sentence: "The forwarding of previously received orders to the facility for fulfillment does not make the facility a place of business."

Subsection (b)(1)(A) is an application of the definition of "place of business of the seller" in subsection (a)(16). The explanation of subsection (a)(16) is also applicable to subsection (b)(1)(A).

The comptroller has expressed this interpretation many times. See Comptroller's Decision No. 15,654 (1985); former §3.334 (2014); STAR Accession No. 201606995L (June 1, 2016); and STAR Accession No. 201906015L (June 13, 2019). These rulings are all indexed and searchable on the comptroller's STAR System. However, it appears that some commenters were unaware of the rulings, or they are interpreting the rulings differently, or they disagree with the rulings. Therefore, the comptroller believes it is appropriate to add an explicit sentence to the rule so that the comptroller's interpretation will be clear and can be challenged in court by those who disagree.

Mr. Harris has advanced a contrary explanation regarding fulfillment warehouses that has superficial appeal: a warehouse cannot fulfill an order unless the warehouse has "received" the order; therefore, a fulfillment warehouse is inherently and automatically a "place of business." In the abstract, this argument may seem like a reasonable interpretation of the word "received." But not in context. When the words of the lengthy statutory definition are considered, and when the legislative history is considered, the legislature intended the opposite - a fulfillment warehouse is not automatically a "place of business" simply because orders have to be forwarded to the warehouse for fulfillment.

To be clear, a fulfillment warehouse can be a "place of business." The legislature set a low threshold of three orders for taxable items at the facility during the calendar year. However, a fulfillment warehouse is not automatically a "place of business" simply because it fulfills orders that have been previously received at other locations.

Mr. Harris also attached a report of Amit Basu, from which Mr. Harris concluded that website orders are received just once - at a fulfillment center. The comptroller draws a different conclusion. Mr. Basu states with regard to a typical website order: "Once

payment and inventory is confirmed, shipment information for the order is transmitted from the eCommerce software program to a computer or terminal at the Seller's fulfillment center." There are typically two computers at two locations. The computer with the eCommerce software program communicates with customer to receive the order, accepts payment from the customer, and communicates confirmation to the customer. That is the location where the order is "received" for purposes of the consummation statutes, not the computer or terminal at the seller's fulfillment center.

An order that is received by a salesperson who is not at a place of business of the seller.

The comptroller amends subsections (b)(4) for stylistic reasons and to more fully state the comptroller's application of the definition of place of business of the seller from subsection (a)(16), particularly with regard to modern methods of communication.

The first sentence of subsection (b)(4) provides that an order that is received by a salesperson who is not at a place of business of the seller when the salesperson receives the order is treated as being received at the location from which the salesperson operates.

The second sentence of subsection (b)(4) expands upon a former subsection for traveling salespersons to specifically address orders that a salesperson receives by mail, telephone, including Voice over Internet Protocol, and cellular phone calls, facsimile, and email while traveling.

The third sentence of subsection (b)(4) states that the location from which the salesperson operates is the principal fixed location from which the salesperson conducts work-related activities. And, the fourth sentence connects subsection (b)(4) to the definition of "place of business of the seller" in subsection (a)(16).

Mr. Kroll commented that subsection (b)(4) "no longer imputes the order to the place of business where the employee is assigned, and that the new policy does not accurately or easily reflect the mobile workforce of today." Mr. Pannell commented that subsection (b)(4) deviates from Tax Code, §321.203(d)(2) and "effectively changes sourcing rules for salespersons who are assigned to regional places of business but do their principal work-related activities at other locations."

Tax Code, §321.203(d) does not impute an order to the location where a salesperson is "assigned." Instead, the statute provides that in certain circumstances, an order may be imputed to the "place of business from which the retailer's agent or employee who took the order operates." And, although an order may be imputed to a place of business of the retailer if the agent or employee operates out of that place of business, the statute does not mandate that an agent or employee be assigned to, or operate out of, a place of business. If an agent or employee does not operate out of a place of business, Tax Code, §321.203(d) has no application.

Prior to the 2020 amendment, the rule did not define the location from which a salesperson operates. The third sentence of subsection (b)(4) now provides in part: "The location from which the salesperson operates is the principal fixed location from which the salesperson conducts work-related activities..." A physical connection between the salesperson and the place of business is a reasonable interpretation of the location from which a salesperson operates. And, it would be unreasonable to allow a vendor to source sales to a place of business by merely "assigning"

a salesperson to that location in the absence of any physical connection.

The final sentence of subsection (b)(4) clarifies that the principal fixed location from which the salesperson conducts work-related activities may or may not be a place of business of the seller, depending upon whether the location meets the definitional requirements of subsection (a)(16). For example, if an entrepreneur conducts sales operations from the entrepreneur's residence, the entrepreneur will be operating out of a place of business of the seller. But if a person performs contract telemarketing from the person's residence, the person will not be operating out of a place of business of the seller because the residence is not "operated by the seller," as required by subsection (a)(16).

An order that is not received by a salesperson.

Subsection (b)(5) provides that a facility without sales personnel is usually not a place of business of the seller. The remainder of the subsection provides examples of the principle.

Subsection (b)(5) is an application of the definition of "place of business of the seller" in subsection (a)(16). The explanation of subsection (a)(16) is also applicable to subsection (b)(5).

The examples in subsection (b)(5) illustrate the concepts in subsection (a)(16). A vending machine is set up for the purpose of receiving orders and has inventory to fulfill the order. However, the comptroller has long held that a person who sells items through vending machines is an itinerant vendor. See STAR Accession No. 200111617L (November 15, 2001); December 5, 2014, issue of the *Texas Register* (39 TexReg 9597) (former §3.334(a)(10)). The vending machine is not an "established outlet, office, or location," even though it may be set up for the purpose of receiving orders.

Mr. Harris and Mr. Kasner noted that there are now cashier-less stores that essentially operate as large vending machines. This example illustrates the difficulty of articulating hard and fast rules that fit every situation. Common sense would say that a vending machine on a street corner is not an "established outlet, office, or location," but a stocked walk-in store operated by the vendor is. Usually, a walk-in store with merchandise will have some sales personnel, even if many of the sales are automated. So, subsection (b)(5) rule comports with common sense. But, the subsection concedes that there could be some atypical situations, such as a fully automated walk-in store with no sales personnel onsite.

Common sense also says that a computer that operates an automated shopping cart software program is not an "established outlet, office, or location." Subsection (b)(5) lists this situation as an example that does not constitute a "place of business."

And, common sense says that an automated telephone ordering system is not an "established outlet, office, or location." Subsection (b)(5) lists this situation as an example that does not constitute a "place of business."

Single place of business.

Mr. Kasner and Mr. Sheets commented that the rule should address the "single place of business" reporting requirement in Tax Code, §321.203(b). The rule addresses Tax Code, §321.203(b) in subsection (c), where it states: "The following rules, taken from Tax Code, §321.203 and §323.203, apply to all sellers engaged in business in this state, regardless of whether they have no place of business in Texas, a single place of business in

Texas, or multiple places of business in the state." This statement in subsection (c) does not represent a change in policy because prior versions of the rule contained similar statements. See the December 5, 2014 issue of the *Texas Register* (39 TexReg 9597 at 9606); the January 1, 2016 issue of the *Texas Register* (41 TexReg 260 at 265) (former §3.334(h)(3)).

Tax Code, §321.203(b) describes the consummation principles for a seller that has only one place of business in the state. In the comptroller's view, those principles are consistent with the treatment of other sellers and do not require special treatment in the rule. Tax Code, §321.203 as a whole establishes a hierarchy among places of business involved in a transaction. If an order is fulfilled from a place of business of the seller in Texas, the sale is consummated at that location even if the order is received at another place of business in Texas (except for orders received in person). Conversely, an order is consummated at the place of business of the seller in Texas where it is received only if the order was not fulfilled from a place of business in Texas (except for orders received in person). Adopted subsection (c) reflects this hierarchy.

The statutory provision in Tax Code, §321.203(b), for a seller with a single place of business in Texas, is a recognition that the hierarchy is not required in that circumstance. The outcome will be the same regardless of whether the order is received, fulfilled, or received and fulfilled from that place of business, and regardless of whether the order is placed at that location in person - the sale will be consummated at that place of business.

Mr. Sheets commented that "the Texas Tax Code allows those retailers with only one place of business to consummate all sales at that location." Several rules of statutory construction are applicable in determining what the Tax Code allows. The Code Construction Act presumes that a just and reasonable result is intended. Government Code, §311.021. Also, the Act presumes that compliance with the United States Constitution and Texas Constitution is intended. *Id.* In the tax arena, as elsewhere, the United States Constitution requires due process. "Due process centrally concerns the fundamental fairness of governmental activity." *Quill v. North Dakota*, 504 U.S. 298, 312 (1992). "Compliance with the Clause's demands 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *N. Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Tr.*, 139 S. Ct. 2213, 2220 (2019), quoting *Quill*, 504 U.S. at 306.

