

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 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

The Texas Health and Human Services Commission (HHSC) adopts the repeal of §355.8068, concerning Local Provider Participation Fund Reporting in Subchapter J, Division 4 and adopts new Subchapter L comprised of §355.8701, concerning Purpose; §355.8702, concerning Definitions; §355.8703, concerning Applicability; §355.8704, concerning Reporting and Monitoring; §355.8705, concerning Post-Determination Review; and §355.8706, concerning State and Federal Reporting.

The repeal of §355.8068 and new §§355.8702, 355.8703, and 355.8706 are adopted without changes as published in the January 14, 2022, issue of the *Texas Register* (47 TexReg 74). The repeal and these new rules will not be republished.

Sections 355.8701, 355.8704, and 355.8705 are adopted with changes to the proposed text as published in the January 14, 2022, issue of the *Texas Register* (47 TexReg 74). These new rules will be republished.

BACKGROUND AND JUSTIFICATION

The purpose of these new rules is to implement the requirements of the 2022-23 General Appropriations Act (GAA), Senate Bill (S.B.) 1, 87th Legislature, Regular Session (Article II, HHSC, Rider 15(b)), which requires HHSC to create an annual report to include: information on all mandatory payments to a Local Provider Participation Fund (LPPF) and all uses for such payments, including the amount of funds from an LPPF for each particular use; the total amount of intergovernmental transfers used to support Medicaid; the total amount of certified public expenditures used to support Medicaid; a summary of any survey data collected by HHSC to provide oversight and monitoring of the use of local funds in the Medicaid program; and all financial reports submitted to the Centers for Medicare and Medicaid Services (CMS).

The repeal of §355.8068, concerning Local Provider Participation Fund Reporting, and new §§355.8701 - 355.8706, concerning Local Funds Monitoring, are necessary to comply with the requirements of 42 CFR §433.51, Public Funds as the State Share of Financial Participation, 42 CFR §433.68, Permissible Health Care-Related Taxes, 42 CFR §433.74, Reporting Requirements, and §§1903(w)(1)(A)(i), 1903(w)(1)(A)(i)(I), and 1903(w)(1)(A)(ii) of the Social Security Act.

COMMENTS

The 31-day comment period ended February 14, 2022. During this period, HHSC received the following comments regard-

ing the proposed rules from one individual and eight entities, including Central Health, Hospital Corporation of America (HCA) Healthcare, Midland Health, Oceans Healthcare, Teaching Hospitals of Texas (THOT), Texas Children's Hospital (TCH), Texas Essential Healthcare Partnerships (TEHP), and Texas Hospital Association (THA). A summary of comments relating to the rules and HHSC's responses follow.

Comment: One commenter recommended allowing an additional 10 business days to the 30 business days currently allowed in §355.8703(b) for the first survey to be completed and to extend from 10 to 14 business days with the possibility of a 10-business day extension by which an entity must furnish additional information to HHSC in response to a risk assessment in §355.8704(d)(2)(B). Another commenter suggested reducing the time allotted for the audit process to prevent undue hardship on a jurisdiction that is undergoing additional review.

Response: HHSC declines to make a change in the rule at this time. HHSC intends for each government entity to submit only one report, regardless of the number of intergovernmental transfers submitted to local funding sources. Once the transition from existing reporting platforms is complete, we expect that the timeframes provided will be sufficient. The review process is designed to ensure a complete and accurate review can be completed prior to making a determination that could adversely impact a governmental entity.

Comment: Several commenters expressed concern that the scope of required data submissions will increase administrative burdens on both local entities and HHSC by requiring the reporting of "other information as determined necessary and appropriate" outside of what is required under federal and state law regarding the use of local funds in Medicaid. A suggestion was made to require the provision of such information only when needed to resolve questions outstanding after the initial survey.

Response: HHSC declines to make a change in the rule at this time. HHSC opts to begin with a broad list of potential information to allow staff to work with the governmental entities to ensure local funds are derived from permissible sources, including gathering the information necessary to provide guidance in modifying current practice (if necessary) to allow them to continue to support the Medicaid program and safety net. HHSC is responsible for oversight of local funds it accepts for use as the state share under federal law, including 42 CFR 433.74(c); however, subject to any administrative and judicial review, CMS is the entity that determines whether a funding source is permissible or impermissible. HHSC maintains unlimited discretion regarding whether and to what extent it will accept funds for use as the non-federal share, and the information required under the proposed rule is necessary for HHSC to conduct accurate and comprehensive oversight. We retain flexibility in the rule to ensure proper oversight of the non-federal share to meet statutory

and regulatory requirements applicable to each state Medicaid agency. This oversight is designed to improve transparency and reduce the risk associated with a deferral or disallowance under federal law.

Comment: Two commenters expressed concern that §355.8704 is vague, has no value for compliance purposes, and requires excessive and open-ended reporting requirements (i.e., transfers of services or value to the governmental entity). The commenters suggested HHSC specify how information is related to current LPPF reporting requirements, narrow to publicly available information, or eliminate these details from the current rule proposal, convene a workgroup of interested parties to develop reports and limit open-ended reporting, and reopen the rule at a future date.

Response: HHSC declines to make changes in response to this comment. HHSC based the reporting requirements contained in the rule on what is necessary to ensure HHSC is providing oversight in compliance with federal statute and regulation. HHSC may make changes to the reporting requirements based on the sufficiency of data received or changes in federal law. In that circumstance, HHSC will seek public comment as necessary pursuant to Texas rulemaking procedure.

Comment: Several commenters expressed concern that the proposed rule requires submission of information that could be used by CMS in the development of future rules and exclusions similar to CMS's proposed and withdrawn Medicaid Fiscal Accountability Regulation (MFAR). Commenters expressed concern that MFAR-like rules, in turn, could create unnecessary risks to the underlying funding structures of supplemental and directed payment programs. One of the commenters recommended deleting the proposed §355.8704(c)(4) and §355.8704(d)(1)(F).

Response: HHSC also remains concerned regarding the potential for CMS' development and adoption of overreaching regulations or policies akin to MFAR. HHSC's most recent communications with CMS regarding MFAR and MFAR-like interpretations of existing federal rules has been transparent and is available to stakeholders on the HHSC Directed Payment Programs website. The specific language in §355.8704(c)(4) and §355.8704(d)(1)(F) as written is intended to provide HHSC with information necessary to demonstrate that the public funds at issue are eligible for use as the non-federal share. HHSC believes that these funds are eligible sources of the non-federal share and declines to make changes to the rule in response to this comment. HHSC does not believe that collection of this information will support any push for regulations or policies that exceed CMS' statutory authority.

Comment: Two commenters requested clarification of the purposes and requirements surrounding both the report in §355.8704(a) - (c) and the survey in §355.8704(d)(1).

Response: Once HHSC has fully implemented the reporting structure anticipated by the rules, HHSC will require only one report annually for each governmental entity. HHSC is responsible for oversight and determines, in its sole discretion, whether to accept or decline local funds for the non-federal share. We retain flexibility in the rule to ensure proper oversight of the non-federal share to meet requirements put in place by the CMS for each state Medicaid agency. This oversight is designed to improve transparency and reduce the risk associated with a CMS deferral or disallowance. HHSC declines to make changes to the rule in response to this comment.

Comment: Two commenters expressed concern over ambiguity and duplication of reporting requirements for the LPPFs. One commenter recommends replacing proposed §355.8704(d)(1)(A) - (J) with language from §355.8068(e) and revising as necessary to include the other methods of finance that the previous rule provided.

Response: HHSC based the reporting requirements contained in the rule on what is necessary to ensure HHSC is providing oversight in compliance with federal statute and regulation. HHSC is responsible for oversight and determines, in its sole discretion, whether to accept or decline local funds for the non-federal share. We retain flexibility in the rule to ensure proper oversight of the non-federal share to meet requirements put in place by CMS for each state Medicaid agency. This oversight is designed to improve transparency and reduce the risk associated with a CMS deferral or disallowance. HHSC declines to make changes to the rule in response to this comment.

Comment: Several commenters stated that existing design features of many programs eliminate links between Intergovernmental Transfers (IGT) and supplemental funds received. One commenter further stated that governmental entities operating an LPPF do not transfer public funds for specific providers and offered suggestions to clarify that dynamic.

Response: HHSC does not agree that a governmental entity would not have knowledge of specific health care providers for which the governmental entity intended to transfer IGT or Certified Public Expenditure (CPE). Each governmental entity chooses which supplemental payment programs it supports and the amount that the governmental entity transfers. The purpose of obtaining information is to allow HHSC to understand and review the arrangements between the governmental entity and the health care providers the governmental entity supports using its local funds. A governmental entity will not be restricted as to the number of health care providers that they may list when completing this reporting, and as such, if a governmental entity is transferring IGT or providing CPE on behalf of all providers in a given geographic area, the governmental entity may indicate that is the case. HHSC will consider whether information from a prior year's survey can be pre-populated for subsequent years so that a governmental entity may reaffirm or amend the list each year, without needing to fully reenter all data and other means of designating the providers the governmental entity intends to support in an effort to reduce administrative burden. HHSC declines to make changes to the rule in response to this comment.

Comment: One commenter stated information on IGT from debt instruments required to be reported in §355.8704(d)(1)(E) might be difficult to determine if the institution uses debt instruments for ongoing operations and not just IGT. The commenter also suggested that not all information on debt instruments may be related to the federal share and recommended §355.8704(d)(1)(E) be modified to state "information on any debt instruments" that a governmental entity uses that are directly related to transferred funds."

Response: HHSC's plans to review information regarding all debt instruments is in response to CMS' ongoing concern to confirm funds received are from a permissible source. HHSC declines to make changes in the rule language in response to this comment.

Comment: Two commenters recommended limiting the scope of §355.8704(d)(1)(G) to reflect the fact that most agreements

between governmental entities and health care providers do not relate to the non-federal share of Medicaid payments.

Response: While HHSC is cognizant of the existence of many agreements unrelated to the non-federal share, HHSC is responsible for ensuring the non-federal share is derived from a permissible source as outlined in §1903(w) of the Social Security Act (SSA). These rules are designed to identify any funding sources that appear to raise compliance concerns in an attempt to prevent potential federal action against the Texas Medicaid program. HHSC declines to make changes in the rule language in response to the comment.

Comment: Two commenters recommended HHSC revise §355.8704(d)(1)(H) to clarify what is meant by "budget revenue."

Response: HHSC has clarified this provision by changing "records of budget revenue received from all sources" to "overview of funds received from all sources available to the governmental entity in its current fiscal year." HHSC seeks summary-level information on funding received from legislative appropriation, federal grants or programs, local taxes, patient revenue, donations, and any other source of funding at the governmental entity's discretion.

Comment: Two commenters requested clarification on how §355.8704(d)(2)(C) could be implemented and recommended using a different term other than "arrangement," such as "funding source" in the rating system.

Response: HHSC agrees that "funding source" is a more accurate description of the findings and has made the change as suggested. HHSC will continue to gather information regarding relationships or agreements between each governmental entity and the providers they support in the Medicaid program to confirm compliance.

Comment: One commenter recommended clarifying §355.8704(d)(2)(B)(i) - (iii) to include how the terms "federal statutes and regulations" are determined and to outline how conflicts between CMS' and HHSC's interpretations of federal statutes and regulations are resolved.

Response: Federal statutes and regulations are those laws and rules that are final and adopted by the U.S. Department of Health and Human Services. To the extent that there are disagreements between HHSC and CMS related to the interpretation or application of those statutes or regulations, HHSC will utilize the available administrative and judicial procedures that are available when such disagreements arise. HHSC will seek information and may provide details to CMS regarding arrangements that CMS would likely deem out of compliance to get additional clarification on permissibility. HHSC declines to change the rule in response to this comment.

Comment: Several commenters proposed HHSC use an evaluation standard, other than green/yellow/red in §355.8704(d)(2)(B)(i) - (iii) that focuses on the approval status of the funding source. The commenters were concerned that the color designations could create mischaracterizations or allow CMS to inappropriately assign risk based on color. One commenter noted that risk labels should be removed entirely because a designation could place a governmental entity in a difficult position to knowingly continue in an arrangement that the State labeled as potentially problematic. Commenters suggested using alternate naming conventions including more neutral terms as are used in other programs and/or removing scores to prevent a mischaracterization by CMS upon learning

a particular governmental entity's designation. One commenter also suggested requesting additional information prior to providing assigned designations to CMS.

Response: HHSC declines to remove designations assigned to each funding source but agrees to replace the color-coding system with the following designations: "likely permissible," "further review required," and "likely impermissible." Sections 355.8704(d)(2)(B)(i) - (iii) and 355.8704(d)(3) are revised accordingly. The intent of the risk assessment is to notify governmental entities where a funding source appears to present a risk to the eligibility of the non-federal share and for the governmental entity to remediate any potentially problematic practices to ensure that all local funds comply with federal and state law. HHSC is responsible for oversight of local funds it accepts for use as the state share under federal law, including 42 CFR 433.74(c); however, subject to any administrative and judicial review, CMS is the entity that determines whether a funding source is permissible or impermissible. HHSC maintains unlimited discretion regarding whether and to what extent it will accept funds for use as the non-federal share, and the funding designations are designed to provide each governmental entity with HHSC's perception of a likely determination from CMS. To protect the integrity of the Texas Medicaid program and safety net, HHSC will not accept funds from a funding source that it deems "likely impermissible" and will perform comprehensive reviews of funding sources designated as "further review required" under the adopted rule as necessary for HHSC to conduct accurate and comprehensive oversight.

Comment: One commenter recommended revising the rule language to state any actions that HHSC will take when determining if IGTs are impermissible and further recommends revising the language categorizing the IGT-entity as "Red" or "Yellow" to be for informational purposes only.

Response: HHSC revises the rule in response to another comment related to the "Red," "Yellow," and "Green" designations and will be designating each funding source as "likely permissible," "further review required," and "likely impermissible." HHSC declines to make changes in rule language in response to this comment, as the designations will be made to inform HHSC action as set forth in the rule.

Comment: A commenter stated that a statistically significant sample is only useful if HHSC's intent is to extrapolate the result of the review to the entire population of IGT-entities or use the results of the reviews to determine if the deep dive pool should be enlarged. The commenter suggested revising language to state that "HHSC will randomly select samples equal to XX% of all IGT-entities categorized as Red and XX% of all IGT-entities categorized as Yellow or to select surveys for review based upon risk analysis, other specific criteria and random sampling."

Response: HHSC declines to revise the rule in response to this comment. The purpose of performing an in-depth review on a statistically significant sample is to make extrapolations and perform more general analyses about the overall risk of the Texas Medicaid program's use of local funding sources.

Comment: One commenter proposed to apply final determinations under §355.8704(g) prospectively and requests the establishment of a process to allow stakeholders to appeal any monitoring program determinations.

Response: HHSC declines to revise the rules as suggested. The process for appealing local funds monitoring program determinations is outlined in §355.8705, Post-Determination Review.

Comment: Two commenters believe the proposed rule does not clearly address the process for a final determination of whether funds are permissible and suggested that §355.8704(g)(2) "permissibility of funds" be deleted or changed to the "appearance of permissibility of funds" and asked whether HHSC would provide its assessment to CMS for its final determination of permissibility of funds. The commenters also requested additional information as to how permissibility is determined and whether HHSC will reject local funds even without CMS input.