Therefore, Tax Code, §321.203(b) cannot be interpreted to mean that all sales are consummated at the seller's single place of business in Texas, even if that place of business did not receive the order from the customer, did not fulfill the order to the customer, and did not serve as the location where the order was delivered to the customer. Mr. Kasner commented that many businesses now use third parties to warehouse, manage, and fulfill their products. Suppose a reseller with a single place of business in City A has a website hosted by a provider in City B that receives an order from a customer in City C. The order is then fulfilled from a third-party manufacturer's warehouse in City D and shipped to the customer in City C. To make the customer in City C pay local sales tax to City A, a jurisdiction that had no relation to the customer or the transaction, would be an unreasonable and possibly unconstitutional reading of the statute. The comptroller concludes that the legislature could not have intended that result.

Mr. Sheets, on behalf of the City of Round Rock, proposed to add specific references to Tax Code, §321.203(b) in the rule.

The comptroller declines to make the proposed revisions for the reasons stated in the preceding paragraphs. The City of Round Rock is challenging the comptroller's interpretation in the pending litigation. Again, it is appropriate to state the comptroller's interpretation in the rule so that those who disagree may challenge the interpretation in court.

The meaning of "receive."

Mr. Kasner commented that the comptroller should adopt a definition of "receive." The comptroller declined to adopt a definition in 2014, and the comptroller declines to adopt a definition now. The legislature left the term undefined, and so will the comptroller.

Mr. Christian's comments referred to a 2006 letter ruling in which the analyst stated that Internet orders are considered "received" when they are "accessed and accepted" by the taxpayer. This statement in the letter ruling does not constitute a rule. The statement in the letter ruling also illustrates the difficulty of articulating a definition. Such a definition would add two new, non-statutory words that are indefinite and also undefined - "accessed" and "accepted." And, these new words are conceptually different than the word "received."

The adopted rule does address the two circumstances that have been most prominently debated - automated website orders and fulfillment warehouses. Subsection (b) of the adopted rule articulates the comptroller's interpretation that an automated website "receives" the order, and a fulfillment warehouse does not "receive" the order when it is forwarded from the website to the warehouse. The comptroller's rationale was discussed in previous sections of this preamble.

Mr. Basu's report states that businesses typically use third-party web hosting services. He analogizes the service to a mailbox, but the service is more than that. The computer server does not just receive the order like a mailbox receives an order - a non-interactive, one-time, one-way communication from the customer. The computer also processes the order, accepts payment for the order, and sends a confirmation to the customer. While all of these interactions with the customer may not be necessary to constitute "receipt" of the order from the customer, surely the totality of the interactions do. So, the comptroller's interpretation, as reflected in subsection (b), is that the computer server receives the order, but the server is not a "place of business" because a server is not an "established outlet, office, or location operated by the retailer or the retailer's agent or employee for the purposes of receiving orders for taxable items."

And, an order received by a fully automated website cannot be "received" a second time by the fulfillment warehouse. As previously stated, when the words of the lengthy statutory definition are considered in context, and when the legislative history is considered, the legislature intended the opposite - a fulfillment warehouse is not automatically a "place of business" simply because orders have to be forwarded to the warehouse for fulfillment.

Mr. Sheets commented that the comptroller should remove the emphasis on how an order is "received." The comptroller disagrees with the characterization. The emphasis is not on how an order is received. As explained in the preceding paragraphs, the emphasis is on where the order is received and whether the facility that receives the order is a "place of business."

Retailer's agent.

Mr. Kasner commented that the comptroller should adopt a definition of "retailer's agent." The comptroller declines. The legisla-

ture did not define the term and gave no indication that the term should have any meaning other than the well-established legal meaning.

Internet.

Mr. Sheets proposed that the comptroller add a definition of the term "Internet." The comptroller declines. As a stand-alone term, the word "Internet" is used only once, in the definition of "remote seller" in subsection (a)(18), where it is used to illustrate a nonexclusive example of media through which orders may be solicited.

Fiscal impact on local governments.

The notice of the proposed amendments to the rule discussed the potential fiscal impact on cities. That discussion acknowledged that there could be some impact, but that the impact could not be quantified. The discussion will not be repeated here.

The comptroller received comments similar to those from the previous rulemaking. Many of the commenters for and against the rule base their comments on whether their jurisdictions will gain or lose tax revenue. Several cities have commented that they will lose millions of dollars in local tax revenue. The comptroller cannot verify those claims because the cities have not shared their data with the comptroller.

As will be explained, the comptroller does not have enough data on the business operations of each business within a jurisdiction to quantify the effect on each jurisdiction. However, the existence of winners and losers does not affect the validity of the rule. The validity of the rule depends on whether the rule is a proper interpretation of the statute.

The Civic Economics organization commented that the comptroller must provide meaningful data and analysis. Mr. Lindley and Mr. Gilmore similarly commented that the comptroller should conduct a study. The comptroller is not withholding data. Aggregate, nonconfidential local tax data is available on the comptroller's website. Individual taxpayer data that the comptroller cannot produce due to the confidentiality statute is insufficient to perform the analyses requested by the commenters.

Mr. Sheets suggested that the comptroller could simply review the 3,607 entries from the comptroller's economic development agreement website to see which of those agreements involve retailers whose locations within the various cities generate significant sales tax. However, that information would be insufficient. The mere fact that a retailer reports significant sales tax receipts to a local jurisdiction does not prove that the retailer is incorrectly reporting or that the retailer would change its reporting as a result of the rule. That determination would also require an understanding of the business operations of the retailer in order to determine the location or locations where the orders were received, the location or locations where the orders were fulfilled, and whether each location was or was not a "place of business." The comptroller would then have to know where and by which manner each order was received. The comptroller would then have to compare that information with how the retailer has been reporting local tax on each transaction, identify the circumstances, if any, that would require the retailer to change its methods of reporting as a result of the rule, and determine the dollar value for each transaction. The comptroller does not have sufficient information on the individual taxpayers or the taxpayers in the aggregate to make this determination.

For example, a company with an economic development agreement may be sourcing local sales tax to a jurisdiction where one of its warehouses is fulfilling the orders. Since 1985, the comp-

troller's interpretation has been that a fulfillment warehouse is not automatically a "place of business," but it may be. To be a "place of business," the company must receive at least three orders during the calendar year at the warehouse. By sourcing local sales tax to the warehouse location, the company is representing to the comptroller that the warehouse is a "place of business" that has received three or more orders. The representation may be correct. It may not be correct. The comptroller does not know unless an error is discovered during the course of an audit. Without that knowledge, the comptroller cannot say whether the company would or would not change its reporting as a result of the rule's explicit statement of the comptroller's existing policy in the rule. This same type of inquiry would have to be made for every reporting location in the state.

Mr. Kasner commented that the proposed rule will "have some amount of loss, likely in the hundreds of millions to Texas localities just due to the sheer volume of outside taxing cities Texans {sic} and their businesses." Mr. Kasner did not provide his calculation. But in the previous rulemaking, Mr. Kasner claimed that "almost \$200,000,000 (\$200MM) would be lost due to shipment to destinations outside Texas." However, there will be no loss as a result of the rule because shipments to destinations outside Texas are exempt from state and local sales tax. See Tax Code, §151.330(a) (Interstate Shipments, Common Carriers, and Services Across State Line) and §321.208 (State Exemptions Applicable).

Mr. Sheets also commented that there would be a loss of city tax revenue paid by rural citizens: "Given how large and rural Texas is, with many unincorporated areas where citizens live outside any city limits, there are hundreds of thousands, if not millions, of Texas citizens who will no longer be subject to local sales tax for items delivered to their homes, if those sales are made from Texas retailers over the Internet through a shopping cart website if a salesperson does not receive the order."

The comptroller rejects the premise that there are multitudes of rural Texans that will "no longer be subject to local sales tax." First, the premise inaccurately assumes that all rural Texans are currently subject to local city sales taxes. In many instances, they are not. For example, marketplace sales are consummated at the customer location. If the customer is in a rural jurisdiction that does not impose sales tax, no sales tax is due under the statute, under the former rule, or under the amended rule. Second, the premise inaccurately assumes that there will be a change in those instances in which local city sales tax is collected from rural citizens. But the rule does not change the statute. For example, if an order is fulfilled from a place of business of the seller in a city, local sales tax will continue to be due based on that location under the statute, under the former rule, and under the adopted rule.

Nevertheless, it is conceivable that the clarifications in the adopted rule will cause some vendors to recognize their non-compliance and change their reporting methods. If most buyers live within local taxing jurisdictions, a revenue loss to one local government will often, but not always, be a revenue gain to others. An aggregate revenue loss, if any, cannot be reliably determined for the same reason that the revenue gain or loss to individual jurisdictions cannot be reliably determined - the comptroller does not have enough data on the business operations of each business to identify and quantify the transactions that might be affected.

Finally, the validity of the rule does not turn on whether there will or will not be a revenue loss or gain to cities or whether it is fair

or unfair to charge city sales tax to rural customers. The validity of the rule turns on whether it is an accurate application of the local tax statutes.

Economic development agreements.

The comptroller received several comments regarding economic development agreements, including a request to grandfather them. The rule does not prevent economic development agreements between cities and fulfillment warehouses. The statute allows local tax to be sourced to the fulfillment location, provided that the fulfillment location is a "place of business." The only effect of the rule is to more clearly state the requirements for a fulfillment warehouse to be a "place of business." Accordingly, the comptroller will not adopt any additional special provisions for economic development agreements.

Compliance costs.

A number of commenters stated that the rule will increase compliance costs. The statements in the preamble to the proposed rule are responsive to the comments and will not be repeated here.

For many, compliance will not change. The Civics Economics organization commented that the rule "impacts only a small portion of total retail sales (again, an unknown portion)." As explained in the preceding section, the portion is unknown because it would require an understanding of the business operations of each business and how that business was reporting local tax.

It is possible that some commenters, particularly those who alleged that the rule completely changes sourcing from origin to destination, are under the misapprehension that the rule will require them to change their reporting methods. For example, a pizza restaurant, or any other kind of retail store that takes website orders for home delivery, will still source its sales to the restaurant or retail store location where the orders are fulfilled for delivery.

Nevertheless, the rule may cause some vendors, small or large, to realize that they are noncompliant. If the vendors come into compliance by changing from single-location reporting to multiple-location reporting, their compliance burden may increase. And if vendors change from multiple-location reporting to single-location reporting, their compliance burden may diminish.

The Internet Tax Freedom Act.

Mr. Harris commented that the rule violates the Internet Tax Freedom Act. The comptroller disagrees. Neither the consummation statutes nor the adopted rule discriminates based on whether the Internet is used. They differentiate based on whether an order is received at a "place of business" or fulfilled at a "place of business," which does not turn on the use of the Internet. An email order received by a salesperson would be received at a "place of business" even though the Internet was used to transmit the communication. An order received by an automated computer shopping cart would not be received at a "place of business," not because the Internet was used, but because a computer shopping cart is not an "established outlet, office, or location." The determination is based on criteria other than the use of the Internet. For example, the Internet plays no role in the determination that an automated telephone ordering system is not a "place of business."

Furthermore, the rule itself does not discriminate against the Internet. Suppose an order is received by a fully automated website and fulfilled from a warehouse without sales personnel. Un-

der the rule, sale tax would be due in the destination city. Under Mr. Harris' interpretation, sales tax would be due in the fulfillment city. But the tax amount depends on the tax rate in each city. If the destination city tax rate is higher, the consumer would pay more tax under the rule. But if the destination city tax rate is lower, the consumer would pay less tax under the rule. Thus, the comptroller's interpretations - that a computer that operates an automated shopping cart software program is not a "place of business," and that a fulfillment warehouse is not automatically a "place of business" - does not discriminate against the Internet.

Statutory Authority.

The comptroller adopts the amendments under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), §321.306 (Comptroller's Rules), §322.203 (Comptroller's Rules), and §323.306 (Comptroller's Rules). These provisions authorize the comptroller to adopt reasonable rules that are consistent with the Tax Code for administration, collection, reporting, and enforcement.

The amendments implement Tax Code, §151.0595 (Single Local Tax Rate for Remote Sellers); Tax Code, Chapter 321, Subchapters A, B, C, D, and F; Tax Code, Chapter 322; Tax Code, Chapter 323.

§3.334. *Local Sales and Use Taxes.*

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Cable system--The system through which a cable service provider delivers cable television or bundled cable service, as those terms are defined in §3.313 of this title (relating to Cable Television Service and Bundled Cable Service).

(2) City--An incorporated city, municipality, town, or village.

(3) City sales and use tax--The tax authorized under Tax Code, §321.101(a), including the additional municipal sales and use tax authorized under Tax Code, §321.101(b), the municipal sales and use tax for street maintenance authorized under Tax Code, §327.003, the Type A Development Corporation sales and use tax authorized under Local Government Code, §504.251, the Type B Development Corporation sales and use tax authorized under Local Government Code, §505.251, a sports and community venue project sales and use tax adopted by a city under Local Government Code, §334.081, and a municipal development corporation sales and use tax adopted by a city under Local Government Code, §379A.081. The term does not include the fire control, prevention, and emergency medical services district sales and use tax authorized under Tax Code, §321.106, or the municipal crime control and prevention district sales and use tax authorized under Tax Code, §321.108.

(4) Comptroller's website--The comptroller's website concerning local taxes located at: <https://comptroller.texas.gov/taxes/sales/>.

(5) County sales and use tax--The tax authorized under Tax Code, §323.101, including a sports and community venue project sales and use tax adopted by a county under Local Government Code, §334.081. The term does not include the county health services sales and use tax authorized under Tax Code, §324.021, the county landfill and criminal detention center sales and use tax authorized under Tax Code, §325.021, or the crime control and prevention district sales and use tax authorized under Tax Code, §323.105.

(6) Drop shipment--A transaction in which an order is received by a seller at one location, but the item purchased is shipped by the seller from another location, or is shipped by the seller's third-party supplier, directly to a location designated by the purchaser.

(7) Engaged in business--This term has the meaning given in §3.286 of this title (relating to Seller's and Purchaser's Responsibilities).

(8) Extraterritorial jurisdiction--An unincorporated area that is contiguous to the corporate boundaries of a city as defined in Local Government Code, §42.021.

(9) Fulfill--To complete an order by transferring possession of a taxable item to a purchaser, or to ship or deliver a taxable item to a location designated by the purchaser. The term does not include receiving or tracking an order, determining shipping costs, managing inventory, or other activities that do not involve the transfer, shipment, or delivery of a taxable item to the purchaser or a location designated by the purchaser.

(10) Itinerant vendor--A seller who travels to various locations for the purpose of receiving orders and making sales of taxable items and who has no place of business in this state. A person who sells items through vending machines is also an itinerant vendor. A salesperson that operates out of a place of business in this state is not an itinerant vendor.

(11) Kiosk--A small stand-alone area or structure:

(A) that is used solely to display merchandise or to submit orders for taxable items from a data entry device, or both;

(B) that is located entirely within a location that is a place of business of another seller, such as a department store or shopping mall; and

(C) at which taxable items are not available for immediate delivery to a purchaser.

(12) Local taxes--Sales and use taxes imposed by any local taxing jurisdiction.

(13) Local taxing jurisdiction--Any of the following:

(A) a city that imposes sales and use tax as provided under paragraph (3) of this subsection;

(B) a county that imposes sales and use tax as provided under paragraph (5) of this subsection;

(C) a special purpose district created under the Special District Local Laws Code or other provisions of Texas law that is authorized to impose sales and use tax by the Tax Code or other provisions of Texas law and as governed by the provisions of Tax Code, Chapters 321 or 323 and other provisions of Texas law; or

(D) a transit authority that imposes sales and use tax as authorized by Transportation Code, Chapters, 451, 452, 453, 457, or 460 and governed by the provisions of Tax Code, Chapter, 322.

(14) Marketplace provider--This term has the meaning given in §3.286 of this title.

(15) Order placed in person--An order placed by a purchaser with the seller while physically present at the seller's place of business regardless of how the seller subsequently enters the order.

(16) Place of business of the seller - general definition--A place of business of the seller must be an established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items from persons other than employees, independent contractors, and natural persons affiliated with the seller. An "established

outlet, office, or location" usually requires staffing by one or more sales personnel. The term does not include a computer server, Internet protocol address, domain name, website, or software application. The "purpose" element of the definition may be established by proof that the sales personnel of the seller receive three or more orders for taxable items at the facility during the calendar year. Additional criteria for determining when a location is a place of business of the seller are provided in subsection (b) of this section for distribution centers, manufacturing plants, storage yards, warehouses and similar facilities; kiosks; and purchasing offices. An outlet, office, facility, or any location that contracts with a retail or commercial business to process for that business invoices, purchase orders, bills of lading, or other equivalent records onto which sales tax is added, including an office operated for the purpose of buying and selling taxable goods to be used or consumed by the retail or commercial business, is not a place of business of the seller if the comptroller determines that the outlet, office, facility, or location functions or exists to avoid the tax legally due under Tax Code, Chapters 321, 322, and 323 or exists solely to rebate a portion of the tax imposed by those chapters to the contracting business. An outlet, office, facility, or location does not exist to avoid the tax legally due under Tax Code, Chapters 321, 322, and 323 or solely to rebate a portion of the tax imposed by those chapters if the outlet, office, facility, or location provides significant business services, beyond processing invoices, to the contracting business, including logistics management, purchasing, inventory control, or other vital business services.

(17) **Purchasing office**--An outlet, office, facility, or any location that contracts with a retail or commercial business to process for that business invoices, purchase orders, bills of lading, or other equivalent records onto which sales tax is added, including an office operated for the purpose of buying and selling taxable goods to be used or consumed by the retail or commercial business.

(18) **Remote Seller**--As defined in §3.286 of this title, a remote seller is a seller engaged in business in this state whose only activity in the state is:

(A) engaging in regular or systematic solicitation of sales of taxable items in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio, or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting sales of taxable items; or

(B) soliciting orders for taxable items by mail or through other media including the Internet or other media that may be developed in the future.

(19) **Seller**--This term has the meaning given in §3.286 of this title and also refers to any agent or employee of the seller.