Response: HHSC declines to make changes to the rule language based on this comment. HHSC's current process is structured to ensure that HHSC will exhaust all efforts to work with a governmental entity to remediate issues that are found to be outside HHSC's recommended compliance parameters. HHSC will notify the governmental entity prior to contacting CMS. The intent of the risk assessment is to notify governmental entities where a funding source appears to present a risk to the eligibility of the non-federal share and for the governmental entity to remediate any potentially problematic practices to ensure that all local funds comply with federal and state law. HHSC is responsible for oversight of local funds it accepts for use as the state share under federal law, including 42 CFR 433.74(c); however, subject to any administrative and judicial review, CMS is the entity that determines whether a funding source is permissible or impermissible. HHSC maintains unlimited discretion regarding whether and to what extent it will accept funds for use as the non-federal share, and the funding designations are designed to provide each governmental entity with HHSC's perception of a likely determination from CMS. To protect the integrity of the Texas Medicaid program and safety net, HHSC will not accept funds from a funding source that it deems "likely impermissible" and will perform comprehensive reviews of funding sources designated as "further review required" under the adopted rule as necessary for HHSC to conduct accurate and comprehensive oversight.

Comment: Several commenters expressed concern regarding HHSC's intent to recoup all Medicaid payments CMS deems to be linked to an impermissible funding source without any contemplated time limit or if the recoupments would be prorated to all providers in an SDA to maintain CMS' proportional payment requirements.

Response: HHSC deems this comment irrelevant to the local funds monitoring rules. The intent of the local funds monitoring program is to notify governmental entities where a funding source appears to present a risk to the eligibility of the non-federal share and for the governmental entity to remediate any potentially problematic practices to ensure that all local funds comply with federal and state law. HHSC is responsible for oversight of local funds it accepts for use as the state share under federal law, including 42 CFR 433.74(c); however, subject to any administrative and judicial review, CMS is the entity that determines whether a funding source is permissible or impermissible and CMS is the entity that makes deferral or disallowance determinations. If CMS were to take action against any Texas funding source, recoupments would be processed in accordance with the associated program reimbursement rules and prescribed payment methodologies.

Comment: Two commenters stated concern that §355.8704(h) shows intent to proactively seek input from CMS on the permissibility of funding sources prior to exhausting all efforts to work with the governmental entity in question to address any processes that HHSC believes may be impermissible.

Response: HHSC declines to make changes to the rule language based on this comment. HHSC's current process is structured to ensure that HHSC will exhaust all efforts to work with a governmental entity to remediate issues that are found to be outside HHSC's recommended compliance parameters. HHSC will notify the governmental entity prior to contacting CMS.

Comment: A commenter stated that providers will need sufficient time to make other arrangements when the local funds source of the non-federal share is determined to be non-compliant and requests that upon this determination, other governmental entities are given consideration to adjust their budget cycles.

Response: HHSC declines to make changes to the rule language based on this comment. HHSC's current process is structured to ensure that HHSC will exhaust all efforts to work with a governmental entity to remediate issues that are found to be outside HHSC's recommended compliance parameters.

Comment: A commenter requested exempting Disproportionate Share Hospital (DSH) from any sections of the rule that would require transferring public hospitals to account for relationships or transfers concerning all other DSH participants.

Response: Each governmental entity chooses which supplemental payment programs it supports and the amount that the governmental entity transfers. The purpose of obtaining information is to allow HHSC to understand and review the arrangements between the governmental entity and the health care providers the governmental entity supports using its local funds. A governmental entity will not be restricted as to the number of health care providers that they may list when completing this reporting and, as such, if a governmental entity is transferring IGT or CPE on behalf of all providers in a given geographic area, the governmental entity may indicate that is the case. HHSC will consider whether information from a prior year's survey can be pre-populated for subsequent years so that a governmental entity may reaffirm or amend the listing each year, without needing to fully reenter all data, and other means of designating the providers the governmental entity intends to support in an effort to reduce administrative burden. HHSC declines to make changes to the rule in response to this comment.

Comment: A commenter requested HHSC clarify that the funding source's risk assessment score in §355.8704(d)(2)(A) is different from the color category rating system §355.8704(d)(2)(B). Another commenter requested the risk assessment score criteria be specified with more clarity in-line with federal law and state that a governmental entity is not required to make changes based on the designations assigned to each funding source.

Response: HHSC declines to revise the rule in response to this comment. The risk assessment score is used to determine the color category rating. HHSC revises the rule in response to another comment changing the color categories "Red," "Yellow," and "Green" to designating each funding source as "likely permissible," "further review required," and "likely impermissible." The intent of the risk assessment is to notify governmental entities where a funding source appears to present a risk to the eligibility of the non-federal share and for the governmental entity to remediate any potentially problematic practices to ensure that all local funds comply with federal and state law. HHSC is responsible for oversight of local funds it accepts for use as the state share under federal law, including 42 CFR 433.74(c); however, subject to any administrative and judicial review, CMS is the entity that determines whether a funding source is permissible or

impermissible. HHSC maintains unlimited discretion regarding whether and to what extent it will accept funds for use as the non-federal share, and the funding designations are designed to provide each governmental entity with HHSC's perception of a likely determination from CMS. To protect the integrity of the Texas Medicaid program and safety net, HHSC will not accept funds from a funding source that it deems "likely impermissible" and will perform comprehensive reviews of funding sources designated as "further review required" under the proposed rule as necessary for HHSC to conduct accurate and comprehensive oversight. If a governmental entity declines to make changes requested by HHSC with regard to any particular funding source, such funding source will remain ineligible for use as the non-federal share.

Comment: Several commenters recommended broadening the definition of "interested party" in §355.8705(a) to include health care providers who would be harmed by a determination against a governmental entity that has non-federal share funds under review. One of the commenters added that by prohibiting private parties from participating in HHSC's review, HHSC may reach conclusions that fail to consider relevant and necessary information. The commenter suggested that if HHSC will not grant an unlimited appeal right for private hospitals, it should consider the alternative allowing a private party to appeal unless the local governmental entity objects. One commenter raised ongoing provider participation in a lawsuit in federal court as support for this position.

Response: HHSC declines to revise the rule in response to this comment. Within its legal authority, HHSC will endeavor to seek information from the governmental entity that could impact a risk determination prior to issuing its findings. A governmental entity participating in a review is not restricted from coordinating with any entity that it determines necessary to provide information to HHSC for consideration in the local funds monitoring assessment of a given funding source. HHSC has determined that private intervention in federal court is irrelevant to the rules adopted herein.

Comment: Two commenters requested HHSC provide more information about the risk assessment scoring process used to determine risk and at the same time add a savings clause that allows HHSC to modify state regulations that provide clear guidance if federal law changes. One commenter recommended the proposed rule (a) specify appropriate criteria for the risk assessment that clearly reflects applicable federal law, including with respect to LPPFs; and (b) remove any uncertainty about and clearly state that local governmental entities have no obligations to act solely on the basis of a yellow or red risk assessment""this should be the case for transfers by LPPF Administrators, if not by all local governmental entities.

Response: HHSC declines to make any changes to the rule at this time in response to this comment and will update the rule as it deems necessary through formal rulemaking procedure. Based on other comments to the rule, HHSC has elected to revise the funding source categories: "likely permissible," "further review required," and "likely impermissible." As mentioned in response to other comments, there is no distinction between an LPPF Administrator and a governmental entity; an LPPF is merely a health care-related tax that is implemented at the local level. A governmental entity may elect to transfer funds raised from a properly administered health care-related tax to HHSC as support for the non-federal share of the Medicaid program. HHSC, in its exclusive discretion, will determine whether and to what

extent it will use a local funding source as the non-federal share of Medicaid payments. The risk assessment scoring process will take into account federal statute, regulations, and HHSC's obligations under federal law as the state Medicaid agency, as well as applicable state law, to provide oversight of the funding sources a governmental entity proposes using as the non-federal share of Medicaid payments.

Comment: Two commenters requested HHSC provide more information on when the first reporting will be due for each local fund source and the period the reporting will cover.

Response: HHSC declines to make a change to the rule in response to this comment. HHSC will be following the implementation guidelines outlined in the rule. Once all governmental entities are phased in, reporting will only occur once per year.

Comment: A commenter expressed concern regarding the proposed rule's failure to properly distinguish the different roles of being a "transferring governmental entity" versus an "LPPF Administrator" and that the source of public funds differs for a hospital district providing its own public funds, either through IGTs or CPEs, versus entities that are statutorily designated to administer an LPPF. One commenter expressed concerns that the governmental entity has less control over the mandatory payments it collects for the LPPF due to statutory limitations placed on LPPF funds, concern about the governmental entities ability to attest to LPPF funds' origin, and concern that the governmental entity lacks basic executive and enforcement authority under LPPF statutes to monitor and investigate those hospitals subject to LPPF payment obligations, and penalize or rectify instances of non-compliance. A commenter also suggested that governmental entities should not be required to attest to compliance as part of reporting.

Response: Funds raised through a governmental entity's implementation of an LPPF are eligible for use as the non-federal share of Medicaid payments if they meet the requirements of a health care-related tax, as contemplated by §1903(w)(3) of the SSA. Governmental entities that administer an LPPF are authorized to do so by Texas statute. While those enacting statutes have limitations, governmental entities must impose the health care-related tax in a manner that complies with federal statutes and regulations. Additionally, governmental entities must pursue taxpayer non-compliance to the fullest extent of their authority to do so, as they would with any other form of tax it elects to impose in its jurisdiction. HHSC does not view LPPF funds as distinct from any other local source of the non-federal share, and governmental entities transferring local funds to HHSC assert that their funds are eligible for the non-federal share. Local governmental entities are permitted to transfer public funds to HHSC only if the governmental entity deems such funds eligible for use as the non-federal share, and governmental entities will be required to confirm that understanding. This process will verify the source and permissibility of all local funds including LPPF funds. HHSC declines to revise the rule in response to this comment.

HHSC made a revision to §355.8701 by adding "law and associated" to better describe the purpose of the rule. A minor edit was made to §355.8705(b)(4)(B)(iii) and (b)(5) for clarity. Additional non-substantive changes were made throughout to improve clarity.

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 4. MEDICAID HOSPITAL SERVICES

1 TAC §355.8068

STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Health and Safety Code §300.0154 and §300A.0154, which require the Executive Commissioner of HHSC to adopt rules relating to LPPF reporting.

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 April 29, 2022.

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Karen Ray

Chief Counsel

Texas Health and Human Services Commission

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For further information, please call: (737) 867-7877



SUBCHAPTER L. LOCAL FUNDS MONITORING

1 TAC §§355.8701 - 355.8706

STATUTORY AUTHORITY

The new sections are adopted under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Health and Safety Code §300.0154 and §300A.0154, which require the Executive Commissioner of HHSC to adopt rules relating to LPPF reporting.

§355.8701. Purpose.

(a) As part of the oversight required by federal and state law, the Texas Health and Human Services Commission (HHSC) requires all non-federal share funds that are provided by local governmental entities, including funds transferred or certified by governmental entities as the non-federal share of Medicaid supplemental and directed payments, to report the source of such funds.

(b) HHSC will use the information reported under this subchapter along with information already collected by HHSC to comply with state and federal law and associated reporting requirements. HHSC may publish the information on the HHSC website at HHSC's discretion.

§355.8704. Reporting and Monitoring.

(a) A governmental entity that provides funds for use as the non-federal share in the Medicaid program must report information to

the Texas Health and Human Services Commission (HHSC) in a form and format to be determined by HHSC.

(b) The information must be reported at least annually, no later than October 31st, or upon request by HHSC.

(c) HHSC will open the information reporting system prior to the end of the federal fiscal year and will review reported information based on governmental entity funding sources, including:

(1) local provider participation funds (LPPFs) authorized by the Texas Health and Safety Code Chapter 288 *et seq.* or other provider tax structures;

(2) non-LPPF provider taxes;

(3) ad valorem tax revenue;

(4) patient revenue;

(5) other local funding sources; and

(6) donations.

(d) HHSC will use the information from the report to monitor each governmental entity fund source and determine the likelihood that the funds are permissible for use in the Medicaid program. The monitoring will include the following:

(1) Survey. An electronic annual survey that will request:

(A) a list of all health care providers for which the governmental entity transferred or certified funds as the non-federal share;

(B) the relationship between the governmental entity and the health care provider, including a copy of any formal or informal agreements between the entity and the provider;

(C) the type of health care provider (i.e. ambulance, dentist, hospital, intermediate care facilities for individuals with an intellectual disability, nursing facility, physician practice group) and ownership status;

(D) the source of the funds used as the non-federal share transferred by the governmental entity;

(E) information on any debt instruments (bonds, loans, etc.) that a governmental entity utilizes and the relationship of the instrument to any transferred funds;

(F) to the extent patient revenue is used, a description of payor mix during the federal fiscal year and any anticipated changes;

(G) any transfer of funds or provision of services from a health care provider or entity related to a health care provider to the governmental entity, including in-cash or in-kind donations, or any other transfer of value;

(H) overview of funds received from all sources available to the governmental entity in its current fiscal year;

(I) other information as determined necessary and appropriate to determine compliance with federal or state statutes and regulations, including attestations of compliance from the local government; and

(J) any publicly available information, such as:

(i) audio recordings of discussions or written minutes from public meetings to set assessment rates or gather feedback from providers or their representatives;

(ii) written correspondence describing the entity's funding dedicated to the Medicaid program;

(iii) URL links to websites that describe the funds transferred or certified as the non-federal share or any agreement between the governmental entity and a health care provider or entity related to a health care provider; and

(iv) copies of any public notices, local orders, announcements, or other related documentation.

(2) Risk Assessment.

(A) The risk assessment will include:

(i) a risk assessment score based on self-reported annual survey responses; and

(ii) any adjustments made at HHSC's discretion based on supplemental documentation and discussion with the impacted governmental entity and review of additional documentation requests as may be needed, in HHSC's sole discretion, to confirm, audit, or modify self-reported data and qualitative descriptions.

(B) Funding sources will be categorized as likely permissible, further review required, or likely impermissible. HHSC will contact entities whose funding sources are categorized as further review required or likely impermissible to obtain additional information. The entity must furnish the requested information to HHSC within ten (10) business days of the date of the request.

(i) Likely permissible. Funding source appears to comply with federal and state statutes and regulations.

(ii) Further review required. Funding source compliance with federal and state statutes and regulations is unclear.

(iii) Likely impermissible. Funding source does not appear to comply with federal or state regulations.

(3) In-depth Review. HHSC will select a sample of survey respondents for an in-depth review in which HHSC may examine supporting documentation, either on-site or electronically, at HHSC's discretion. HHSC will select a sample of survey respondents sufficient to result in a 95 percent confidence level with a 5 percent margin of error. HHSC will initially select entities that are in the likely impermissible and further review required categories, and if additional entities are necessary to complete a sample size, they will be randomly selected from the likely permissible category. HHSC will notify a governmental entity if an on-site review will occur at least ten (10) calendar days prior to the visit.

(4) Determination. Determination of completeness of reporting and HHSC's assigned risk assessment for each funding source.

(5) Post-Determination Review. Post-determination review will be conducted as outlined in this subchapter.

(6) Federal Reporting.

(e) If a governmental entity fails to submit the required information or supplemental documentation as requested by HHSC by the deadline specified in this section, HHSC will not accept further transfer of funds for any Medicaid program from the governmental entity until the reporting requirement is satisfied and may process recoupments for any payments resulting from funds transferred determined to be non-compliant.

(f) Prior to the applicable deadline, a governmental entity may request an extension of up to ten (10) business days for any deadline contained in this subchapter. HHSC may grant or reject such request at its sole discretion.

(g) HHSC will notify the governmental entity upon determination of:

(1) reporting compliance;

(2) permissibility of funds; and

(3) a risk assessment category for each funding source.

(h) After review of any additional information provided, HHSC may also seek input on the likely permissibility of the funds from the Centers for Medicare and Medicaid Services (CMS). In the event HHSC elects to request input from CMS regarding the compliance of a specific funding source as contemplated by this subchapter, HHSC will notify the governmental entity prior to requesting such review. HHSC may, at its discretion, accept or reject local funds from the governmental entity for such funding source while awaiting CMS input; however, HHSC will recoup all Medicaid payments generated from a funding source deemed impermissible by CMS at any time.