(20) **Special purpose district**--A local governmental entity authorized by the Texas legislature for a specific purpose, such as crime control, a local library, emergency services, county health services, or a county landfill and criminal detention center.

(21) **Storage**--This term has the meaning given in §3.346 of this title (relating to Use Tax).

(22) **Temporary place of business of the seller**--A location operated by a seller for a limited period of time for the purpose of selling and receiving orders for taxable items and where the seller has inventory available for immediate delivery to a purchaser. For example, a person who rents a booth at a weekend craft fair or art show to sell and take orders for jewelry, or a person who maintains a facility at a job site to rent tools and equipment to a contractor during the construction of real property, has established a temporary place of business. A temporary place of business of the seller includes a sale outside of a

distribution center, manufacturing plant, storage yard, warehouse, or similar facility of the seller in a parking lot or similar space sharing the same physical address as the facility but not within the walls of the facility.

(23) **Transit authority**--A metropolitan rapid transit authority (MTA), advanced transportation district (ATD), regional or subregional transportation authority (RTA), city transit department (CTD), county transit authority (CTA), regional mobility authority (RMA) or coordinated county transportation authority created under Transportation Code, Chapters 370, 451, 452, 453, 457, or 460.

(24) **Two percent cap**--A reference to the general rule that, except as otherwise provided by Texas law and as explained in this section, a seller cannot collect, and a purchaser is not obligated to pay, more than 2.0% of the sales price of a taxable item in total local sales and use taxes for all local taxing jurisdictions.

(25) **Use**--This term has the meaning given in §3.346 of this title.

(26) **Use tax**--A tax imposed on the storage, use or other consumption of a taxable item in this state.

(b) **Determining the place of business of a seller.**

(1) **Distribution centers, manufacturing plants, storage yards, warehouses, and similar facilities.**

(A) A distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller for the purpose of selling taxable items where sales personnel of the seller receive three or more orders for taxable items during the calendar year from persons other than employees, independent contractors, and natural persons affiliated with the seller is a place of business of the seller. Forwarding previously received orders to the facility for fulfillment does not make the facility a place of business.

(B) If a location that is a place of business of the seller, such as a sales office, is in the same building as a distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller, then the entire facility is a place of business of the seller.

(2) **Kiosks.** A kiosk is not a place of business of the seller for the purpose of determining where a sale is consummated for local tax purposes. A seller who owns or operates a kiosk in Texas is, however, engaged in business in this state as provided in §3.286 of this title.

(3) **Purchasing offices.**

(A) A purchasing office is not a place of business of the seller if the purchasing office exists solely to rebate a portion of the local sales and use tax imposed by Tax Code, Chapters 321, 322, or 323 to a business with which it contracts; or if the purchasing office functions or exists to avoid the tax legally due under Tax Code, Chapters 321, 322, or 323. A purchasing office does not exist solely to rebate a portion of the local sales and use tax or to avoid the tax legally due under Tax Code, Chapters 321, 322, or 323 if the purchasing office provides significant business services to the contracting business beyond processing invoices, including logistics management, purchasing, inventory control, or other vital business services.

(B) In making a determination under subparagraph (A) of this paragraph, as to whether a purchasing office provides significant business services to the contracting business beyond processing invoices, the comptroller will compare the total value of the other business services to the value of processing invoices. If the total value of the other business services, including logistics management, purchasing, inventory control, or other vital business services, is less than the

value of the service to process invoices, then the purchasing office will be presumed not to be a place of business of the seller.

(C) If the comptroller determines that a purchasing office is not a place of business of the seller, the sale of any taxable item is deemed to be consummated at the place of business of the seller from whom the purchasing office purchased the taxable item for resale and local sales and use taxes are due according to the following rules.

(i) When taxable items are purchased from a Texas seller, local sales taxes are due based on the location of the seller's place of business where the sale is deemed to be consummated, as determined in accordance with subsection (c) of this section.

(ii) When the sale of a taxable item is deemed to be consummated at a location outside of this state, local use tax is due based on the location where the items are first stored, used or consumed by the entity that contracted with the purchasing office in accordance with subsection (d) of this section.

(4) An order that is received by a salesperson who is not at a place of business of the seller when the salesperson receives the order is treated as being received at the location from which the salesperson operates. Examples include orders that a salesperson receives by mail, telephone, including Voice over Internet Protocol and cellular phone calls, facsimile, and email while traveling. The location from which the salesperson operates is the principal fixed location where the salesperson conducts work-related activities. The location from which a salesperson operates will be a place of business of the seller only if the location meets the definition of a "place of business of a seller" in subsection (a)(16) of this section on its own, without regard to the orders imputed to that location by this paragraph.

(5) A facility without sales personnel is usually not a "place of business of the seller." A vending machine is not "an established outlet, office, or location," and does not constitute a "place of business of the seller." Instead, a vending machine sale is treated as a sale by an itinerant vendor. See subsections (a)(10) and (c)(6) of this section. However, a walk-in retail outlet with a stock of goods available for immediate purchase through a cashier-less point of sale terminal at the outlet would be "an established outlet, office, or location" so as to constitute a "place of business of the seller" even though sales personnel are not required for every sale. A computer that operates an automated shopping cart software program is not an established outlet, office, or location," and does not constitute a "place of business of the seller." A computer that operates an automated telephone ordering system is not "an established outlet, office, or location," and does not constitute a "place of business of the seller."

(c) Local sales tax - Consummation of sale - determining the local taxing jurisdictions to which sales tax is due. Except for the special rules applicable to remote sellers in subsection (i)(3) of this section, direct payment permit purchases in subsection (j) of this section, and certain taxable items, including taxable items sold by a marketplace provider, as provided in subsection (k) of this section, each sale of a taxable item is consummated at the location indicated by the provisions of this subsection. The following rules, taken from Tax Code, §321.203 and §323.203, apply to all sellers engaged in business in Texas, regardless of whether they have no place of business in Texas, a single place of business in Texas, or multiple places of business in Texas.

(1) Consummation of sale - order received at a place of business of the seller in Texas.

(A) Order placed in person. Except as provided by paragraph (3) of this subsection, when an order for a taxable item is placed in person at a seller's place of business in Texas, including at a temporary place of business of the seller in Texas, the sale of that item

is consummated at that place of business of the seller, regardless of the location where the order is fulfilled.

(B) Order not placed in person.

(i) Order fulfilled at a place of business of the seller in Texas. When an order is received at a place of business of the seller in Texas and is fulfilled at a place of business of the seller in Texas, the sale is consummated at the place of business where the order is fulfilled.

(ii) Order not fulfilled at a place of business of the seller in Texas. When an order is received at a place of business of the seller in Texas and is fulfilled at a location that is not a place of business of the seller in Texas, the sale is consummated at the place of business where the order is received.

(2) Consummation of sale - order not received at a place of business of the seller in Texas.

(A) Order fulfilled at a place of business of the seller in Texas. When an order is received at a location that is not a place of business of the seller in Texas or is received outside of Texas, and is fulfilled from a place of business of the seller in Texas, the sale is consummated at the place of business where the order is fulfilled.

(B) Order not fulfilled from a place of business of the seller in Texas.

(i) Order fulfilled in Texas. When an order is received at a location that is not a place of business of the seller in Texas and is fulfilled from a location in Texas that is not a place of business of the seller, the sale is consummated at the location in Texas to which the order is shipped or delivered, or at which the purchaser of the item takes possession.

(ii) Order not fulfilled in Texas. When an order is received by a seller at a location that is not a place of business of the seller in Texas, and is fulfilled from a location outside of Texas, the sale is not consummated in Texas. However, a use is consummated at the first point in Texas where the item is stored, used, or consumed after the interstate transit has ceased. A taxable item delivered to a point in Texas is presumed to be for storage, use, or consumption at that point until the contrary is established. Local use tax should be collected as provided in subsection (d) of this section. Except as provided in subsection (i)(3) of this section, a remote seller required to collect state use tax under §3.286(b)(2) of this title must also collect local use tax.

(3) Exception for qualifying economic development agreements entered into before January 1, 2009, pursuant to Tax Code, §321.203(c-4) - (c-5) or §323.203(c-4) - (c-5). This paragraph is effective until September 1, 2024. If applicable, the local sales tax due on the sale of a taxable item is based on the location of the qualifying warehouse, which is a place of business of the seller, from which the item is shipped or delivered or at which the purchaser of the item takes possession.

(4) Local sales taxes are due to each local taxing jurisdiction with sales tax in effect where the sale is consummated. Local use tax may also be due if the total amount of local sales taxes due does not reach the two percent cap, and the item purchased is shipped or delivered to a location in one or more different local taxing jurisdictions, as provided in subsection (d) of this section.

(5) Multiple special purpose district taxes, multiple transit authority sales taxes, or a combination of the two may apply to a single transaction. If the sale of a taxable item is consummated at a location within the boundaries of multiple special purpose districts or transit authorities, local sales tax is owed to each of the jurisdictions in effect at that location. For example, a place of business of the seller located in the city of San Antonio is within the boundaries of both the San Antonio

Advanced Transportation District and the San Antonio Metropolitan Transit Authority, and the seller is required to collect sales tax for both transit authorities. Similarly, a place of business of the seller in Flower Mound is located within the boundaries of two special purpose districts, the Flower Mound Crime Control District and the Flower Mound Fire Control District, and the seller is responsible for collecting sales tax for both special purpose districts.