§355.8705. *Post-Determination Review.*

(a) An interested party who disputes a determination under §355.8704(g) of this chapter (relating to Reporting and Monitoring) may request post-determination review under this section.

(b) The purpose of a post-determination review is to provide for the informal and efficient resolution of the matter(s) in dispute. A post-determination review is not a formal administrative hearing and is conducted according to the following procedures:

(1) The Texas Health and Human Services Commission (HHSC) must receive a request for a post-determination review electronically to PFD_LFM@hhs.texas.gov no later than 30 calendar days from the date of a notification under §355.8704(g) of this chapter. If the 30th calendar day is a weekend day, national holiday, or state holiday, then the first business day following the 30th calendar day is the final day the receipt of the written request will be accepted. HHSC will extend this deadline for an additional 15 days if it receives a request for the extension prior to the initial 30-day deadline. A request for a post-determination review or extension that is not received by the stated deadline will not be accepted.

(2) An interested party must, with its request for a post-determination review, submit a concise statement of the specific determinations it disputes, its recommended resolution, and any supporting documentation the interested party deems relevant to the dispute. It is the responsibility of the interested party to render all pertinent information at the time it submits its request for a post-determination review. A request for a post-determination review that does not meet the requirements of this subparagraph will not be accepted.

(3) The written request for the post-determination review or extension must be signed by a legally authorized representative for the interested party. A request for a post-determination review or extension that is not requested by a legally authorized representative of the interested party will not be accepted.

(4) On receipt of a request for post-determination review that meets the requirements of this section, HHSC will:

(A) acknowledge receipt of the request to the requestor; and

(B) coordinate the review of the information submitted by the interested party and may request additional information from the interested party, which must be received no later than 14 calendar days from the date of the written request for additional information.

(i) If the 14th calendar day is a weekend day, national holiday, or state holiday, then the first business day following the 14th calendar day is the final day the receipt of the additional information will be accepted.

(ii) Information received after 14 calendar days may not be used in the post-determination review decision unless the interested party requests an extension and receives written approval from HHSC staff to submit the information after 14 calendar days. HHSC must receive a request for an extension to the 14-calendar-day due date prior to the 14th calendar day.

(iii) HHSC may make subsequent requests for additional information. If HHSC makes a subsequent request for additional information, the timeframes for submission and receipt of the information apply just as they applied to the initial request for additional information.

(5) Upon review and receipt of all requested supplemental information, HHSC will provide a final decision no later than 180 days after receipt of the request or receipt of supplemental information, whichever is later. An interested party may request an update on the status of the post-determination review at any time.

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 April 29, 2022.

TRD-202201700

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

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For further information, please call: (737) 867-7877



TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 28. TEXAS AGRICULTURAL FINANCE AUTHORITY

SUBCHAPTER G. RURAL ECONOMIC DEVELOPMENT FINANCE PROGRAM

4 TAC §§28.70 - 28.80, 28.83 - 28.87

The Texas Agricultural Finance Authority (Authority), a public authority within the Texas Department of Agriculture (Department) adopts new Title 4, Part 1, Chapter 28, Subchapter G, §§28.70 - 28.80 and 28.83 - 28.87, to the Texas Administrative Code, providing rules for the establishment, implementation, and administration of the Rural Economic Development Finance Program. The rules are adopted without changes to the proposed text as published in the March 18, 2022, issue of the *Texas Register* (47 TexReg 1359) and will not be republished.

Under this new program, the Authority is offering two new types of loans, Texas Rural Community Loans; and Agriculture and Community Economic Development Loans, to provide financial assistance to eligible entities, including agricultural businesses and other rural economic development projects. The rules delineate specific standards of eligibility, application requirements and procedures, and application evaluation criteria, and addresses loan transactions, including commitments, collateral administration, and default procedures.

No comments on the proposed rules were received.

The rules are adopted pursuant to §12.016 of the Texas Agriculture Code (Code), which authorizes the Department to adopt rules as necessary for the administration of its powers and duties under the Code, and §§58.022(1) and 58.023 of the Code, which further authorizes the Authority to adopt and enforce by-laws, rules, and procedures in order to carry out its functions under Chapter 58 of the Code.

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

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Skyler Shafer

Assistant General Counsel

Texas Department of Agriculture

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



TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §1.16

The Texas Higher Education Coordinating Board (Coordinating Board) adopts the repeal of Title 19, Part 1, Chapter 1, Subchapter A, §1.16, Contracts, Including Grants, for Materials and/or Services, without changes to the proposed text as published in the January 28, 2022, issue of the *Texas Register* (47 TexReg 237). The rule will not be republished.

The repeal of the rule is part of the agency's adoption, via separate rule making, of a new §1.16 that increases the dollar thresholds of contracting delegated to the Commissioner of Higher Education. The repeal and new rule streamline the agency's process while maintaining clarity about authority to contract.

No comments were received regarding the adoption of the repeal.

The repeal is adopted under Texas Education Code §61.028(a), which provides the Coordinating Board with the authority to delegate authority to the Commissioner of Higher Education; and Texas Government Code §2261.254, which requires the Board to execute contracts and authorizes the Board to delegate authority to the Commissioner and Deputy Commissioner to execute contracts.

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 April 29, 2022.

TRD-202201686

Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Effective date: May 19, 2022
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For further information, please call: (512) 427-6297



19 TAC §1.16

The Texas Higher Education Coordinating Board (Coordinating Board) adopts new rules in Title 19, Part 1, Chapter 1, Subchapter A, §1.16, Contracts, Including Grants, for Materials and/or Services, with changes to the proposed text as published in the January 28, 2022, issue of the *Texas Register* (47 TexReg 238). The rule will be republished.

The adopted repeal and new §1.16 clarifies and streamlines the agency's contracting process by doing the following:

Subsection (a):

Increases the authority of the Commissioner of Higher Education to execute contracts up to \$5 million.

Clarifies that the Commissioner will provide written notification to the Board Chair, Board Vice Chair, and Chair of the Agency Operations Committee prior to execution of the contract (or other Agreement) that totals more than \$1 million, including all amendments.

Sets out the reporting requirements that the Director of Contracts and Procurement will comply with, as required by law.

Subsection (b):

Provides that an Agreement that exceeds \$5 million requires Board approval, except those that the agency is required by law to execute, e.g. non-discretionary pass through funding.

Sets out the reporting requirements that the Director of Contracts and Procurement will comply with, as required by law, for contracts exceeding \$5 million.

Subsection (c):

Provides that a Deputy or Associate Commissioner has authority to enter into an Agreement that totals \$100,000 or less.

Provides that an Assistant Commissioner has authority to enter into an Agreement that totals \$10,000 or less.

Subsection (d):

Requires the Commissioner to provide a quarterly report to the Board listing all Agreements entered into by the Board that are \$10,000 or greater.

Subsection (e):

Sets out the statutory requirement for the Board to approve in an Open Meeting certain changes to contracts for goods or services, as set out in Government Code Chapter 2155.

Subsection (f):

Requires the agency to use the procedures set out in its Procurement and Contract Management and Grant Management Handbooks to ensure adequate contract and grant management and monitoring.

No comments were received regarding the adoption of the new rule.

The new rule is adopted under Texas Education Code §61.028(a), which provides the Coordinating Board with the authority to delegate authority to the Commissioner of Higher Education; Texas Government Code §2261.254, which requires the Board to execute contracts over \$1 million, and authorizes the Board to delegate authority to the Commissioner and Deputy Commissioner to execute such contracts; and Texas Government Code §2261.255, governing requirements for contracts exceeding \$5 million.

§1.16. *Contracts, Including Grants, for Materials and/or Services.*

(a) The Board delegates to the Commissioner authority to approve and enter into all payable and receivable Agreements, including contracts, grants, and other agreements, and interagency contracts for which the Agreement, inclusive of all amendments, totals \$5 million or less.

(1) The Commissioner is authorized to approve and sign all Agreements that total up to \$5 million, inclusive of all amendments subject to the notification requirements in paragraph (2) of this subsection.

(2) The Commissioner shall provide written notification to the Board Chair, Board Vice Chair, and Chair of the Agency Operations committee of any Agreement that totals \$1 million or more, inclusive of all amendments, prior to execution of the Agreement.

(3) For each contract for the purchase of goods or services that has a value exceeding \$1 million, there must be contract reporting requirements that provide information on the following:

(A) compliance with financial provisions and delivery schedules under the contract;

(B) corrective action plans required under the contract and the status of any active corrective action plan; and

(C) any liquidated damages assessed or collected under the contract.

(D) Verification is required of:

(i) the accuracy of any information reported under this subsection that is based on information provided by a contractor; and

(ii) the delivery time of goods or services scheduled for delivery under the contract.

(b) Any Agreement exceeding \$5 million, inclusive of all amendments, requires Board approval prior to execution of the contract or other Agreement, except those described in paragraph (1) of this subsection. The Commissioner is authorized to sign an Agreement or amendment that totals more than \$5 million that has been approved by the Board.

(1) Agreements exceeding \$5 million that the agency is required by law to enter into, i.e., those that are appropriated to the agency as non-discretionary funding to a third party, do not require Board approval and are delegated to the Commissioner for approval and signature.

(2) For each contract for the purchase of goods or services that has a value totaling \$5 million or more, the procurement director must:

(A) verify in writing that the solicitation and purchasing methods and contractor selection process comply with state law and agency policy; and

(B) submit to the Board information on any potentially significant issue that may arise in the solicitation, purchasing, or contractor selection process.

(c) In addition to the Commissioner, the following employees have authority to approve an Agreement:

(1) A Deputy or Associate Commissioner if the Agreement, inclusive of all amendments, totals \$100,000 or less.

(2) An Assistant Commissioner, in addition to a Deputy or Associate Commissioner, with primary oversight of a particular Agreement if the Agreement, inclusive of all amendments, totals \$10,000 or less.

(d) The Commissioner shall provide a report to the Board, at least quarterly, describing all Agreements entered into by the agency during the preceding quarter, the total of which, inclusive of all amendments, is \$10,000 or greater.

(e) The Board shall, in an open meeting, consider any material change to all contracts for goods or services awarded under Texas Government Code, Chapter 2155. A material change to a contract includes extending the length or postponing the completion of a contract for six months or more; or increasing the total consideration to be paid under a contract by at least 10 percent, including by substituting certain goods, materials, products, or services. Goods are supplies, materials, or equipment. Services are the furnishing of skilled or unskilled labor or professional work but do not include a professional service subject to Subchapter A, Chapter 2254, Texas Government Code, service of a state employee, consulting service or service of a consultant as defined by Subchapter B, Chapter 2254, or the service of a public utility.

(f) Agency staff shall utilize THECB's Procurement and Contract Management Handbook or Grant Management guidelines and the THECB's Risk Assessment tool to determine which Agreements require enhanced contract or grant monitoring.

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

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Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

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For further information, please call: (512) 427-6297



CHAPTER 6. HEALTH EDUCATION, TRAINING, AND RESEARCH FUNDS

SUBCHAPTER F. PLANNING GRANTS FOR GRADUATE MEDICAL EDUCATION

19 TAC §6.107, §6.110

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to Title 19, Part 1, Chapter 6, Subchapter F, §6.107, Definitions and §6.110, General Information, without changes to the proposed text as published in the January 28, 2022, issue of the *Texas Register* (47 TexReg 240). The rules will not be republished.

The adopted amendments align Texas Administrative Code rules with statutory changes regarding the inclusion of podiatric medicine residency programs in the definition of a Graduate Medical Education Program and provide clarification regarding grantee reporting and return of award funds.

The adopted amendment to §6.107 of the Texas Administrative Code implements legislative changes made to Texas Education Code Chapter 58A, Section 58A.001(5)(b) by House Bill 2509 (87R). The adopted addition of §6.110(d) provides the requirement that grantees return unexpended funds, remaining funds if award is terminated, and funds expended on unallowed costs.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Education Code, Sections 58A.001(5)(b), which makes podiatric medicine an eligible program for grants under Chapter 58A; 58A.003, which requires the Board to seek reimbursement for any grant funds that the recipient fails to use in accordance with law; and Sections 58A.021 and 58A.022, which provides the Coordinating Board with the authority to award and administer one-time graduate medical education planning and partnership grants to hospitals, medical schools, and community-based, ambulatory patient care centers located in this state that seek to develop new graduate medical education programs with first-year residency positions.

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

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Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

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For further information, please call: (512) 427-6166



SUBCHAPTER G. UNFILLED POSITION GRANTS FOR GRADUATE MEDICAL EDUCATION

19 TAC §6.122, §6.125

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to Title 19, Part 1, Chapter 6, Subchapter G, §6.122, Definitions, and §6.125, General Information, without changes to the proposed text as published in the January 28, 2022, issue of the *Texas Register* (47 TexReg 241). The rules will not be republished.

The adopted amendments align Texas Administrative Code rules with statutory changes regarding the inclusion of podiatric medicine residency programs in the definition of a Graduate Medical Education Program and provide clarification regarding grantee reporting and return of award funds.

The adopted amendment to §6.122 of the Texas Administrative Code implements legislative changes made to Texas Education Code Chapter 58A, Subchapter A, Section 58A.001(5)(b) by House Bill 2509 (87R). The adopted addition of §6.125(d) provides the requirement that grantees return unexpended funds,

remaining funds if award is terminated, and reimburse funds expended on unallowed or unauthorized costs, as required by Section 58A.003.

No comments were received regarding the adoption of the amendments.

The amendment is adopted under Texas Education Code, Sections 58A.001(5)(b), which makes podiatric medicine an eligible program for grants under Chapter 58A; 58A.003, which requires the Board to seek reimbursement for any grant funds that the recipient fails to use in accordance with law; and Sections 58A.021 and 58A.023, which provides the Coordinating Board with the authority to award and administer grants to graduate medical education programs to enable those programs to fill first-year residency positions that are accredited but unfilled as of July 1, 2013.

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

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Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

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For further information, please call: (512) 427-6166



SUBCHAPTER H. GRANTS FOR NEW AND EXPANDED PROGRAMS FOR GRADUATE MEDICAL EDUCATION

19 TAC §6.137, §6.140

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to Title 19, Part 1, Chapter 6, Subchapter H, §6.137, Definitions, and §6.140, General Information, without changes to the proposed text as published in the January 28, 2022, issue of the *Texas Register* (47 TexReg 242). The rules will not be republished.

The adopted amendments align Texas Administrative Code with statutory changes regarding the inclusion of podiatric medicine residency programs in the definition of a Graduate Medical Education Program and provide clarification regarding return or reimbursement of award funds.

The adopted amendment to §6.137 of the Texas Administrative Code implements legislative changes made to Texas Education Code Chapter 58A, Subchapter A, Section 58A.001(5)(b) by House Bill 2509 (87R). The adopted addition of §6.140(d) provides the requirement that grantees return unexpended funds, remaining funds if award is terminated, and reimburse funds expended on unallowed or unauthorized costs, as required by Section 58A.003.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Education Code, Sections 58A.001(5)(b), which makes podiatric medicine an eligible program for grants under Chapter 58A; 58A.003, which re-

quires the Board to seek reimbursement for any grant funds that the recipient fails to use in accordance with law; and 58A.021 and 58A.024, which provide the Coordinating Board with the authority to award and administer grants to eligible graduate medical education programs to enable those programs to fill first-year residency positions that are accredited but unfilled as of July 1, 2013.

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

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Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

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For further information, please call: (512) 427-6166



SUBCHAPTER I. RESIDENT PHYSICIAN EXPANSION GRANT PROGRAM

19 TAC §§6.175 - 6.184

The Texas Higher Education Coordinating Board (Coordinating Board) adopts the repeal of Title 19, Part 1, Chapter 6, Subchapter I, §§6.175 - 6.184, Resident Physician Expansion Grant Program, without changes to the proposed text as published in the January 28, 2022, issue of the *Texas Register* (47 TexReg 244). The rules will not be republished.