(6) Itinerant vendors; vending machines.

(A) Itinerant vendors. Sales made by itinerant vendors are consummated at, and itinerant vendors must collect sales tax based upon, the location where the item is delivered or at which the purchaser of the item takes possession. Itinerant vendors do not have any responsibility to collect use tax.

(B) Vending machines. Sales of taxable items made from a vending machine are consummated at the location of the vending machine. See §3.293 of this title (relating to Food; Food Products; Meals; Food Service) for more information about vending machine sales.

(d) Local use tax. The provisions addressing the imposition of state use tax in §3.346 of this title also apply to the imposition of local use tax. For example, consistent with §3.346(e) of this title, all taxable items that are shipped or delivered to a location in this state that is within the boundaries of a local taxing jurisdiction are presumed to have been purchased for use in that local taxing jurisdiction as well as presumed to have been purchased for use in the state.

(1) General rules.

(A) When local use taxes are due in addition to local sales taxes as provided by subsection (c) of this section, all applicable use taxes must be collected or accrued in the following order until the two percent cap is reached: city, county, special purpose district, and transit authority. If more than one special purpose district use tax is due, all such taxes are to be collected or accrued before any transit authority use tax is collected or accrued. See subparagraphs (D) and (E) of this paragraph.

(B) If a local use tax cannot be collected or accrued at its full rate without exceeding the two percent cap, the seller cannot collect it, or any portion of it, and the purchaser is not responsible for accruing it.

(C) If a seller collects a local sales tax on an item, or a purchaser accrues a local sales tax on an item, a use tax for the same type of jurisdiction is not due on the same item. For example, after a city sales tax has been collected or accrued for an item, no use tax is due to that same or a different city on that item, but use tax may be due to a county, special purpose district, or transit authority. Similarly, if one or more special purpose district sales taxes have been collected or accrued for an item, no special purpose district use tax is due on that item, and if one or more transit authority sales taxes have been collected or accrued for an item, no transit authority use tax is due on that item.

(D) Collection or accrual of use tax for multiple special purpose districts. If more than one special purpose district use tax is in effect at the location where use of an item occurs, the special purpose district taxes are due in the order of their effective dates, beginning with the earliest effective date, until the two percent cap is met. The effective dates of all special purpose district taxes are available on the comptroller's website. However, if the collection or accrual of use tax for the district with the earliest effective date would exceed the two percent cap, the tax for that district is not due and the seller or purchaser should determine, following the criteria in subparagraphs (A) - (C) of this paragraph, whether use tax is due for the district that next became effective.

(i) If the competing special purpose district taxes became effective on the same date, the special purpose district taxes are due in the order of the earliest date for which the election in which the district residents authorized the imposition of sales and use tax by the district was held.

(ii) If the elections to impose the local taxes were held on the same date, the special purpose district taxes are due in the order of the earliest date for which the enabling legislation under which each district was created became effective.

(E) Collection or accrual of use tax for multiple transit authorities. If more than one transit authority use tax is in effect at the location where use of an item occurs, and the two percent cap has not been met, the transit authority taxes are due in the order of their effective dates, beginning with the earliest effective date, until the two percent cap is met. The effective dates of all transit authority taxes are available on the comptroller's website. However, if the collection or accrual of use tax for the authority with the earliest effective date would exceed the two percent cap, the tax for that authority is not due and the seller or purchaser should determine, following the criteria in subparagraphs (A) - (D) of this paragraph, whether use tax is due for the authority that next became effective.

(i) If the competing transit authorities became effective on the same date, the transit authority taxes are due in the order of the earliest date for which the election in which the authority residents authorized the imposition of sales and use tax by the authority was held.

(ii) If the elections to impose local taxes were held on the same date, the transit authority use taxes are due in the order of the earliest date for which the enabling legislation under which each authority was created became effective.

(2) General use tax rules applied to specific situations. The following fact patterns explain how local use tax is to be collected or accrued and remitted to the comptroller based on, and subject to, the general rules in paragraph (1) of this subsection.

(A) Sale consummated outside the state, item delivered from outside the state or from a location in Texas that is not operated by the seller - local use tax due. Except as provided in subsection (i)(3) of this section, if a sale is consummated outside of this state according to the provisions of subsection (c) of this section, and the item purchased is either shipped or delivered to a location in this state as designated by the purchaser from a location outside of the state, or if the order is drop shipped directly to the purchaser from a third-party supplier, local use tax is owed based upon the location in this state to which the order is shipped or delivered or at which the purchaser of the item takes possession. The seller is responsible for collecting the local use tax due on the sale. If the seller does not collect the local use taxes due on the sale, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller according to the provisions in paragraph (1) of this subsection. For example, if an order for a taxable item is received by a seller at a location outside of Texas, and the order is shipped to the purchaser from a location outside of the state, local use tax is due based upon the location to which the order is shipped or delivered or at which the purchaser of the item takes possession.

(B) Sale consummated in Texas outside a local taxing jurisdiction, item delivered into one or more local taxing jurisdictions - local use tax due. If a sale is consummated at a location in Texas that is outside of the boundaries of any local taxing jurisdiction according to the provisions of subsection (c) of this section, and the order is shipped or delivered to the purchaser at a location in this state that is within the boundaries of one or more local taxing jurisdictions, local use tax is due based on the location to which the items are shipped or delivered or at which the purchaser of the item takes possession. The seller is

responsible for collecting the local use taxes due on the sale, regardless of the location of the seller in Texas. If the seller fails to collect any local use taxes due, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller.

(C) Sale consummated in any local taxing jurisdictions imposing less than 2.0% in total local taxes - local sales taxes and use taxes due. If a sale is consummated at a location in Texas where the total local sales tax rate imposed by the taxing jurisdictions in effect at that location does not equal 2.0% according to the provisions of subsection (c) of this section, and the item is shipped or delivered to the purchaser at a location in this state that is inside the boundaries of a different local taxing jurisdiction, additional local use tax may be due based on the location to which the order is shipped or delivered or at which the purchaser of the item takes possession, subject to the two percent cap. The seller is responsible for collecting any additional local use taxes due on the sale, regardless of the location of the seller in Texas. See subsection (i) of this section. If the seller fails to collect the additional local use taxes due, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller.

(i) Example one - if an order is received in person at a place of business of the seller, such that the sale is consummated at the location where the order is received as provided under subsection (c)(1)(A) of this section, and the local sales tax due on the sale does not meet the two percent cap, additional local use taxes are due based on the location to which the order is shipped or delivered or at which the purchaser of the item takes possession, subject to the provisions in paragraph (1) of this subsection.

(ii) Example two - if a seller receives an order for a taxable item at a seller's place of business in Texas, and the seller ships or delivers the item from an out-of-state location to a location in this state as designated by the purchaser, local sales tax is due based upon the location of the place of business of the seller where the order is received. If the local sales tax due on the item does not meet the two percent cap, use taxes, subject to the provisions in paragraph (1) of this subsection, are due based upon the location where the items are shipped or delivered or at which the purchaser of the item takes possession.

(e) Effect of other law.

(1) Tax Code, Title 2, Subtitles A (General Provisions) and B (Enforcement and Collection), Tax Code, Chapter 141 (Multistate Tax Compact) and Tax Code, Chapter 151 (Limited Sales, Excise, and Use Tax) apply to transactions involving local taxes. Related sections of this title and comptroller rulings shall also apply with respect to local taxes. This includes authorities such as court cases and federal law that affect whether an item is taxable or is excluded or exempt from taxation.

(2) Permits, exemption certificates, and resale certificates required by Tax Code, Chapter 151, shall also satisfy the requirements for collecting and remitting local taxes, unless otherwise indicated by this section or other sections of this title. For example, see subsection (n) of this section concerning prior contract exemptions.

(3) Any provisions in this section or other sections of this title related to a seller's responsibilities for collecting and remitting local taxes to the comptroller shall also apply to a purchaser if the seller does not collect local taxes that are due. The comptroller may proceed against the seller or purchaser for the local tax owed by either.

(f) Tax rates. Except as otherwise provided by law, no local governmental entity may adopt or increase a sales and use tax if, as a result of the adoption or increase of the tax, the combined rate of all sales and use taxes imposed by local taxing jurisdictions having territory in the local governmental entity would exceed 2.0% at any location

within the boundaries of the local governmental entity's jurisdiction. The following are the local tax rates that may be adopted.

(1) Cities. Cities may impose sales and use tax at a rate of up to 2.0%.

(2) Counties. Counties may impose sales and use tax at rates ranging from 0.5% to 1.5%.

(3) Special purpose districts. Special purpose districts may impose sales and use tax at rates ranging from 0.125% to 2.0%.

(4) Transit authorities. Transit authorities may impose sales and use tax at rates ranging from 0.25% to 1.0%.

(g) Jurisdictional boundaries, combined areas, and city tax imposed through strategic partnership agreements.

(1) Jurisdictional boundaries.

(A) City boundaries. City taxing jurisdictional boundaries cannot overlap one another and a city cannot impose a sales and use tax in an area that is already within the jurisdiction of another city.

(B) County boundaries. County tax applies to all locations within that county.

(C) Special purpose district and transit authority boundaries. Special purpose districts and transit authorities may cross or share boundaries with other local taxing jurisdictions and may encompass, in whole or in part, other local taxing jurisdictions, including cities and counties. A geographic location or address in this state may lie within the boundaries of more than one special purpose district or more than one transit authority.

(D) Extraterritorial jurisdictions. Except as otherwise provided by paragraph (3) of this subsection concerning strategic partnership agreements and subsection (1)(5) of this section concerning the City of El Paso and Fort Bliss, city sales and use tax does not apply to taxable sales that are consummated outside the boundaries of the city, including sales made in a city's extraterritorial jurisdiction. However, an extraterritorial jurisdiction may lie within the boundaries of a special purpose district, transit authority, county, or any combination of the three, and the sales and use taxes for those jurisdictions would apply to those sales.

(2) Combined areas. A combined area is an area where the boundaries of a city overlap the boundaries of one or more other local taxing jurisdictions as a result of an annexation of additional territory by the city, and where, as the result of the imposition of the city tax in the area in addition to the local taxes imposed by the existing taxing jurisdictions, the combined local tax rate would exceed 2.0%. The comptroller shall make accommodations to maintain a 2.0% rate in any combined area by distributing the 2.0% tax revenue generated in these combined areas to the local taxing jurisdictions located in the combined areas as provided in Tax Code, §321.102 or Health and Safety Code, §775.0754. Combined areas are identified on the comptroller's website. Sellers engaged in transactions on which local sales or use taxes are due in a combined area, or persons who must self-accrue and remit tax directly to the comptroller, must use the combined area local code when reporting the tax rather than the codes for the individual city, county, special purpose districts, or transit authorities that make up the combined area.

(3) City tax imposed through strategic partnership agreements.

(A) The governing bodies of a district, as defined in Local Government Code, §43.0751, and a city may enter into a limited-purpose annexation agreement known as a strategic partnership agreement. Under this agreement, the city may impose sales and use

tax within all or part of the boundaries of a district. Areas within a district that are annexed for this limited purpose are treated as though they are within the boundaries of the city for purposes of city sales and use tax.

(B) Counties, transit authorities, and special purpose districts may not enter into strategic partnership agreements. Sales and use taxes imposed by those taxing jurisdictions do not apply in the limited-purpose annexed area as part of a strategic partnership agreement between a city and an authorized district. However, a county, special purpose district, or transit authority sales and use tax, or any combination of these three types of taxes, may apply at locations included in a strategic partnership agreement between a city and an authorized district if the tax is imposed in that area by the applicable jurisdiction as allowed under its own controlling authorities.

(C) Prior to September 1, 2011, the term "district" was defined in Local Government Code, §43.0751 as a municipal utility district or a water control and improvement district. The definition was amended effective September 1, 2011, to mean a conservation and reclamation district operating under Water Code, Chapter 49.

(h) Places of business of the seller and job sites crossed by local taxing jurisdiction boundaries.

(1) Places of business of the seller crossed by local taxing jurisdiction boundaries. If a place of business of the seller is crossed by one or more local taxing jurisdiction boundaries so that a portion of the place of business of the seller is located within a taxing jurisdiction and the remainder of the place of business of the seller lies outside of the taxing jurisdiction, tax is due to the local taxing jurisdictions in which the sales office is located. If there is no sales office, sales tax is due to the local taxing jurisdictions in which any cash registers are located.

(2) Job sites.

(A) Residential repair and remodeling; new construction of an improvement to realty. When a contractor is improving real property under a separated contract, and the job site is crossed by the boundaries of one or more local taxing jurisdictions, the local taxes due on any separately stated charges for taxable items incorporated into the real property must be allocated to the local taxing jurisdictions based on the total square footage of the real property improvement located within each jurisdiction, including the square footage of any standalone structures that are part of the construction, repair, or remodeling project. For more information about tax due on materials used at residential and new construction job sites, refer to §3.291 of this title (relating to Contractors).

(B) Nonresidential real property repair and improvement. When taxable services are performed to repair, remodel, or restore nonresidential real property, including a pipeline, transmission line, or parking lot, that is crossed by the boundaries of one or more local taxing jurisdictions, the local taxes due on the taxable services, including materials and any other charges connected to the services performed, must be allocated among the local taxing jurisdictions based upon the total mileage or square footage, as appropriate, of the repair, remodeling, or restoration project located in each jurisdiction. For more information about tax due on materials used at nonresidential real property repair and remodeling job sites, refer to §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance).

(i) Sellers' and purchasers' responsibilities for collecting or accruing local taxes.

(1) Sale consummated in Texas; seller responsible for collecting local sales taxes and applicable local use taxes. When a sale of a taxable item is consummated at a location in Texas as provided by

subsection (c) of this section, the seller must collect each local sales tax in effect at the location. If the total rate of local sales tax due on the sale does not reach the two percent cap, and the seller ships or delivers the item into another local taxing jurisdiction, then the seller is required to collect additional local use taxes due, if any, based on the location to which the item is shipped or delivered or at which the purchaser of the item takes possession, regardless of the location of the seller in Texas. For more information regarding local use taxes, refer to subsection (d) of this section.

(2) Out-of-state sale; seller engaged in business in Texas. Except as provided in paragraph (3) of this subsection, when a sale is not consummated in Texas, a seller who is engaged in business in this state is required to collect and remit local use taxes due, if any, on orders of taxable items shipped or delivered at the direction of the purchaser into a local taxing jurisdiction in this state based upon the location in this state to which the item is shipped or delivered or at which the purchaser of the item takes possession as provided in subsection (d) of this section.

(3) Local use tax rate for remote sellers.

(A) A remote seller required to collect and remit one or more local use taxes in connection with a sale of a taxable item must compute the amount using:

(i) the combined tax rate of all applicable local use taxes based on the location to which the item is shipped or delivered or at which the purchaser of the item takes possession; or

(ii) at the remote seller's election, the single local use tax rate published in the *Texas Register*.

(B) A remote seller that is storing tangible personal property in Texas to be used for fulfillment at a facility of a marketplace provider that has certified that it will assume the rights and duties of a seller with respect to the tangible personal property, as provided for in §3.286 of this title, may elect the single local use tax rate under subparagraph (A)(ii) of this paragraph.

(C) Notice to the comptroller of election and revocation of election.

(i) Before using the single local use tax rate, a remote seller must notify the comptroller of its election using a form prescribed by the comptroller. A remote seller may also notify the comptroller of the election on its use tax permit application form. The remote seller must use the single local use tax rate for all of its sales of taxable items until the election is revoked as provided in clause (ii) of this subparagraph.

(ii) A remote seller may revoke its election by filing a form prescribed by the comptroller. If the comptroller receives the notice by October 1, the revocation will be effective January 1 of the following year. If the comptroller receives the notice after October 1, the revocation will be effective January 1 of the year after the following year. For example, a remote seller must notify the comptroller by October 1, 2020, for the revocation to be effective January 1, 2021. If the comptroller receives the revocation on November 1, 2020, the revocation will be effective January 1, 2022.

(D) Single local use tax rate.

(i) The single local use tax rate in effect for the period beginning October 1, 2019, and ending December 31, 2019, is 1.75%.

(ii) The single local use tax rate in effect for the period beginning January 1, 2020, and ending December 31, 2020, is 1.75%.

(E) Annual publication of single local use tax rate. Before the beginning of a calendar year, the comptroller will publish notice of the single local use tax rate in the *Texas Register* that will be in effect for that calendar year.

(F) Calculating the single local use tax rate. The single local use tax rate effective in a calendar year is equal to the estimated average rate of local sales and use taxes imposed in this state during the preceding state fiscal year. As soon as practicable after the end of a state fiscal year, the comptroller must determine the estimated average rate of local sales and use taxes imposed in this state during the preceding state fiscal year by:

(i) dividing the total amount of net local sales and use taxes remitted to the comptroller during the state fiscal year by the total amount of net state sales and use tax remitted to the comptroller during the state fiscal year;

(ii) multiplying the amount computed under clause (i) of this subparagraph by the rate provided in Tax Code, §151.051; and

(iii) rounding the amount computed under clause (ii) of this subparagraph to the nearest .0025.

(G) Direct refund. A purchaser may request a refund based on local use taxes paid in a calendar year for the difference between the single local use tax rate paid by the purchaser and the amount the purchaser would have paid based on the combined tax rate for all applicable local use taxes. Notwithstanding the refund requirements under §3.325(a)(1) of this title (relating to Refunds and Payments Under Protest), a non-permitted purchaser may request a refund directly from the comptroller for the tax paid in the previous calendar year, no earlier than January 1 of the following calendar year within the statute of limitation under Tax Code, 111.104 (Refunds).