The adopted repeal removes agency rules that no longer have statutory authority.

Authority for Subchapter I was provided by Texas Education Code (TEC), Section 61.511 (83R) on September 1, 2013, which provided the Coordinating Board with the authority to administer the Resident Physician Expansion Grant Program to encourage creation of new graduate medical education positions through community collaboration and innovative funding. The adopted repeal of Subchapter I of the Texas Administrative Code is based on the nonrenewal and expiration of TEC Section 61.511 on September 1, 2015.

No comments were received regarding the adoption of the repeal.

The repeal is adopted under Texas Education Code, Section 61.511, which provided the Coordinating Board with the authority to administer the Resident Physician Expansion Grant Program to encourage creation of new graduate medical education positions through community collaboration and innovative funding. Rulemaking authority lapsed when Section 61.511 expired on September 1, 2015.

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

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Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6166



CHAPTER 13. FINANCIAL PLANNING SUBCHAPTER M. TOTAL RESEARCH EXPENDITURES

19 TAC §13.303

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to Title 19, Part 1, Chapter 13, Subchapter M, §13.303, Standards and Accounting Methods for Determining Total Research Expenditures, without changes to the proposed text as published in the November 5, 2021, issue of the *Texas Register* (46 TexReg 7493). The rule will not be republished.

The adopted amendment in §13.303(c)(1), clarifies that the narrow definition of research expenditures used in the Coordinating Board's Research Expenditure Survey does not include pass-through funds that are passed from an institution to a sub-recipient, if the sub-recipient is another academic or health related entity in order to avoid double-counting of expenditures that are used for the calculation of state research fund distribution. The pass through of funds from one institution of higher education to another is not itself an expenditure of funds pursuant to Education Code §62.053 or 19 Texas Administrative Code §13.302.

Comments: Comments were received from four institutions in The University of Texas System (The University of Texas at Arlington, The University of Texas at El Paso, The University of Texas at San Antonio, and The University of Texas at Tyler) regarding four areas of concern:

Pass-through funds to other public institutions would no longer be counted as total research expenditures.

The National Center for Education Statistics (NCSES) nationwide survey of research expenditures allows counting of pass-through funds. That survey is the standard used for national comparisons of research intensity, e.g., the Carnegie classification of research institutions.

National Research University Fund (NRUF) set different criteria for the allocation of research funds and maintenance of national standards should be encouraged.

The proposed amendment to the rule will discourage collaboration and interdisciplinary and collaborative research across Texas institutions.

Response: The Coordinating Board disagrees with the comments based on the following:

The proposed rule change would allow expenditures of pass-through funds only at either the original or receiving institution, if funds were passed between Texas public institutions. No longer could both institutions include the funding as research expenditures. While such occurrences are rare and amounts are typically small, the proposed amendment would further reduce the chance of double counting.

The NCSES survey allows counting of pass-through funds. The national and Texas surveys do not use a one-to-one equivalent methodology. The proposed rule change continues to allow counting of pass-through funds to entities other than Texas public institutions.

Competitiveness for NRUF does not come into play as result of the rule change. The Standards and Accounting Methods for Restricted Research Expenditures already prohibit double counting of pass-through funds between institutions competing for the same state dollars.

A more accurate accounting of research expenditures would not likely inhibit collaboration between institutions. Researchers who collaborate within and between institutions are concerned about the grant amounts (obligations) awarded to each investigator and may not necessarily be as concerned about institutional research expenditures used for formula distribution of state appropriations.

The amendment is adopted under Texas Education Code, Sections 62.051-62.0535, which provides the Coordinating Board with the authority to prescribe standards and accounting methods for determining the amount of total research funds expended

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

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Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

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For further information, please call: (512) 427-6166



CHAPTER 22. STUDENT FINANCIAL AID PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §§22.3, 22.6, 22.11

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to Title 19, Part 1, Chapter 22, Subchapter A, §22.3, Student Compliance with Selective Service Registration, §22.6, Applying for State Financial Aid, and §22.11, Provisions specific to the TEXAS Grant, TEOG, TEG, and Texas Work-Study Programs, without changes to the proposed text as published in the January 28, 2022, issue of the *Texas Register* (47 TexReg 244). The rules will not be republished.

Texas Education Code, Section 51.9095, outlines certain requirements regarding Selective Service registration regarding state financial aid eligibility, while directing the Coordinating Board to adopt rules for the administration of the section. Texas Administrative Code, Section 22.3 aligned the administration of this requirement with the federal requirements regarding Selective Service and the receipt of federal financial aid. With the elimination of the federal requirements, Section 22.3 is amended to eliminate reference to the federal process and to outline the administrative process for the state requirement. The amended rule acknowledges that the intent of the statute

can be achieved through the submission of either the Selective Service Statement of Registration Status or documentation from the Selective Service System demonstrating the applicant's Selective Service registration.

Texas Education Code, Section 61.07762, requires the Coordinating Board to adopt procedures that allow an applicant to complete the Texas Application for State Financial Aid (TASFA) through an electronic submission process in the portal that provides the common application form. To allow applicants the opportunity to use the online TASFA, regardless of which Texas institution of higher education they plan to attend, the Texas Administrative Code, Section 22.6, is amended to clarify that institutions of higher education are required to accept the data submitted through the newly developed online TASFA, which will be the sole, acceptable online version of the TASFA. This amendment implements the legislative mandate to provide for TASFA completion through Apply Texas, the State's common application form portal. This amendment provides a modern, accessible, and uniform method for students to apply for financial aid.

The General Appropriations Act for the 2022-2023 Biennium, Article III, Higher Education Coordinating Board, Rider 17, altered the maximum percentage and dollar amount that an institution may transfer between the Texas College Work-Study Program and the state grant program in which the institution participates: the TEXAS Grant, the Texas Educational Opportunity Grant, or the Tuition Equalization Grant. Texas Administrative Code, Section 22.11, is amended to align with the new maximum percentage and dollar amounts. Texas Education Code, Sections 56.077, 56.303, 56.403, and 61.229, authorize the Coordinating Board to adopt rules regarding the administration of the Texas College Work-Study Program, the TEXAS Grant Program, the Texas Educational Opportunity Grant Program, and the Tuition Equalization Grant Program, respectively.

No comments or were received regarding the adoption of the amendments.

The amendments are adopted under Texas Education Code, Section 51.9095, 56.077, 56.303, 56.403, and 61.229, which provide the Coordinating Board with the authority to establish rules related to the affected state financial aid programs.

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

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Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

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For further information, please call: (512) 427-6365



TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 228. PAIN MANAGEMENT

22 TAC §228.1

The Texas Board of Nursing (Board) adopts amendments to §228.1, relating to *Standards of Practice*, with changes to the proposed text published in the January 7, 2022, issue of the *Texas Register* (47 TexReg 13). The rule will be republished.

Changes to the Adopted Text. The Board received one joint comment on the proposal. In response to the written comments on the published proposal, the Board has made changes to §228.1(i)(1) and (2) as adopted. These changes, however, do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice. Further, the Board believes these changes address the commenters' concerns.

Reasoned Justification. In April 2018, and in accordance with the Government Code §2001.039, the Board filed a notice of intention to review and consider for re-adoption, re-adoption with amendments, or repeal, §228.1 contained in Title 22, Part 11, of the Texas Administrative Code, pursuant to the 2015 rule review plan adopted by the Board at its July 2015 meeting. The proposed rule review was published in the *Texas Register* on April 6, 2018, (43 TexReg 2167) for public comment. Written comments were received from the APRN Alliance (Alliance). The Board considered the Alliance's written comments at its July 2018 meeting and charged the Board's Advanced Practice Nursing Advisory Committee (APNAC) with reviewing the written comments and making recommendations to the Board regarding amendments to §228.1.

The APNAC met on December 10, 2018, to consider the Board's charge. At its October 2021 Board meeting, the Board considered the Alliance's written comments; the APNAC's recommendations regarding amendments to §228.1; and Staff's recommendations regarding amendments to the rule. The Board decided to make some, but not all, of the Alliance's suggested changes to the rule. The Board re-adopted §228.1 without changes in the November 26, 2021, edition of the *Texas Register* to complete the outstanding rule review. The Board then proposed separate rule amendments to §228.1 in the January 7, 2022, edition of the *Texas Register* to address the Alliance's remaining comments.

Explanation of Amendments. In response to the Alliance's written comments, as well as recent changes to the Occupations Code Chapter 168, the Board proposed amendments to subsection (i). Subsection (i) applies to pain management clinics, as that term is defined in the Occupations Code §168.001. The Occupations Code §168.201(c) requires the owner or operator of a pain management clinic to be on-site at the clinic at least 33% of the clinic's total number of operating hours and to review at least 33% of the total number of patient files of the clinic, including the patient files of a clinic employee or contractor to whom authority for patient care has been delegated by the clinic. The current rule text applies these requirements to APRNs. However, the owner or operator of a pain management clinic, as defined by statute, does not include an APRN. Section 228.1 was originally enacted during the height of the operation of pill mills, and the Board received complaints involving clinics where APRNs were working without physician involvement, in some cases without any delegation agreement or physician collaboration. Requiring on-site presence and additional chart review was intended, at that time, to ensure appropriate delegation and collaboration in the interest of patient safety. Since the enactment of that provision, however, the Board has seen a reduction in pill mill activity due to increased enforcement efforts, federal regulation of schedule II medications, and increased awareness at both the state and fed-

eral level. Further, APRNs who prescribe are currently required by the Occupations Code Chapter 157 to meet prescriptive authority agreement and chart review requirements with their delegating physicians. Those requirements still apply to APRNs working in pain management clinics. Based upon these factors, the APNAC felt the requirements in §228.1 for additional chart review were unnecessarily duplicative. Further, the APNAC felt that requiring an APRN to be on-site with a physician at a pain management clinic more often than what was required by statute would be overly restrictive and unlikely to promote a safer patient environment. As such, the APNAC recommended striking subsections (i)(1) and (2) from the current rule. The Board agreed with the recommendations of the APNAC in this regard and proposed striking these subsections from the rule for these reasons.

Further, the Occupations Code §168.002 was amended in September 2019 by House Bill (HB) 3285 to eliminate the prior exemption from which subsection (i)(4) was derived. Under the prior law, a clinic owned or operated by an APRN who treated patients in the nurse's area of specialty and who personally used other forms of treatment with the issuance of a prescription for a majority of the patient was exempt from the requirements of the chapter. HB 3285 eliminated that exemption from the statute. For consistency with this statutory change, the Board proposed eliminating (i)(4) from the rule in its entirety.

The Board also proposed minor editorial changes to subsection (i)(5) for additional clarity in the rule text.

The proposed amendments were published in the January 7, 2022, edition of the *Texas Register*, and the Board received one joint written comment from the Texas Medical Association and the Texas Pain Society regarding the proposed amendments. The Board considered the written comments at its April 2022 meeting and decided to make changes to the rule text as adopted to address the written comments.

How the Section Will Function. The adopted amendments to §228.1(i) eliminate existing paragraphs (1), (2), and (4) from the subsection and re-arrange the remainder of the subsection accordingly. The adopted amendment to newly numbered §228.1(i)(1) requires an APRN to ensure that s/he is in compliance with all other requirements for delegation of prescriptive authority for medications as set forth in Board rule and the Occupations Code Chapter 157. The adopted amendment to newly numbered §228.1(i)(2) clarifies that an APRN cannot own or operate a pain management clinic, as that term is defined by the Occupations Code Chapter 168 and any applicable rules promulgated by the Texas Medical Board.

Summary of Comments Received. The Board received one joint comment from the Texas Medical Association and the Texas Pain Society. The commenters generally state that they that have no opposition to the proposed amendments and agree they are consistent with the underlying statutory law. However, the commenters state that they have two suggestions for clarity in the rule.

First, the commenters recommend adding a reference to "the Occupations Code" for clarification in proposed §228.1(i)(1). Specifically, the commenters recommend including "and the Occupations Code" after the phrase "Board rule". The commenters state that it's important to re-iterate that the Occupations Code controls the requirements for delegation for prescriptive authority to prevent unnecessary confusion or noncompliance with the law.

Second, the commenters recommend striking the last sentence from proposed amended §228.1(i)(2) as it may cause unintended confusion since there is no exemption or other way to fall outside the certification requirement for a pain management clinic that applies to an APRN after the passage of House Bill 3285 (86th Legislative Session). The commenters alternatively suggested wording for clarification if the sentence is not eliminated entirely.

Agency Response to Comments: The Board generally agrees with the commenters' suggestions and has made changes to the rule text as adopted in order to improve the section's clarity. In addition to the recommended language of the commenters, the Board has amended §228.1(i)(1) as adopted to include specific reference to the Occupations Code Chapter 157, which contains the statutory requirements for the delegation of prescriptive authority in this state, in lieu of a more general reference to the Occupations Code, as suggested by the commenters. Further, with regard to adopted §228.1(i)(2), the Board has eliminated the second sentence in the proposed paragraph in its entirety, as recommended by the commenters. The Board has also added clarifying language referencing the Occupations Code Chapter 168, which contains the statutory definition of a pain management clinic in this state, and rules promulgated by the Texas Medical Board that refer to the definition of a pain management clinic and related certification requirements.

The Board finds these changes address the concerns of the commenters and add appropriate clarity to the rule as adopted.

Names of Those Commenting For and Against the Proposal.

For: None.

Against: None.

For, with changes: The Texas Medical Association and the Texas Pain Society.

Neither for nor against, with changes: None.

Statutory Authority. The amendments are adopted under the authority of the Occupations Code §301.151 and Chapters 157 and 168, in particular §§168.001, 168.002, and 168.201. Section 301.151 addresses the Board's rulemaking authority. Chapter 168 addresses the statutory requirements related to pain management clinics. Chapter 157 addresses physician delegation and prescriptive authority agreement requirements.

§228.1. Standards of Practice.

(a) **Definitions.** The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

(1) **Controlled substance** (also referred to as scheduled drugs)--A substance, including a drug, adulterant, and dilutant, listed in Schedules I through V or Penalty Groups 1, 1-A, or 2 through 4 of Chapter 481, Health and Safety Code (Texas Controlled Substances Act). The term includes the aggregate weight of any mixture, solution, or other substance containing a controlled substance.

(2) **Dangerous drug**--A device or drug that is unsafe for self-medication and that is not included in Schedules I through V or Penalty Groups 1 through 4 of Chapter 481, Health and Safety Code. The term includes a device or drug that bears, or is required to bear, the legend: "Caution: federal law prohibits dispensing without prescription" or "Rx only" or another legend that complies with federal law.

(3) **Device**--An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related

article, including a component part or accessory, that is required under federal or state law to be ordered or prescribed by a practitioner. The term includes durable medical equipment.

(4) Medication--A dangerous drug, controlled substance, non-prescription drug, or device. For purposes of this chapter, the term also includes herbal and naturopathic remedies.

(5) Non-prescription drug--A non-narcotic drug or device that may be sold without a prescription and that is labeled and packaged in compliance with state or federal law.

(6) Pain management clinic--As defined in Chapter 168, Occupations Code.

(b) Purpose. This section sets forth the minimum standards of nursing practice for an advanced practice registered nurse (APRN) who provides pain management services.

(1) The goal of pain management is to therapeutically treat the patient's pain in relation to overall health, including physical function, psychological, social and work-related factors.

(2) Medications must be prescribed in a therapeutic manner that helps, rather than harms, the patient. Medications must be recognized to be pharmacologically appropriate and safe for the diagnosis for which the medication is being used.

(3) Proper treatment of pain must be based on careful and complete patient assessment and sound clinical judgment. Harm can result from failure to use sound clinical judgment, particularly in drug therapy. The APRN shall provide treatment of pain that is within the current standard of care and is supported by evidence based research.

(4) Documentation in patient records shall be legible, complete, and accurate. All consultations and referrals with the delegating physician and other health care providers shall be documented.

(5) Any treatment plan should be mutually agreed upon by the patient and the provider. Treatment of pain requires a reasonably detailed and documented plan of care to ensure that the patient's treatment is appropriately monitored. A documented explanation of the rationale for the particular treatment plan is required for cases in which treatment with scheduled drugs is difficult to relate to the patient's objective physical, radiographic, or laboratory findings. Ongoing consultation and referral to the delegating physician and other health care providers shall be documented.

(c) Evaluation of the Patient Seeking Treatment for Pain.

(1) The APRN shall ensure that a current and complete health history is documented in the patient record. The APRN shall per-form and document a physical assessment that includes a problem focused exam specific to the chief presenting complaint of the patient. At a minimum, this assessment must be performed and documented when prescribing and/or ordering a new medication or a refill of a medication for the patient.

(2) Pain assessment and documentation in the patient record shall include, as appropriate:

(A) The nature and intensity of the pain;

(B) All current and past treatments for pain, including relevant patient records from prior treating providers as available;

(C) Underlying conditions and co-existing physical and psychiatric disorders;

(D) The effect of pain on physical and psychological function;

(E) History and potential for substance misuse, abuse, dependence, addiction or other substance use disorder, including relevant validated, objective testing and risk stratification tools; and

(F) One or more recognized clinical indications for the use of a medication, if prescribed.

(d) Treatment Plan and Outcomes for Patients with Pain. The APRN who treats patients with pain shall ensure that there is a written treatment plan documented in the patient record. Information in the patient record shall include, as appropriate:

(1) A written explanation of how the medication(s) ordered/prescribed relate(s) to the chief presenting complaint and treatment of pain;

(2) The name, dosage, frequency, and quantity of any medication prescribed and number of refills authorized;

(3) Laboratory testing and diagnostic evaluations ordered;

(4) All other treatment options that are planned or considered;

(5) Plans for ongoing monitoring of the treatment plan and outcomes;

(6) Subjective and objective measures that will be used to determine treatment outcomes, such as pain relief and improved physical and psychosocial function;

(7) Any and all consultations and referrals, including the date the consultation and/or referral was made; to whom the consultation and/or referral was made; the time frame for completion of the consultation and/or referral; and the results of the consultation and/or referral; and

(8) Documentation of informed consent, as required by subsection (e) of this section.

(e) Informed consent includes a discussion with the patient, a person(s) designated by the patient, or with the patient's surrogate or guardian, if the patient is without medical decision-making capacity, of the risks and benefits of the use of medications for the treatment of pain. As appropriate, this discussion should be documented by either a written, signed document maintained in the patient record or a contemporaneous notation included in the patient record. Discussion of risks and benefits should include an explanation of the following:

(1) Diagnosis;

(2) Treatment plan;

(3) Expected therapeutic outcomes, including the realistic expectations for sustained pain relief, and possibilities for lack of pain relief;

(4) Non-pharmacological therapies;

(5) Potential side effects of treatments and drug therapy and how to manage common side effects;

(6) Adverse effects of medication use, including the potential for dependence, addiction, tolerance, and withdrawal; and

(7) Potential for impaired judgment and motor skills.

(f) If the treatment plan includes drug therapy beyond 90 days, the use of a written pain management agreement should be included, as appropriate. The written pain management agreement should outline patient responsibilities that, at a minimum require the patient to:

(1) Submit to laboratory testing for drug confirmation upon request of the APRN, the delegating physician, and/or any other health care providers;

(2) Adhere to the number and frequency of prescription refills;

(3) Use only one provider to prescribe controlled substances related to pain management, and to make consultations and referrals;

(4) Use only one pharmacy for all prescriptions for controlled substances related to pain management;

(5) Acknowledge potential consequences of non-compliance with the agreement; and

(6) Acknowledge processes following successful completion of treatment goals, including weaning of medications.

(g) Ongoing monitoring of the treatment of pain.

(1) The APRN shall see the patient for periodic review of the treatment plan at reasonable intervals.

(2) The periodic review shall include an assessment of the patient's progress toward reaching treatment plan goals, taking into consideration the history of medication usage, as well as any new information about the pain, and the patient's compliance with the pain management agreement.

(3) Each periodic review of the treatment plan shall be documented in the patient record.

(4) Any adjustment in the treatment plan based on individual needs of the patient shall be documented.

(5) Continuation or modification of the use of medications for pain management shall be based on an evaluation of progress toward treatment plan goals, as well as evaluation and consideration of any new factors that may influence the treatment plan.

(A) Progress or lack of progress in relieving pain and meeting treatment objectives shall be documented in the patient record. Progress may be indicated by the patient's decreased pain, increased level of function, and/or improved quality of life.

(B) Objective evidence of improved or diminished function shall be monitored. Information from the patient, family members, or other caregivers should be considered in determining the patient's response to treatment.

(C) If the patient's progress is unsatisfactory, the current treatment plan should be reevaluated, with consideration given to the use of other therapeutic modalities and/or services of other providers.

(6) Continuation of the use of scheduled drugs shall include consultation with the delegating physician and documentation of such consultation in the patient record, as required for delegation of prescriptive authority for controlled substances pursuant to §157.0511 and §168.201, Occupations Code.

(h) Consultation and Referral. In certain situations, further evaluation and treatment may be indicated.

(1) Patients who are at risk for substance use disorders or addiction require special attention. Consideration should be given to consultation with and/or referral to a provider who is an expert in the treatment of patients with substance use disorders.

(2) Patients with chronic pain and histories of substance use disorders or with co-existing psychological and/or psychiatric disorders may require consultation with and/or referral to an expert in the

treatment of such patients. Consideration should be given to consultation with and/or referral to a provider who is an expert in the treatment of patients with these histories and/or disorders.

(3) Information regarding the consideration of consultation and/or referral under this subsection should be documented in the patient record

(i) Pain management clinics in the state of Texas. Prior to providing pain management services in these settings, APRNs who practice in pain management clinics shall verify that the clinic has been properly certified as a pain management clinic by the Texas Medical Board and that the certification is current.

(1) The APRN shall ensure that s/he is in compliance with all other requirements for delegation of prescriptive authority for medications as set forth in Board rule and the Occupations Code Chapter 157.

(2) APRNs shall not own or operate a pain management clinic, as that term is defined by the Occupations Code Chapter 168 and any applicable rules promulgated by the Texas Medical Board.

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 April 29, 2022.

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Jena Abel

Deputy General Counsel

Texas Board of Nursing

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For further information, please call: (512) 305-6822

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 7. MEMORANDA OF UNDERSTANDING

30 TAC §7.103

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §7.103.

Amendments to §7.103 are adopted *with changes* to the text as published in the December 3, 2021, issue of the *Texas Register* (46 TexReg 8197), and, therefore, the rule will be republished. Non-substantive changes to the adopted text are made to conform to *Texas Register* formatting requirements.

Background and Summary of the Factual Basis for the Adopted Rule

This rulemaking adoption will implement portions of Senate Bill (SB) 703, 87th Legislature, Regular Session, which removed the Texas Department of Agriculture's (TDA) roles and responsibilities related to regulation of the aquaculture industry. Previously, the TCEQ, the TDA, and the Texas Parks and Wildlife Department (TPWD) coordinated on regulating the aquaculture industry. This multi-agency coordination is codified in a Memorandum of Understanding (MOU) in 30 Texas Administrative Code (TAC)

§7.103. This rulemaking will revise the MOU to remove the TDA from this multi-agency coordination.

Additionally, this rulemaking adoption will make additional updates to the MOU, based on TCEQ rule changes related to the aquaculture industry since the MOU was last adopted. These include repeal of the permit-by-rule and exemptions in Chapter 321, Subchapter O, and the issuance of the Aquaculture General Permit Number TXG130000.

Section Discussion

The commission adopts revisions throughout the rule to remove all references to the TDA, in accordance with SB 703, which removed the TDA's roles and responsibilities related to regulation of the aquaculture industry. Additionally, the commission adopts revisions throughout the rule to change the commission's name from the Texas Natural Resource Conservation Commission to the TCEQ. The commission also adopts revisions throughout the rule to improve readability and the overall structure of the rule.

Lastly, the commission adopts revisions throughout the rule to remove references to registrations and exemptions issued by the TCEQ to the aquaculture industry because the TCEQ repealed the regulations in Chapter 321, Subchapter O, that provided for these types of authorizations. These authorization types have been replaced by the Aquaculture General Permit Number TXG130000.

The commission adopts minor clarifications and revisions to subsection (a) as noted above regarding revisions throughout the rule.

The commission adopts revisions to subsection (b) to update the definition of "Aquaculture" consistent with the definition in the Aquaculture General Permit Number TXG130000 and to remove the definition of "Memorandum of Understanding" because this definition is not included in other MOUs.

The commission adopts revisions to subsection (c) to add references to additional applicable state statutes that establish TCEQ and TPWD authorities.

The commission adopts revisions to subsection (d) to establish coordination activities regarding renewal and amendment of the Aquaculture General Permit Number TXG130000. The adopted revisions will also revise procedures related to TPWD requesting additional information from applicants rather than from the TCEQ during their review of Notices of Intent (NOI) and individual permit applications. Additional adopted revisions to this subsection will revise the timing of when, in the permitting process, the TCEQ must send applications to the TPWD, and remove the TCEQ's requirement to develop guidelines for a site assessment environmental report for new commercial shrimp facilities located within the coastal zone. The report guidelines have been developed and the TCEQ's individual permit application form requires new commercial shrimp facilities located within the coastal zone to develop and submit a site assessment report.

The commission adopts removal of subsection (e) relating to the executive review committee and adopts new subsection (e) relating to other coordination activities that were previously included as part of subsection (d). The executive review committee is being removed because SB 703 removed the requirement for an executive review committee. The TCEQ and TPWD would continue coordination effort via the interagency workgroup as described in new subsection (e)(3).

The commission adopts amendments to subsection (f) to revise the effective date of the MOU to coordinate with the effective date of the rule and to remove the requirement for the agency governing bodies to sign the MOU. The governing bodies will each adopt the rule to signify their agreement to the MOU requirements.

Final Regulatory Impact Analysis

The commission reviewed the rulemaking adoption in light of the regulatory analysis requirements of Texas Government Code (TGC), §2001.0225, and determined that the rulemaking action is not subject to §2001.0225 because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is defined as a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The rulemaking adoption does not meet the definition of "Major environmental rule" because it is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Rather, this rulemaking adoption is intended to implement an interagency review procedure for applications requesting authorization to discharge wastewater from aquaculture facilities and coordinate enforcement actions in response to discharges from aquaculture facilities. The rulemaking adoption will also implement portions of SB 703, which removed the TDA's roles and responsibilities related to regulation of the aquaculture industry. This rulemaking adoption should not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Therefore, the commission finds that this rulemaking adoption is not a "Major environmental rule."

Furthermore, the rulemaking adoption does not meet any of the four applicability requirements listed in TGC, §2001.0225(a). TGC, §2001.0225 only applies to a state agency's adoption of a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopts a rule solely under the general powers of the agency instead of under a specific state law.

Specifically, the rulemaking adoption does not exceed a standard set by federal law, rather it addresses the process for the TCEQ and TPWD to coordinate the regulation of aquaculture facilities within the federal law and authority delegated to the state. Likewise, the rulemaking adoption does not exceed an express requirement of state law nor exceed a requirement of a delegation agreement because state law expressly authorizes it. Finally, the rulemaking adoption was not developed solely under the general powers of the agency because it is also authorized under TWC, §5.104, which authorizes TCEQ to enter into an MOU with any other state agency, and Texas Agriculture Code, §134.031, which directs the TCEQ and TPWD to enter into an MOU.

Under TGC, §2001.0225, only a "Major environmental rule" requires a regulatory impact analysis. Because the rulemaking

adoption does not constitute a "Major environmental rule," a regulatory impact analysis is not required.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated the rulemaking adoption and performed analysis of whether the rulemaking adoption constitutes a taking under TGC, §2007.043. The specific purpose of the rulemaking adoption is to improve coordination between the TCEQ and TPWD and facilitate an exchange of information to assist the TCEQ in making environmentally sound decisions. The rulemaking adoption will substantially advance this stated purpose by updating the current MOU between the TCEQ and TPWD. The rulemaking adoption provides a formal mechanism by which the TPWD may review and provide feedback on aquaculture issues that are subject to regulation by the TCEQ and have the potential to affect natural resources and the regulation of aquaculture within the jurisdiction of the TPWD.

Promulgation and enforcement of the rulemaking adoption will be neither a statutory nor a constitutional taking of private real property. Specifically, the subject regulations will not affect a landowner's rights in private real property because this rulemaking will not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Thus, this rule will not impose burdens on private real property because the rulemaking adoption neither relates to, nor has any impact on the use or enjoyment of private real property, and there will be no reduction in value of the property as a result of this rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking adoption and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rulemaking adoption is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

Public Comment

The commission held a public hearing on January 4, 2022. The comment period closed on January 5, 2022. No public comments were received.

Statutory Authority

The rule is adopted under Texas Water Code (TWC), §5.102, concerning general powers of the commission; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its power and duties; TWC, §5.104, which authorizes the Texas Commission on Environmental Quality (TCEQ) to enter into a Memorandum of Understanding (MOU) with any other state agency; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which establishes the commission's jurisdiction over all aspects of establishing and controlling the quality of waters of the state with all power necessary or convenient to

carry out the responsibilities of that jurisdiction; and Texas Agriculture Code, §134.031, which requires the TCEQ and the Texas Parks and Wildlife Department to enter into an MOU for the regulation of matters relating to aquaculture.

The adopted rule implements portions of Senate Bill 703, 87th Legislature, Regular Session.

§7.103. Memorandum of Understanding (MOU) between the Texas Commission on Environmental Quality (TCEQ) and the Texas Parks and Wildlife Department (TPWD) Regarding the Regulation of Aquaculture.

(a) Need for agreement.

(1) The Texas Commission on Environmental Quality (TCEQ) and Texas Parks and Wildlife Department (TPWD) seek to ensure that regulation of aquaculture is conducted in a manner that is both collaborative and responsible.

(2) The TCEQ and TPWD are concerned about issues relating to the raising of non-native aquatic species and their potential for escape into natural ecosystems, including the introduction of disease into natural ecosystems.

(3) The TCEQ and TPWD are concerned about the quality of wastewater discharges from aquaculture facilities and their effects on receiving waters in reservoirs, streams, bays, and estuaries.

(4) The TCEQ and TPWD seek to implement an interagency review procedure for applications requesting authorization to discharge wastewater from aquaculture facilities.

(5) The TCEQ and TPWD seek to implement an effective system by which coordination and collaboration can be achieved to expedite enforcement actions in response to discharges from aquaculture facilities that are found to contain contagious disease that may impact state waters.

(6) Texas Water Code, §5.104, authorizes the TCEQ to enter into an MOU with any other state agency.

(7) Texas Agriculture Code, §134.031, directs the TCEQ and TPWD to enter into an MOU for the regulation of matters relating to aquaculture.

(8) It is the intention of this MOU to provide a formal mechanism by which the TPWD may review and provide feedback on aquaculture issues that are subject to regulation by the TCEQ and that have the potential to affect natural resources and the regulation of aquaculture within the jurisdiction of the TPWD. This exchange of information would assist the TCEQ in making environmentally sound decisions and would improve coordination between the TCEQ and TPWD.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings.

(1) Aquaculture--The business of producing or rearing aquatic species (fish, crustaceans, mollusks, or any other organisms, excluding aquatic plants and algae, living in either fresh or marine waters) utilizing ponds, lakes, cages, fabricated tanks and raceways, or other similar structures.