(H) Marketplace providers. Notwithstanding subparagraph (A) of this paragraph, marketplace providers may not use the single local use tax rate and must compute the amount of local use tax to collect and remit using the combined tax rate of all applicable local use taxes.

(4) Purchaser responsible for accruing and remitting local taxes if seller fails to collect.

(A) If a seller does not collect the state sales tax, any applicable local sales taxes, or both, on a sale of a taxable item that is consummated in Texas, then the purchaser is responsible for filing a return and paying the tax. The local sales taxes due are based on the location in this state where the sale is consummated as provided in subsection (c) of this section.

(B) A purchaser who buys an item for use in Texas from a seller who does not collect the state use tax, any applicable local use taxes, or both, is responsible for filing a return and paying the tax. The local use taxes due are based on the location where the item is first stored, used, or consumed by the purchaser.

(C) For more information about how to report and pay use tax directly to the comptroller, see §3.286 of this title.

(5) Local tax is due on the sales price of a taxable item, as defined in Tax Code, §151.007, in the report period in which the taxable item is purchased or the period in which the taxable item is first stored, used, or otherwise consumed in a local taxing jurisdiction.

(6) A purchaser is not liable for additional local use tax if the purchaser pays local use tax using the rate elected by an eligible remote seller according to paragraph (3) of this subsection. The remote seller must be identified on the comptroller's website as electing to use

the single local use tax rate. A purchaser must verify that the remote seller is listed on the comptroller's website. If the remote seller is not listed on the comptroller's website, the purchaser will be liable for additional use tax due in accordance to paragraph (4) of this subsection.

(j) Items purchased under a direct payment permit.

(1) When taxable items are purchased under a direct payment permit, local use tax is due based upon the location where the permit holder first stores the taxable items, except that if the taxable items are not stored, then local use tax is due based upon the location where the taxable items are first used or otherwise consumed by the permit holder.

(2) If, in a local taxing jurisdiction, storage facilities contain taxable items purchased under a direct payment exemption certificate and at the time of storage it is not known whether the taxable items will be used in Texas, then the taxpayer may elect to report the use tax either when the taxable items are first stored in Texas or are first removed from inventory for use in Texas, as long as use tax is reported in a consistent manner. See also §3.288(i) of this title (relating to Direct Payment Procedures and Qualifications) and §3.346(g) of this title.

(3) If local use tax is paid on stored items that are subsequently removed from Texas before they are used, the tax may be recovered in accordance with the refund and credit provisions of §3.325 of this title and §3.338 of this title (relating to Multistate Tax Credits and Allowance of Credit for Tax Paid to Suppliers).

(k) Special rules for certain taxable goods and services. Sales of the following taxable goods and services are consummated at, and local tax is due based upon, the location indicated in this subsection.

(1) Amusement services. Local tax is due based upon the location where the performance or event occurs. For more information on amusement services, refer to §3.298 of this title (relating to Amusement Services).

(2) Cable services. When a service provider uses a cable system to provide cable television or bundled cable services to customers, local tax is due as provided for in §3.313 of this title. When a service provider uses a satellite system to provide cable services to customers, no local tax is due on the service in accordance with the Telecommunications Act of 1996, §602.

(3) Florists. Local sales tax is due on all taxable items sold by a florist based upon the location where the order is received, regardless of where or by whom delivery is made. Local use tax is not due on deliveries of taxable items sold by florists. For example, if the place of business of the florist where an order is taken is not within the boundaries of any local taxing jurisdiction, no local sales tax is due on the item and no local use tax is due regardless of the location of delivery. If a Texas florist delivers an order in a local taxing jurisdiction at the instruction of an unrelated florist, and if the unrelated florist did not take the order within the boundaries of a local taxing jurisdiction, local use tax is not due on the delivery. For more information about florists' sales and use tax obligations, refer to §3.307 of this title (relating to Florists).

(4) Landline telecommunications services. Local taxes due on landline telecommunications services are based upon the location of the device from which the call or other transmission originates. If the seller cannot determine where the call or transmission originates, local taxes due are based on the address to which the service is billed. For more information, refer to §3.344 of this title (relating to Telecommunications Services).

(5) Marketplace provider sales. Local taxes are due on sales of taxable items through a marketplace provider based on the lo-

cation in this state to which the item is shipped or delivered or at which the purchaser takes possession. For more information, refer to §3.286 of this title.

(6) Mobile telecommunications services. Local taxes due on mobile telecommunications services are based upon the location of the customer's place of primary use as defined in §3.344(a)(8) of this title, and local taxes are to be collected as indicated in §3.344(h) of this title.

(7) Motor vehicle parking and storage. Local taxes are due based on the location of the space or facility where the vehicle is parked. For more information, refer to §3.315 of this title (relating to Motor Vehicle Parking and Storage).

(8) Natural gas and electricity. Any local city and special purpose taxes due are based upon the location where the natural gas or electricity is delivered to the purchaser. As explained in subsection (l)(1) of this section, residential use of natural gas and electricity is exempt from all county sales and use taxes and all transit authority sales and use taxes, most special purpose district sales and use taxes, and many city sales and use taxes. A list of the cities and special purpose districts that do impose, and those that are eligible to impose, local sales and use tax on residential use of natural gas and electricity is available on the comptroller's website. For more information, also refer to §3.295 of this title (relating to Natural Gas and Electricity).

(9) Nonresidential real property repair and remodeling services. Local taxes are due on services to remodel, repair, or restore nonresidential real property based on the location of the job site where the remodeling, repair, or restoration is performed. See also subsection (h)(2)(B) of this section and §3.357 of this title.

(10) Residential real property repair and remodeling and new construction of a real property improvement performed under a separated contract. When a contractor constructs a new improvement to realty pursuant to a separated contract or improves residential real property pursuant to a separated contract, the sale is consummated at the job site at which the contractor incorporates taxable items into the customer's real property. See also subsection (h)(2)(A) of this section and §3.291 of this title.

(11) Waste collection services. Local taxes are due on garbage or other solid waste collection or removal services based on the location at which the waste is collected or from which the waste is removed. For more information, refer to §3.356 of this title (relating to Real Property Service).

(l) Special exemptions and provisions applicable to individual jurisdictions.

(1) Residential use of natural gas and electricity.

(A) Mandatory exemptions from local sales and use tax. Residential use of natural gas and electricity is exempt from most local sales and use taxes. Counties, transit authorities, and most special purpose districts are not authorized to impose sales and use tax on the residential use of natural gas and electricity. Pursuant to Tax Code, §321.105, any city that adopted a local sales and use tax effective October 1, 1979, or later is prohibited from imposing tax on the residential use of natural gas and electricity. See §3.295 of this title.

(B) Imposition of tax allowed in certain cities. Cities that adopted local sales tax prior to October 1, 1979, may, in accordance with the provisions in Tax Code, §321.105, choose to repeal the exemption for residential use of natural gas and electricity. The comptroller's website provides a list of cities that impose tax on the residential use of natural gas and electricity, as well as a list of those cities that do not currently impose the tax, but are eligible to do so.

(C) Effective January 1, 2010, a fire control, prevention, and emergency medical services district organized under Local Government Code, Chapter 344 that imposes sales tax under Tax Code, §321.106, or a crime control and prevention district organized under Local Government Code, Chapter 363 that imposes sales tax under Tax Code, §321.108, that is located in all or part of a municipality that imposes a tax on the residential use of natural gas and electricity as provided under Tax Code, §321.105 may impose tax on residential use of natural gas and electricity at locations within the district. A list of the special purpose districts that impose tax on residential use of natural gas and electricity and those districts eligible to impose the tax that do not currently do so is available on the comptroller's website.

(2) Telecommunication services. Telecommunications services are exempt from all local sales taxes unless the governing body of a city, county, transit authority, or special purpose district votes to impose sales tax on these services. However, since 1999, under Tax Code, §322.109(d), transit authorities created under Transportation Code, Chapter 451 cannot repeal the exemption unless the repeal is first approved by the governing body of each city that created the local taxing jurisdiction. The local sales tax is limited to telecommunications services occurring between locations within Texas. See §3.344 of this title. The comptroller's website provides a list of local taxing jurisdictions that impose tax on telecommunications services.

(3) Emergency services districts.

(A) Authority to exclude territory from imposition of emergency services district sales and use tax. Pursuant to the provisions of Health and Safety Code, §775.0751(c-1), an emergency services district wishing to enact a sales and use tax may exclude from the election called to authorize the tax any territory in the district where the sales and use tax is then at 2.0%. The tax, if authorized by the voters eligible to vote on the enactment of the tax, then applies only in the portions of the district included in the election. The tax does not apply to sales made in the excluded territories in the district and sellers in the excluded territories should continue to collect local sales and use taxes for the local taxing jurisdictions in effect at the time of the election under which the district sales and use tax was authorized as applicable.

(B) Consolidation of districts resulting in sales tax sub-districts. Pursuant to the provisions of Health and Safety Code, §775.018(f), if the territory of a district proposed under Health and Safety Code, Chapter 775 overlaps with the boundaries of another district created under that chapter, the commissioners court of each county and boards of the counties in which the districts are located may choose to create a consolidated district in the overlapping territory. If two districts that want to consolidate under Health and Safety Code, §775.024 have different sales and use tax rates, the territory of the former districts located within the consolidated area will be designated as sub-districts and the sales tax rate within each sub-district will continue to be imposed at the rate the tax was imposed by the former district that each sub-district was part of prior to the consolidation.