(2) Application--A request submitted by an aquaculture facility to the TCEQ for authorization to discharge under an individual permit or a Notice of Intent (NOI) to seek authorization under a general permit.

(c) Responsibilities.

(1) The responsibilities of the TCEQ relate primarily to its role as the natural resource agency with primary responsibility over

conservation of natural resources and the protection of the environment, under Texas Water Code, §5.012.

(A) The TCEQ has general jurisdiction over the state's water quality program including issuance of wastewater discharge permits, water quality planning, and enforcement of water quality rules, standards, orders, and permits, under Texas Water Code, §5.013.

(B) The TCEQ seeks to maintain the quality of water in the state consistent with public health and enjoyment, the propagation and protection of terrestrial and aquatic life, the operation of existing industries, and the economic development of the state, and to require the use of all reasonable methods to implement this policy.

(C) The TCEQ is responsible for review of wastewater applications and issuance of wastewater discharge permits.

(2) The responsibilities of the TPWD relate primarily to its functions as a natural resource agency, including its resource protection functions, as designated by the Texas Parks and Wildlife Code, §12.001 and §12.0011.

(A) The TPWD is the state agency with primary responsibility for protecting the state's fish and wildlife resources.

(B) The TPWD provides recommendations that will protect fish and wildlife resources to local, state, and federal agencies that approve, permit, license, or construct developmental projects.

(C) The TPWD provides information on fish and wildlife resources to any local, state, and federal agencies or private organizations that make decisions affecting those resources.

(D) The TPWD regulates the taking, possession, and conservation of all kinds of marine life and other aquatic life.

(E) The TPWD regulates the introduction of fish, shellfish, and aquatic plants into public water, under Texas Parks and Wildlife Code, §66.015(b).

(F) The TPWD regulates the importation, possession, and placing into state water of harmful or potentially harmful exotic species of fish, shellfish, or aquatic plants, under Texas Parks and Wildlife Code, §66.007(a), and is responsible for review of applications and subsequent issuance of permits relating to these activities

(d) Coordination procedures for wastewater discharge applications and permits.

(1) Coordination procedures for the Aquaculture General Permit Number TXG130000 and associated NOIs.

(A) During renewal or amendment of the Aquaculture General Permit, the TCEQ will provide the initial draft permit to the TPWD for review and comment prior to submitting the draft to EPA for review and approval.

(i) Within 45 days of the date of receipt of the initial draft permit, the TPWD will complete its initial assessment, and by letter shall provide the TCEQ with formal written recommendations designed to protect fish and wildlife resources or indicate that it has no comments.

(ii) If the TCEQ does not receive formal written comments from the TPWD within 45 days of the date of receipt of the initial draft permit, the TCEQ will conclude that there are no comments and continue processing of the general permit renewal or amendment.

(iii) Formal written comments received from the TPWD will be considered by the TCEQ in developing the final draft permit. The TPWD's comments will be evaluated in conjunction with

all other applicable factors and will be incorporated by the TCEQ whenever it is consistent with the TCEQ's responsibilities. In accordance with the responsibilities of the TCEQ as described in subsection (c)(1) of this section, the TCEQ reserves the right to determine the requirements of the final draft permit. Concurrent with submission of the final draft permit to EPA, the TCEQ will provide a copy of the final draft permit to the TPWD.

(B) The TCEQ will provide copies of all NOIs to the TPWD within 14 days of the date of receipt.

(i) Within 45 days of the date of receipt of the NOI by the TPWD, the TPWD will complete its initial assessment, and by letter shall provide the TCEQ with formal written recommendations designed to protect fish and wildlife resources; indicate that it has no comments; or notify the TCEQ that it has requested additional information from the applicant. If TPWD requires additional information to make its evaluation, then the TPWD may request such additional information from the applicant within 45 days of the date of receipt of the NOI.

(ii) Except as provided by paragraph (3)(B) of this subsection, if the TCEQ does not receive a response from the TPWD within 45 days of the TPWD receipt of the NOI, the TCEQ will conclude that there are no comments and continue processing of the application.

(iii) Formal written comments received from the TPWD will be considered by the TCEQ in determining whether to grant authorization under the general permit or require the applicant to seek authorization under an individual permit. The TPWD's comments will be evaluated in conjunction with all other applicable factors consistent with the TCEQ's responsibilities. In accordance with the responsibilities of the TCEQ as described in subsection (c)(1) of this section, the TCEQ reserves the right to determine the final disposition of the NOI.

(2) Coordination procedures for individual permit applications.

(A) The TCEQ will provide to the TPWD a copy of each individual permit application file received which requests authorization to discharge wastewater from aquaculture facilities within 14 days of the TCEQ administrative review completion. The application file shall include a copy of the application and any comments, memoranda, letters, or other information incorporated in the application file following date of application receipt so that the TPWD may complete an initial assessment of the proposed operation.

(B) Within 45 days of the date of receipt of the permit application file, the TPWD will complete its initial assessment, and by letter shall provide the TCEQ with formal written recommendations designed to protect fish and wildlife resources; indicate that it has no comments; or notify the TCEQ that it has requested additional information from the applicant. If TPWD requires additional information to make its evaluation, then the TPWD may request such additional information from the applicant within 45 days of the date of receipt of the permit application file.

(C) Except as provided by paragraph (3)(B) of this subsection, if the TCEQ does not receive a response from the TPWD within 45 days of the TPWD receipt of the permit application file, the TCEQ will conclude that there are no comments and continue processing of the application.

(D) Formal written comments received from the TPWD will be considered by the TCEQ in developing the final draft permit. The TPWD's comments will be evaluated in conjunction with all other applicable factors and will be incorporated by the TCEQ whenever it is consistent with the TCEQ's responsibilities. In accordance with the

responsibilities of the TCEQ as described in subsection (c)(1) of this section, the TCEQ reserves the right to determine the requirements of the final draft permit. Upon making a preliminary recommendation regarding an application, the TCEQ will provide a response to the TPWD that contains a copy of the final draft permit and documentation providing an explanation on why any of the TPWD's comments were not incorporated.

(3) Coordination procedures applicable to all applications.

(A) The scope of review by the TPWD may include, but is not limited to: consideration of especially sensitive receiving water conditions (aquatic habitat); impacts of the discharge on substrate (scouring, sedimentation) and water transparency; alteration of receiving water flow characteristics; existing or attainable biological and recreational uses; discharge rate and volume; and the likelihood of disease transmission. Comments may be addressed directly to the applicant by the TPWD.

(B) If the TPWD requests additional information from the applicant, the TPWD will request that the applicant provide a copy of the information to the TCEQ. If the applicant does not provide the additional information to the TPWD within 30 days of a request, the TCEQ will determine whether it is appropriate to either suspend processing the application or return it to the applicant. Upon receipt of additional information from the applicant, the TPWD will have 30 days to complete its review and either make final recommendations to the TCEQ or indicate that it has no comments. If formal written comments are not received from the TPWD within 30 days of receipt of the additional information, the TCEQ will conclude that there are no comments and continue processing of the application.

(C) The TCEQ will consider guidelines developed by the TPWD with input from the TCEQ and stakeholders identifying sensitive aquatic habitat within the coastal zone when reviewing wastewater discharge applications for new aquaculture facilities or expansion of existing facilities in the coastal zone.

(D) The TCEQ and TPWD will strive to provide each other notification of public meetings and contested case hearings that relate to aquaculture applications.

(e) Other coordination activities.

(1) The TPWD shall, within 120 days of the date of adoption of this MOU, review the wastewater discharge application forms and provide proposed changes that are necessary to obtain relevant information for the TPWD's review. The TCEQ will solicit feedback from the TPWD each time the TCEQ revises the forms related to aquaculture facilities.

(2) A new exotic species permit will not be issued by the TPWD to any aquaculture facility that proposes to discharge wastewater until a TCEQ wastewater discharge permit or other authorization has been issued or it is determined that the facility is exempted from such requirements.

(3) An interagency work group will be formed, whose function will be to coordinate on matters related to aquaculture to aid in ensuring that proposed wastewater discharges will not adversely affect bays, estuaries, or other water in the state. This work group will meet at least annually to address aquaculture issues relating to water quality, fish and wildlife resources, and receiving stream habitat and uses. This work group will serve to strengthen coordination between the TCEQ and TPWD related to the aquaculture industry and provide a conduit for shared information. The work group shall be composed of members of each agency and staffed at levels which are mutually agreeable as adequate to accomplish the stated goals. Each agency

shall designate a primary contact person for this group and notify the other agency of any changes to the primary contact person.

(4) The TCEQ and TPWD will coordinate studies related to applications that request authorizations for the discharge wastewater. This may include on-site visits, receiving water assessments, sample collection, data analysis and related activities. Notification of these activities will be provided at least five days prior to the activity or as soon as is practicable. The TPWD will notify the appropriate TCEQ regional office and the Wastewater Permitting Section Manager. The TCEQ will notify the TPWD Water Quality Program.

(5) The TCEQ and TPWD will strive to coordinate responses to emergency conditions, investigation of unauthorized wastewater discharges, and compliance inspections of aquaculture facilities for wastewater discharges. The TCEQ and TPWD will provide notice to each other at least five days prior to conducting a site inspection related to wastewater discharges, so as to allow the other agency to participate if desired. The TPWD will notify the appropriate TCEQ regional office and the TCEQ will notify the TPWD Water Quality Program.

(6) The TCEQ and TPWD will continue to develop and provide to applicants, permit conditions and, as appropriate, guidance related to disease, quarantine conditions, and emergency plans.

(f) General conditions.

(1) The term of this MOU shall be from the effective date until amendment or termination of this agreement. Any amendment to the MOU shall be made by mutual agreement of the parties.

(2) Each party shall adopt the MOU by rule, including subsequent amendments. This MOU, and any subsequent amendment, shall become effective on the effective date of the rule.

(3) Reservation of rights. Each agency has and reserves the right to take whatever actions necessary to pursue or preserve any legal remedies available to that agency, and nothing in this MOU is intended to waive or foreclose any such right.

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

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Charrmaine Backens

Deputy Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-0600



CHAPTER 336. RADIOACTIVE SUBSTANCE RULES

SUBCHAPTER D. STANDARDS FOR PROTECTION AGAINST RADIATION

30 TAC §336.357

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §336.357.

Amendments to §336.357 are adopted *with changes* to the text as published in the December 3, 2021, issue of the *Texas Register* (46 TexReg 8212), and, therefore, the rule will be republished.

Background and Summary of the Factual Basis for the Adopted Rule

The commission adopts changes to Chapter 336, Subchapter D, that revise the commission's rules concerning physical protection of category 1 and category 2 quantities of radioactive materials to ensure compatibility with federal regulations promulgated by the Nuclear Regulatory Commission (NRC), which is necessary to preserve the status of Texas as an Agreement State under Title 10 Code of Federal Regulations (CFR) Part 150 and under the "Articles of Agreement between the United States Atomic Energy Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended." Rules which are designated by NRC as compatibility items must be adopted by an Agreement State within three years of the effective date of the NRC rules, in most cases.

Section Discussion

In addition to the adopted amendments, various stylistic, non-substantive changes are included to update rule language to current *Texas Register* requirements and agency rules and guidelines.

§336.357, *Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material*

The commission adopts amended §336.357(j) regarding requirements for physical protection of category 1 and category 2 quantities of radioactive materials.

The commission adopts amended §336.357(e)(3)(A) and §336.357(e)(3)(B) to update the contact information for the NRC to ensure compatibility with federal regulations promulgated by the NRC with modification. The mail stop in §336.357(e)(3)(A) has been changed to reflect current updates in the NRC address.

The commission adopts amended §336.357(j)(4)(B), §336.357(j)(4)(C), §336.357(j)(4)(C)(i), §336.357(j)(4)(E), §336.357(j)(4)(F), §336.357(j)(4)(G), and §336.357(j)(4)(H)(ii) to add "list of individuals that have been approved for unescorted access" to the list of information for which access must be controlled. These rule amendments are adopted to ensure compatibility with federal regulations promulgated by the NRC.

The commission adopts amended §336.357(u)(1)(A) to update the name for a specific NRC division to ensure compatibility with federal regulations promulgated by the NRC.

The commission adopts amended §336.357(c)(2)(B) to add that the oath or affirmation certifications that the reviewing official is deemed trustworthy and reliable is to be provided to the executive director. This rule amendment was adopted based on comments from the NRC to ensure compatibility with federal regulations promulgated by the NRC.

The commission adopts amended §336.357(u), §336.357(u)(1)(A), §336.357(u)(1)(C), §336.357(u)(3)(A), §336.357(u)(3)(B), and §336.357(u)(4) to add the executive director to the list of individuals that the licensee shall provide advanced notice of shipment of category 1 quantities of radioactive material. This rule amendment was adopted based

on comments from the NRC to ensure compatibility with federal regulations promulgated by the NRC.

Final Regulatory Impact Determination

The commission reviewed the rule under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rule is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "Major environmental rule" as defined in the statute. A "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rule is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because these revisions are required for the TCEQ to maintain compatibility with the NRC for these licensing programs. Furthermore, the adopted rule does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The adopted rule does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

Texas Health and Safety Code (THSC), Chapter 401, authorizes the commission to regulate the disposal of most radioactive substances in Texas. THSC, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. In addition, Texas is an "Agreement State" authorized by the NRC to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The adopted rule is compatible with federal law.

The adopted rule does not exceed an express requirement of state law. THSC, Chapter 401, establishes general requirements, including requirements for public notices, for the licensing and disposal of radioactive substances, source material recovery, and commercial radioactive substances storage and processing. The adopted rule is compatible with a requirement of a delegation agreement or contract between the state and an agency of the federal government. Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety under the Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended by the Low Level

Radioactive Waste Policy Act Amendments (LLRWPA), 42 USC 2021.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated this adopted rule and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007, is applicable. The commission's preliminary assessment indicates that the Private Real Property Rights Preservation Act does not apply to this adopted rule because it is an action reasonably taken to fulfill an obligation mandated by federal law. The commission further evaluated this adopted rule and performed a preliminary assessment of whether this rule constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this adopted rule will be neither a statutory nor a constitutional taking of private real property. The adopted rule does not affect a landowner's rights in private real property because this rule does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations.

Consistency with the Coastal Management Program

The commission reviewed the adopted rule and found that it is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Public Comment

The commission offered a public hearing on January 6, 2022. The comment period closed on January 10, 2022. One comment was received from the NRC.

Response to Comments

Comment

The NRC commented that the proposed regulations would meet the compatibility and health and safety categories established in the Office of Nuclear Material Safety and Safeguards (NMSS) Procedure SA-200, *Compatibility Categories and Health and Safety Identification for NRC Regulations and Other Program Elements*, if TCEQ incorporated three modifications into the proposed regulations. The three modifications are:

1. Add the state agency in §336.357(u)(1)(A) to the list of individuals to whom the licensee is required to provide advance notification of shipment of category 1 quantities of radioactive material.
2. Modify §336.357(c)(2)(B) to add the individual or office to whom the licensee is to provide oath or affirmation certifications that the reviewing official is deemed trustworthy and reliable.
3. Change the mail stop in §336.357(e)(3)(A) to T-07D04M. The proposed rulemaking would have changed the mail stop in §336.357(e)(3)(A) from T-03B46M to T-8B20.

Response

The commission agrees with the comments from the NRC and have incorporated these changes into the adopted rule. The executive director was added as the individual in §336.357(u)(1)(A) and 336.357(c)(2)(B).

Statutory Authority

The rule is adopted under the Texas Radiation Control Act, Texas Health and Safety Code (THSC), Chapter 401; THSC, §401.011, which provides the commission authority to regulate and license the disposal of radioactive substances, the commercial processing and storage of radioactive substances, and the recovery and processing of source material; THSC, §401.051, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; THSC, §401.103, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; THSC, §401.104, which requires the commission to provide rules for licensing for the disposal of radioactive substances; and THSC, §401.106, which authorizes the commission to adopt rules to exempt a source of radiation from the licensing requirements provided by the TRCA. The rule is adopted as authorized by Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The adopted amendment implements THSC, Chapter 401, and is adopted to meet compatibility standards set by the United States Nuclear Regulatory Commission.

§336.357. Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material.

(a) Specific exemption. A licensee that possesses radioactive waste that contains category 1 or category 2 quantities of radioactive material is exempt from the requirements of subsections (b) - (w) of this section. However, any radioactive waste that contains discrete sources, ion-exchange resins, or activated material that weighs less than 2,000 kilograms (4,409 pounds) is not exempt from the requirements of subsections (b) - (w) of this section. The licensee shall implement the following requirements to secure the radioactive waste:

- (1) use continuous physical barriers that allow access to the radioactive waste only through established access control points;
- (2) use a locked door or gate with monitored alarm at the access control point;
- (3) assess and respond to each actual or attempted unauthorized access to determine whether an actual or attempted theft, sabotage, or diversion occurred; and
- (4) immediately notify the local law enforcement agency (LLEA) and request an armed response from the LLEA upon determination that there was an actual or attempted theft, sabotage, or diversion of the radioactive waste that contains category 1 or category 2 quantities of radioactive material.

(b) Personnel access authorization requirements for category 1 or category 2 quantities of radioactive material.

- (1) General.

(A) Each licensee that possesses an aggregated quantity of radioactive material at or above the category 2 threshold shall establish, implement, and maintain its access authorization program in accordance with the requirements of this subsection and subsections (c) - (h) of this section.

(B) An applicant for a new license and each licensee, upon application for modification of its license, that would become newly subject to the requirements of this subsection and subsections (c) - (h) of this section, shall implement the requirements of this subsection and subsections (c) - (h) of this section, as appropriate, before taking possession of an aggregated category 1 or category 2 quantity of radioactive material.

(C) Any licensee that has not previously implemented the Security Orders or been subject to the provisions of this subsection and subsections (c) - (h) of this section shall implement the provisions of this subsection and subsections (c) - (h) of this section before aggregating radioactive material to a quantity that equals or exceeds the category 2 threshold.

(2) General performance objective. The licensee's access authorization program must ensure that the individuals specified in paragraph (3)(A) of this subsection are trustworthy and reliable.

(3) Applicability.

(A) Licensees shall subject the following individuals to an access authorization program:

(i) any individual whose assigned duties require unescorted access to category 1 or category 2 quantities of radioactive material or to any device that contains the radioactive material; and

(ii) reviewing officials.

(B) Licensees need not subject the categories of individuals listed in subsection (f)(1) of this section to the investigation elements of the access authorization program.

(C) Licensees shall approve for unescorted access to category 1 or category 2 quantities of radioactive material only those individuals with job duties that require unescorted access to category 1 or category 2 quantities of radioactive material.

(D) Licensees may include individuals needing access to safeguards information-modified handling under 10 Code of Federal Regulations (CFR) Part 73, in the access authorization program under this subsection and subsections (c) - (h) of this section.

(c) Access authorization program requirements.

(1) Granting unescorted access authorization.

(A) Licensees shall implement the requirements of subsection (b) of this section, this subsection, and subsections (d) - (h) of this section for granting initial or reinstated unescorted access authorization.

(B) Individuals determined to be trustworthy and reliable shall also complete the security training required by subsection (j)(3) of this section before being allowed unescorted access to category 1 or category 2 quantities of radioactive material.

(2) Reviewing officials.

(A) Reviewing officials are the only individuals who may make trustworthiness and reliability determinations that allow individuals to have unescorted access to category 1 or category 2 quantities of radioactive materials possessed by the licensee.

(B) Each licensee shall name one or more individuals to be reviewing officials. After completing the background investigation on the reviewing official, the licensee shall provide under oath or affirmation, a certification that the reviewing official is deemed trustworthy and reliable by the licensee. The licensee shall provide a copy of the oath or affirmation certifications of any and all individuals to the executive director once completed. The fingerprints of the named re-

viewing official must be taken by a law enforcement agency, Federal or State agencies that provide fingerprinting services to the public, or commercial fingerprinting services authorized by a State to take fingerprints. The licensee shall recertify that the reviewing official is deemed trustworthy and reliable every 10 years in accordance with subsection (d)(3) of this section.

(C) Reviewing officials must be permitted to have unescorted access to category 1 or category 2 quantities of radioactive materials or access to safeguards information or safeguards information-modified handling, if the licensee possesses safeguards information or safeguards information-modified handling.

(D) Reviewing officials cannot approve other individuals to act as reviewing officials.

(E) A reviewing official does not need to undergo a new background investigation before being named by the licensee as the reviewing official if:

(i) the individual has undergone a background investigation that included fingerprinting and a Federal Bureau of Investigations (FBI) criminal history records check and has been determined to be trustworthy and reliable by the licensee; or

(ii) the individual is subject to a category listed in subsection (f)(1) of this section.

(3) Informed consent.

(A) Licensees may not initiate a background investigation without the informed and signed consent of the subject individual. This consent must include authorization to share personal information with other individuals or organizations as necessary to complete the background investigation. Before a final adverse determination, the licensee shall provide the individual with an opportunity to correct any inaccurate or incomplete information that is found during the background investigation. Licensees do not need to obtain signed consent from those individuals that meet the requirements of subsection (d)(2) of this section. A signed consent must be obtained prior to any reinvestigation.

(B) The subject individual may withdraw his or her consent at any time. Licensees shall inform the individual that:

(i) if an individual withdraws his or her consent, the licensee may not initiate any elements of the background investigation that were not in progress at the time the individual withdrew his or her consent; and

(ii) the withdrawal of consent for the background investigation is sufficient cause for denial or termination of unescorted access authorization.

(4) Personal history disclosure. Any individual who is applying for unescorted access authorization shall disclose the personal history information that is required by the licensee's access authorization program for the reviewing official to make a determination of the individual's trustworthiness and reliability. Refusal to provide, or the falsification of, any personal history information required by subsection (b) of this section, this subsection, and subsections (d) - (h) of this section is sufficient cause for denial or termination of unescorted access.

(5) Determination basis.

(A) The reviewing official shall determine whether to permit, deny, unfavorably terminate, maintain, or administratively withdraw an individual's unescorted access authorization based on an evaluation of all of the information collected to meet the requirements

of subsection (b) of this section, this subsection, and subsections (d) - (h) of this section.

(B) The reviewing official may not permit any individual to have unescorted access until the reviewing official has evaluated all of the information collected to meet the requirements of subsection (b) of this section, this subsection, and subsections (d) - (h) of this section and determined that the individual is trustworthy and reliable. The reviewing official may deny unescorted access to any individual based on information obtained at any time during the background investigation.

(C) The licensee shall document the basis for concluding whether or not there is reasonable assurance that an individual is trustworthy and reliable.

(D) The reviewing official may terminate or administratively withdraw an individual's unescorted access authorization based on information obtained after the background investigation has been completed and the individual granted unescorted access authorization.

(E) Licensees shall maintain a list of persons currently approved for unescorted access authorization. When a licensee determines that a person no longer requires unescorted access or meets the access authorization requirements, the licensee shall remove the person from the approved list as soon as possible, but no later than seven working days, and take prompt measures to ensure that the individual is unable to have unescorted access to the material.

(6) Procedures. Licensees shall develop, implement, and maintain written procedures for implementing the access authorization program. The procedures must include provisions for the notification of individuals who are denied unescorted access. The procedures must include provisions for the review, at the request of the affected individual, of a denial or termination of unescorted access authorization. The procedures must contain a provision to ensure that the individual is informed of the grounds for the denial or termination of unescorted access authorization and allow the individual an opportunity to provide additional relevant information.

(7) Right to correct and complete information.

(A) Prior to any final adverse determination, licensees shall provide each individual subject to subsection (b) of this section, this subsection, and subsections (d) - (h) of this section with the right to complete, correct, and explain information obtained as a result of the licensee's background investigation. Confirmation of receipt by the individual of this notification must be maintained by the licensee for a period of one year from the date of the notification.

(B) If, after reviewing his or her criminal history record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, update, or explain anything in the record, the individual may initiate challenge procedures. These procedures include direct application by the individual challenging the record to the law enforcement agency that contributed the questioned information or a direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, ATTN: SCU, Mod. D-2, 1000 Custer Hollow Road, Clarksburg, WV 26306, as set forth in 28 CFR §§16.30 - 16.34. In the latter case, the FBI will forward the challenge to the agency that submitted the data, and will request that the agency verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division will make any changes necessary in accordance with the information supplied by that agency. Licensees must provide at least 10 days for an individual to initiate action to challenge the results of an FBI criminal history records

check after the record is made available for his or her review. The licensee may make a final adverse determination based upon the criminal history records only after receipt of the FBI's confirmation or correction of the record.

(8) Records.

(A) The licensee shall retain documentation regarding the trustworthiness and reliability of individual employees for three years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material.

(B) The licensee shall retain a copy of the current access authorization program procedures as a record for three years after the procedure is no longer needed. If any portion of the procedure is superseded, the licensee shall retain the superseded material for three years after the record is superseded.

(C) The licensee shall retain the list of persons approved for unescorted access authorization for three years after the list is superseded or replaced.

(d) Background investigations.

(1) Initial investigation. Before allowing an individual unescorted access to category 1 or category 2 quantities of radioactive material or to the devices that contain the material, licensees shall complete a background investigation of the individual seeking unescorted access authorization. The scope of the investigation must encompass at least the seven years preceding the date of the background investigation or since the individual's eighteenth birthday, whichever is shorter. The background investigation must include at a minimum:

(A) fingerprintings and an FBI identification and criminal history records check in accordance with subsection (e) of this section;

(B) verification of true identity. Licensees shall verify the true identity of the individual applying for unescorted access authorization to ensure that the applicant is who he or she claims to be. A licensee shall review official identification documents (e.g., driver's license; passport; government identification; certificate of birth issued by the state, province, or country of birth) and compare the documents to personal information data provided by the individual to identify any discrepancy in the information. Licensees shall document the type, expiration, and identification number of the identification document, or maintain a photocopy of identifying documents on file in accordance with subsection (g) of this section. Licensees shall certify in writing that the identification was properly reviewed and shall maintain the certification and all related documents for review upon inspection;

(C) employment history verification. Licensees shall complete an employment history verification, including military history. Licensees shall verify the individual's employment with each previous employer for the most recent seven years before the date of application;

(D) verification of education. Licensees shall verify the individual's education during the claimed period;

(E) character and reputation determination. Licensees shall complete reference checks to determine the character and reputation of the individual who has applied for unescorted access authorization. Unless other references are not available, reference checks may not be conducted with any person who is known to be a close member of the individual's family, including but not limited to the individual's spouse, parents, siblings, or children, or any individual who resides in the individual's permanent household. Reference checks under subsections (b) and (c) of this section, this subsection, and subsections (e) -

(h) of this section must be limited to whether the individual has been and continues to be trustworthy and reliable;

(F) the licensee shall also, to the extent possible, obtain independent information to corroborate the information provided by the individual (e.g., seek references not supplied by the individual); and

(G) if a previous employer, educational institution, or any other entity with which the individual claims to have been engaged fails to provide information or indicates an inability or unwillingness to provide information within a time frame deemed appropriate by the licensee, but at least after 10 business days of the request or if the licensee is unable to reach the entity, the licensee shall document the refusal, unwillingness, or inability in the record of investigation and attempt to obtain the information from an alternate source.

(2) Grandfathering.

(A) Individuals who have been determined to be trustworthy and reliable for unescorted access to category 1 or category 2 quantities of radioactive material under the Fingerprint Orders may continue to have unescorted access to category 1 and category 2 quantities of radioactive material without further investigation. These individuals shall be subject to the reinvestigation requirement.

(B) Individuals who have been determined to be trustworthy and reliable under the provisions of 10 CFR Part 73 or the Security Orders for access to safeguards information, safeguards information-modified handling, or risk-significant material may have unescorted access to category 1 and category 2 quantities of radioactive material without further investigation. The licensee shall document that the individual was determined to be trustworthy and reliable under the provisions of 10 CFR Part 73 or a Security Order. Security Order, in this context, refers to any order that was issued by the United States Nuclear Regulatory Commission (NRC) that required fingerprints and an FBI criminal history records check for access to safeguards information, safeguards information-modified handling, or risk significant material such as special nuclear material or large quantities of uranium hexafluoride. These individuals shall be subject to the reinvestigation requirement.

(3) Reinvestigations. Licensees shall conduct a reinvestigation every 10 years for any individual with unescorted access to category 1 or category 2 quantities of radioactive material. The reinvestigation shall consist of fingerprinting and an FBI identification and criminal history records check in accordance with subsection (e) of this section. The reinvestigations must be completed within 10 years of the date on which these elements were last completed.

(e) Requirements for criminal history records checks of individuals granted unescorted access to category 1 or category 2 quantities of radioactive material.

(1) General performance objective and requirements.

(A) Except for those individuals listed in subsection (f) of this section and those individuals grandfathered under subsection (d)(2) of this section, each licensee subject to the provisions of subsections (b) - (d) of this section, this subsection, and subsections (f) - (h) of this section shall fingerprint each individual who is to be permitted unescorted access to category 1 or category 2 quantities of radioactive material. Licensees shall transmit all collected fingerprints to the NRC for transmission to the FBI. The licensee shall use the information received from the FBI as part of the required background investigation to determine whether to grant or deny further unescorted access to category 1 or category 2 quantities of radioactive materials for that individual.

(B) The licensee shall notify each affected individual that his or her fingerprints will be used to secure a review of his or her criminal history record and shall inform him or her of the procedures for revising the record or adding explanations to the record.

(C) Fingerprinting is not required if a licensee is reinstating an individual's unescorted access authorization to category 1 or category 2 quantities of radioactive materials if:

(i) the individual returns to the same facility that granted unescorted access authorization within 365 days of the termination of his or her unescorted access authorization; and

(ii) the previous access was terminated under favorable conditions.

(D) Fingerprints do not need to be taken if an individual who is an employee of a licensee, contractor, manufacturer, or supplier has been granted unescorted access to category 1 or category 2 quantities of radioactive material, access to safeguards information, or safeguards information-modified handling by another licensee, based upon a background investigation conducted under this section, the Fingerprint Orders, or 10 CFR Part 73. An existing criminal history records check file may be transferred to the licensee asked to grant unescorted access in accordance with the provisions of subsection (g)(3) of this section.

(E) Licensees shall use the information obtained as part of a criminal history records check solely for the purpose of determining an individual's suitability for unescorted access authorization to category 1 or category 2 quantities of radioactive materials, access to safeguards information, or safeguards information-modified handling.

(2) Prohibitions.

(A) Licensees may not base a final determination to deny an individual unescorted access authorization to category 1 or category 2 quantities of radioactive material solely on the basis of information received from the FBI involving:

(i) an arrest more than one year old for which there is no information of the disposition of the case; or

(ii) an arrest that resulted in dismissal of the charge or an acquittal.

(B) Licensees may not use information received from a criminal history records check obtained under subsections (b) - (d) of this section, this subsection, and subsections (f) - (h) of this section in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States nor shall licensees use the information in any way that would discriminate among individuals on the basis of race, religion, national origin, gender, or age.

(3) Procedures for processing of fingerprint checks.

(A) For the purpose of complying with subsections (b) - (d) of this section, this subsection, and subsections (f) - (h) of this section, licensees shall use an appropriate method listed in 10 CFR §37.7 to submit to the United States Nuclear Regulatory Commission, Director, Division of Physical and Cyber Security Policy, 11545 Rockville Pike, ATTN: Criminal History Program/Mail Stop T-07D04M, Rockville, Maryland 20852, one completed, legible standard fingerprint card (Form FD-258, ORIMDNR000Z), electronic fingerprint scan or, where practicable, other fingerprint record for each individual requiring unescorted access to category 1 or category 2 quantities of radioactive material. Copies of these forms may be obtained by emailing MAILSVS.Resource@nrc.gov.