(4) East Aldine Management District.

(A) Special sales and use tax zones within district; separate sales and use tax rate. As set out in Special District Local Laws Code, §3817.154(e) and (f), the East Aldine Management District board may create special sales and use tax zones within the boundaries of the District and, with voter approval, enact a special sales and use tax rate in each zone that is different from the sales and use tax rate imposed in the rest of the district.

(B) Exemptions from special zone sales and use tax. The sale, production, distribution, lease, or rental of; and the use, storage, or other consumption within a special sales and use tax zone of; a taxable item sold, leased, or rented by the entities identified in clauses

(i) - (vi) of this subparagraph are exempt from the special zone sales and use tax. State and all other applicable local taxes apply unless otherwise exempted by law. The special zone sales and use tax exemption applies to:

(i) a retail electric provider as defined by Utilities Code, §31.002;

(ii) an electric utility or a power generation company as defined by Utilities Code, §31.002;

(iii) a gas utility as defined by Utilities Code, §101.003 or §121.001, or a person who owns pipelines used for transportation or sale of oil or gas or a product or constituent of oil or gas;

(iv) a person who owns pipelines used for the transportation or sale of carbon dioxide;

(v) a telecommunications provider as defined by Utilities Code, §51.002; or

(vi) a cable service provider or video service provider as defined by Utilities Code, §66.002.

(5) Imposition of city sales tax and transit tax on certain military installations; El Paso and Fort Bliss. Pursuant to Tax Code, §321.1045 (Imposition of Sales and Use Tax in Certain Federal Military Installations), for purposes of the local sales and use tax imposed under Tax Code, Chapter 321, the city of El Paso includes the area within the boundaries of Fort Bliss to the extent it is in the city's extraterritorial jurisdiction. However, the El Paso transit authority does not include Fort Bliss. See Transportation Code, §453.051 concerning the Creation of Transit Departments.

(m) Restrictions on local sales tax rebates and other economic incentives. Pursuant to Local Government Code, §501.161, Section 4A and 4B development corporations may not offer to provide economic incentives, such as local sales tax rebates authorized under Local Government Code, Chapters 380 or 381, to persons whose business consists primarily of purchasing taxable items using resale certificates and then reselling those same items to a related party. A related party means a person or entity which owns at least 80% of the business enterprise to which sales and use taxes would be rebated as part of an economic incentive.

(n) Prior contract exemptions. The provisions of §3.319 of this title (relating to Prior Contracts) concerning definitions and exclusions apply to prior contract exemptions.

(1) Certain contracts and bids exempt. No local taxes are due on the sale, use, storage, or other consumption in this state of taxable items used:

(A) for the performance of a written contract executed prior to the effective date of any local tax if the contract may not be modified because of the tax; or

(B) pursuant to the obligation of a bid or bids submitted prior to the effective date of any local tax if the bid or bids and contract entered into pursuant thereto are at a fixed price and not subject to withdrawal, change, or modification because of the tax.

(2) Annexations. Any annexation of territory into an existing local taxing jurisdiction is also a basis for claiming the exemption provided by this subsection.

(3) Local taxing jurisdiction rate increase; partial exemption for certain contracts and bids. When an existing local taxing jurisdiction raises its sales and use tax rate, the additional amount of tax

that would be due as a result of the rate increase is not due on the sale, use, storage, or other consumption in this state of taxable items used:

(A) for the performance of a written contract executed prior to the effective date of the tax rate increase if the contract may not be modified because of the tax; or

(B) pursuant to the obligation of a bid or bids submitted prior to the effective date of the tax rate increase if the bid or bids and contract entered into pursuant thereto are at a fixed price and not subject to withdrawal, change, or modification because of the tax.

(4) Three-year statute of limitations.

(A) The exemption in paragraph (1) of this subsection and the partial exemption in paragraph (3) of this subsection have no effect after three years from the date the adoption or increase of the tax takes effect in the local taxing jurisdiction.

(B) The provisions of §3.319 of this title apply to this subsection to the extent they are consistent.

(C) Leases. Any renewal or exercise of an option to extend the time of a lease or rental contract under the exemptions provided by this subsection shall be deemed to be a new contract and no exemption will apply.

(5) Records. Persons claiming the exemption provided by this subsection must maintain records which can be verified by the comptroller or the exemption will be lost.

(6) Exemption certificate. An identification number is required on the prior contract exemption certificates furnished to sellers. The identification number should be the person's 11-digit Texas taxpayer number or federal employer's identification (FEI) number.

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 10, 2023.

TRD-202300113

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Effective date: January 30, 2023

Proposal publication date: September 23, 2022

For further information, please call: (512) 475-2220



TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 45. COMMUNITY LIVING ASSISTANCE AND SUPPORT SERVICES AND COMMUNITY FIRST CHOICE (CFC) SERVICES

As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code §531.0201

and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1.

Therefore, the Executive Commissioner of HHSC adopts the repeal of §§45.101 - 45.105, 45.201, 45.202, 45.211 - 45.218, 45.221 - 45.227, 45.231, 45.301, 45.302, 45.401 - 45.410, 45.503, 45.505, 45.521 - 45.525, 45.531, 45.533, 45.601 - 45.609, 45.611 - 45.619, 45.621, 45.701 - 45.709, 45.801 - 45.811, and 45.902 in Texas Administrative Code Title 40 (40 TAC), Part 1, Chapter 45, related to the Community Living Assistance and Support Services and Community First Choice (CFC) Services.

The repeal of §§45.101 - 45.105, 45.201, 45.202, 45.211 - 45.218, 45.221 - 45.227, 45.231, 45.301, 45.302, 45.401 - 45.410, 45.503, 45.505, 45.521 - 45.525, 45.531, 45.533, 45.601 - 45.609, 45.611 - 45.619, 45.621, 45.701 - 45.709, 45.801 - 45.811, and 45.902 is adopted without changes to the proposed text as published in the September 2, 2022, issue of the *Texas Register* (47 TexReg 5301). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The adoption repeals all of the rules in 40 TAC Chapter 45 for the Community Living Assistance and Support Services (CLASS) Program authorized under §1915(c) of the Social Security Act. HHSC is adopting new rules regarding the CLASS Program in 26 TAC Chapter 259 elsewhere in this issue of the *Texas Register*.

COMMENTS

The 31-day comment period ended October 3, 2022.

During this period and the public hearing held on September 26, 2022, HHSC did not receive any comments regarding the proposed repeal.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§45.101 - 45.105

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300060

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Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077



SUBCHAPTER B. ELIGIBILITY, ENROLLMENT, AND REVIEW DIVISION 1. ELIGIBILITY AND MAINTENANCE OF INTEREST LIST

40 TAC §§45.201, §45.202

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300061

Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077



DIVISION 2. ENROLLMENT PROCESS

40 TAC §§45.211 - 45.218

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300062

Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077



DIVISION 3. REVIEWS

40 TAC §§45.221 - 45.227

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300063

Karen Ray

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Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077



DIVISION 4. SERVICE BACKUP PLANS

40 TAC §45.231

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300064

Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077



SUBCHAPTER C. RIGHTS AND RESPONSIBILITIES OF AN INDIVIDUAL

40 TAC §§45.301, §45.302

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300065

Karen Ray

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Department of Aging and Disability Services

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077



SUBCHAPTER D. TRANSFER, DENIAL, SUSPENSION, REDUCTION, AND TERMINATION OF SERVICES

40 TAC §§45.401 - 45.410

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300066

Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077



SUBCHAPTER E. SUPPORT FAMILY SERVICES

DIVISION 1. INTRODUCTION

40 TAC §45.503, §45.505

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300067
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077



DIVISION 2. SUPPORT FAMILY AGENCY

40 TAC §§45.521 - 45.525

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300068

Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077



DIVISION 3. SUPPORT FAMILIES

40 TAC §45.531, §45.533

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300069
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077



SUBCHAPTER F. ADAPTIVE AIDS AND MINOR HOME MODIFICATIONS

DIVISION 1. ADAPTIVE AIDS

40 TAC §§45.601 - 45.609

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300070

Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077



DIVISION 2. MINOR HOME MODIFICATIONS
40 TAC §§45.611 - 45.619

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300071

Karen Ray

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Department of Aging and Disability Services

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077



DIVISION 3. CFC ERS

40 TAC §45.621

STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300072

Karen Ray
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Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077



SUBCHAPTER G. ADDITIONAL CMA REQUIREMENTS

40 TAC §§45.701 - 45.709

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300073

Karen Ray

Chief Counsel

Department of Aging and Disability Services

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077



SUBCHAPTER H. ADDITIONAL DSA REQUIREMENTS

40 TAC §§45.801 - 45.811

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300074

Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077



SUBCHAPTER I. FISCAL MONITORING

40 TAC §45.902

STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of

HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS Program.

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 10, 2023.

TRD-202300075

Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