Guidance on submitting electronic fingerprints can be found at <https://www.nrc.gov/security/chp.html>.

(B) Fees for the processing of fingerprint checks are due upon application. Licensees shall submit payment with the application for the processing of fingerprints through corporate check, certified check, cashier's check, money order, or electronic payment, made payable to "U.S. NRC." (For guidance on making electronic payments, contact the Division of Physical and Cyber Security Policy by e-mailing Crimhist.Resource@nrc.gov.) Combined payment for multiple applications is acceptable. The NRC publishes the amount of the fingerprint check application fee on the NRC's public website. (To find the current fee amount, go to the Licensee Criminal History Records Checks & Firearms Background Check information page at <https://www.nrc.gov/security/chp.html> and see the link for How do I determine how much to pay for the request?).

(C) The NRC will forward to the submitting licensee all data received from the FBI as a result of the licensee's application(s) for criminal history records checks.

(f) Relief from fingerprinting, identification, and criminal history records checks and other elements of background investigations for designated categories of individuals permitted unescorted access to certain radioactive materials.

(1) Fingerprinting, and the identification and criminal history records checks required by §149 of the Atomic Energy Act of 1954, as amended, and other elements of the background investigation, are not required for the following individuals prior to granting unescorted access to category 1 or category 2 quantities of radioactive materials:

(A) an employee of the NRC or of the Executive Branch of the United States (U.S.) Government who has undergone fingerprinting for a prior U.S. Government criminal history records check;

(B) a Member of Congress;

(C) an employee of a member of Congress or Congressional committee who has undergone fingerprinting for a prior U.S. Government criminal history records check;

(D) the Governor of a State or his or her designated State employee representative;

(E) Federal, State, or local law enforcement personnel;

(F) State Radiation Control Program Directors and State Homeland Security Advisors or their designated State employee representatives;

(G) Agreement State employees conducting security inspections on behalf of the NRC under an agreement executed under §274.i. of the Atomic Energy Act;

(H) representatives of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement who have been certified by the NRC;

(I) emergency response personnel who are responding to an emergency;

(J) commercial vehicle drivers for road shipments of category 1 and category 2 quantities of radioactive material;

(K) package handlers at transportation facilities such as freight terminals and railroad yards;

(L) any individual who has an active federal security clearance, provided that he or she makes available the appropriate documentation. Written confirmation from the agency/employer that

granted the federal security clearance or reviewed the criminal history records check must be provided to the licensee. The licensee shall retain this documentation for a period of three years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material; and

(M) any individual employed by a service provider licensee for which the service provider licensee has conducted the background investigation for the individual and approved the individual for unescorted access to category 1 or category 2 quantities of radioactive material. Written verification from the service provider must be provided to the licensee. The licensee shall retain the documentation for a period of three years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material; and

(2) Fingerprinting, and the identification and criminal history records checks required by §149 of the Atomic Energy Act of 1954, as amended, are not required for an individual who has had a favorably adjudicated U.S. Government criminal history records check within the last five years, under a comparable U.S. Government program involving fingerprinting and an FBI identification and criminal history records check provided that he or she makes available the appropriate documentation. Written confirmation from the agency/employer that reviewed the criminal history records check must be provided to the licensee. The licensee shall retain this documentation for a period of three years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material. These programs include, but are not limited to:

(A) National Agency Check;

(B) Transportation Worker Identification Credentials under 49 CFR Part 1572;

(C) Bureau of Alcohol, Tobacco, Firearms, and Explosives background check and clearances under 27 CFR Part 555;

(D) Health and Human Services security risk assessments for possession and use of select agents and toxins under 42 CFR Part 73;

(E) Hazardous Material security threat assessment for hazardous material endorsement to commercial drivers license under 49 CFR Part 1572; and

(F) Customs and Border Protection's Free and Secure Trade Program.

(g) Protection of information.

(1) Each licensee who obtains background information on an individual under subsections (b) - (f) of this section, this subsection, and subsection (h) of this section shall establish and maintain a system of files and written procedures for protection of the records and the personal information from unauthorized disclosure.

(2) The licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his or her representative, or to those who have a need to have access to the information in performing assigned duties in the process of granting or denying unescorted access to category 1 or category 2 quantities of radioactive material, safeguards information, or safeguards information-modified handling. No individual authorized to have access to the information may disseminate the information to any other individual who does not have a need to know.

(3) The personal information obtained on an individual from a background investigation may be provided to another licensee:

(A) upon the individual's written request to the licensee holding the data to disseminate the information contained in his or her file; and

(B) the recipient licensee verifies information such as name, date of birth, social security number, gender, and other applicable physical characteristics.

(4) The licensee shall make background investigation records obtained under subsections (b) - (f) of this section, this subsection, and subsection (h) of this section available for examination by an authorized representative of the commission to determine compliance with the regulations and laws.

(5) The licensee shall retain all fingerprint and criminal history records (including data indicating no record) received from the FBI or a copy of these records if the individual's file has been transferred on an individual for three years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material.

(h) Access authorization program review.

(1) Each licensee shall be responsible for the continuing effectiveness of the access authorization program. Each licensee shall ensure that access authorization programs are reviewed to confirm compliance with the requirements of subsections (b) - (g) of this section and this subsection and that comprehensive actions are taken to correct any noncompliance identified. The review program shall evaluate all program performance objectives and requirements. Each licensee shall periodically (at least annually) review the access authorization program content and implementation.

(2) The results of the reviews, along with any recommendations, must be documented. Each review report must identify conditions that are adverse to the proper performance of the access authorization program, the cause of the condition(s), and, when appropriate, recommend corrective actions, and corrective actions taken. The licensee shall review the findings and take any additional corrective actions necessary to preclude repetition of the condition, including re-assessment of the deficient areas where indicated.

(3) Review records must be maintained for three years.

(i) Security program.

(1) Applicability.

(A) Each licensee that possesses an aggregated category 1 or category 2 quantity of radioactive material shall establish, implement, and maintain a security program in accordance with the requirements of this subsection and subsections (j) - (q) of this section.

(B) An applicant for a new license, and each licensee that would become newly subject to the requirements of this subsection and subsections (j) - (q) of this section upon application for modification of its license, shall implement the requirements of this subsection and subsections (j) - (q) of this section, as appropriate, before taking possession of an aggregated category 1 or category 2 quantity of radioactive material.

(C) Any licensee that has not previously implemented the Security Orders or been subject to the provisions of this subsection and subsections (j) - (q) of this section shall provide written notification to the commission at least 90 days before aggregating radioactive material to a quantity that equals or exceeds the category 2 threshold.

(2) General performance objective. Each licensee shall establish, implement, and maintain a security program that is designed to monitor and, without delay, detect, assess, and respond to an actual or

attempted unauthorized access to category 1 or category 2 quantities of radioactive material.

(3) Program features. Each licensee's security program must include the program features, as appropriate, described in subsections (j) - (p) of this section.

(j) General security program requirements.

(1) Security plan.

(A) Each licensee identified in subsection (i)(1) of this section shall develop a written security plan specific to its facilities and operations. The purpose of the security plan is to establish the licensee's overall security strategy to ensure the integrated and effective functioning of the security program required by subsection (i) of this section, this subsection, and subsections (k) - (q) of this section. The security plan must, at a minimum:

(i) describe the measures and strategies used to implement the requirements of subsection (i) of this section, this subsection, and subsections (k) - (q) of this section; and

(ii) identify the security resources, equipment, and technology used to satisfy the requirements of subsection (i) of this section, this subsection, and subsections (k) - (q) of this section.

(B) The security plan must be reviewed and approved by the individual with overall responsibility for the security program.

(C) A licensee shall revise its security plan as necessary to ensure the effective implementation of the executive director's requirements. The licensee shall ensure that:

(i) the revision has been reviewed and approved by the individual with overall responsibility for the security program; and

(ii) the affected individuals are instructed on the revised plan before the changes are implemented.

(D) The licensee shall retain a copy of the current security plan as a record for three years after the security plan is no longer required. If any portion of the plan is superseded, the licensee shall retain the superseded material for three years after the record is superseded.

(2) Implementing procedures.

(A) The licensee shall develop and maintain written procedures that document how the requirements of subsection (i) of this section, this subsection, and subsections (k) - (q) of this section and the security plan will be met.

(B) The implementing procedures and revisions to these procedures must be approved in writing by the individual with overall responsibility for the security program.

(C) The licensee shall retain a copy of the current procedure as a record for three years after the procedure is no longer needed. Superseded portions of the procedure must be retained for three years after the record is superseded.

(3) Training.

(A) Each licensee shall conduct training to ensure that those individuals implementing the security program possess and maintain the knowledge, skills, and abilities to carry out their assigned duties and responsibilities effectively. The training must include instruction in:

(i) the licensee's security program and procedures to secure category 1 or category 2 quantities of radioactive material and the purposes and functions of the security measures employed;

(ii) the responsibility to report promptly to the licensee any condition that causes or may cause a violation of the requirements of the commission, the NRC, or any Agreement State;

(iii) the responsibility of the licensee to report promptly to the LLEA and licensee any actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material; and

(iv) the appropriate response to security alarms.

(B) In determining those individuals who shall be trained on the security program, the licensee shall consider each individual's assigned activities during authorized use and response to potential situations involving actual or attempted theft, diversion, or sabotage of category 1 or category 2 quantities of radioactive material. The extent of the training must be commensurate with the individual's potential involvement in the security of category 1 or category 2 quantities of radioactive material.

(C) Refresher training must be provided at a frequency not to exceed 12 months and when significant changes have been made to the security program. This training must include:

(i) review of the training requirements of this paragraph and any changes made to the security program since the last training;

(ii) reports on any relevant security issues, problems, and lessons learned;

(iii) relevant results of commission inspections; and

(iv) relevant results of the licensee's program review and testing and maintenance.

(D) The licensee shall maintain records of the initial and refresher training for three years from the date of the training. The training records must include dates of the training, topics covered, a list of licensee personnel in attendance, and related information.

(4) Protection of information.

(A) Licensees authorized to possess category 1 or category 2 quantities of radioactive material shall limit access to and unauthorized disclosure of their security plan, implementing procedures, and the list of individuals that have been approved for unescorted access.

(B) Efforts to limit access shall include the development, implementation, and maintenance of written policies and procedures for controlling access to, and for proper handling and protection against unauthorized disclosure of, the security plan, implementing procedures, and the list of individuals that have been approved for unescorted access.

(C) Before granting an individual access to the security plan, implementing procedures, or the list of individuals that have been approved for unescorted access, licensees shall:

(i) evaluate an individual's need to know the security plan, implementing procedures, or the list of individuals that have been approved for unescorted access; and

(ii) if the individual has not been authorized for unescorted access to category 1 or category 2 quantities of radioactive material, safeguards information, or safeguards information-modified handling, the licensee must complete a background investigation to determine the individual's trustworthiness and reliability. A trustworthiness and reliability determination shall be conducted by the reviewing official and shall include the background investigation elements contained in subsection (d)(1)(B) - (G) of this section.

(D) Licensees need not subject the following individuals to the background investigation elements for protection of information:

(i) the categories of individuals listed in subsection (f)(1) of this section; or

(ii) security service provider employees, provided written verification that the employee has been determined to be trustworthy and reliable, by the required background investigation in subsection (d)(1)(B) - (G) of this section, has been provided by the security service provider.

(E) The licensee shall document the basis for concluding that an individual is trustworthy and reliable and should be granted access to the security plan, implementing procedures, or the list of individuals that have been approved for unescorted access.

(F) Licensees shall maintain a list of persons currently approved for access to the security plan, implementing procedures, or the list of individuals that have been approved for unescorted access. When a licensee determines that a person no longer needs access to the security plan, implementing procedures, or the list of individuals that have been approved for unescorted access or no longer meets the access authorization requirements for access to the information, the licensee shall remove the person from the approved list as soon as possible, but no later than seven working days, and take prompt measures to ensure that the individual is unable to obtain the security plan, implementing procedures, or the list of individuals that have been approved for unescorted access.

(G) When not in use, the licensee shall store its security plan, implementing procedures, and the list of individuals that have been approved for unescorted access in a manner to prevent unauthorized access. Information stored in non-removable electronic form must be password protected.

(H) The licensee shall retain as a record for three years after the document is no longer needed:

(i) a copy of the information protection procedures; and

(ii) the list of individuals approved for access to the security plan, implementing procedures, or the list of individuals that have been approved for unescorted access.

(k) LLEA coordination.

(1) A licensee subject to subsections (i) and (j) of this section, this subsection, and subsections (l) - (q) of this section shall coordinate, to the extent practicable, with an LLEA for responding to threats to the licensee's facility, including any necessary armed response. The information provided to the LLEA must include:

(A) a description of the facilities and the category 1 and category 2 quantities of radioactive materials along with a description of the licensee's security measures that have been implemented to comply with subsections (i) and (j) of this section, this subsection, and subsections (l) - (q) of this section; and

(B) a notification that the licensee will request a timely armed response by the LLEA to any actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of material.

(2) The licensee shall notify the executive director within three business days if:

(A) the LLEA has not responded to the request for coordination within 60 days of the coordination request; or

(B) the LLEA notifies the licensee that the LLEA does not plan to participate in coordination activities.

(3) The licensee shall document its efforts to coordinate with the LLEA. The documentation must be kept for three years.

(4) The licensee shall coordinate with the LLEA at least every 12 months, or when changes to the facility design or operation adversely affect the potential vulnerability of the licensee's material to theft, sabotage, or diversion.

(l) Security zones.

(1) Licensees shall ensure that all aggregated category 1 and category 2 quantities of radioactive material are used or stored within licensee established security zones. Security zones may be permanent or temporary.

(2) Temporary security zones must be established as necessary to meet the licensee's transitory or intermittent business activities, such as periods of maintenance, source delivery, and source replacement.

(3) Security zones must, at a minimum, allow unescorted access only to approved individuals through:

(A) isolation of category 1 and category 2 quantities of radioactive materials by the use of continuous physical barriers that allow access to the security zone only through established access control points. A physical barrier is a natural or man-made structure or formation sufficient for the isolation of the category 1 or category 2 quantities of radioactive material within a security zone; or

(B) direct control of the security zone by approved individuals at all times; or

(C) a combination of continuous physical barriers and direct control.

(4) For category 1 quantities of radioactive material during periods of maintenance, source receipt, preparation for shipment, installation, or source removal or exchange, the licensee shall, at a minimum, provide sufficient individuals approved for unescorted access to maintain continuous surveillance of sources in temporary security zones and in any security zone in which physical barriers or intrusion detection systems have been disabled to allow such activities.

(5) Individuals not approved for unescorted access to category 1 or category 2 quantities of radioactive material must be escorted by an approved individual when in a security zone.

(m) Monitoring, detection, and assessment.

(1) Monitoring and detection.

(A) Licensees shall establish and maintain the capability to continuously monitor and detect without delay all unauthorized entries into its security zones. Licensees shall provide the means to maintain continuous monitoring and detection capability in the event of a loss of the primary power source or provide for an alarm and response in the event of a loss of the capability to continuously monitor and detect unauthorized entries.

(B) Monitoring and detection must be performed by:

(i) a monitored intrusion detection system that is linked to an onsite or offsite central monitoring facility;

(ii) electronic devices for intrusion detection alarms that will alert nearby facility personnel;

(iii) a monitored video surveillance system;

(iv) direct visual surveillance by approved individuals located within the security zone; or

(v) direct visual surveillance by a licensee designated individual located outside the security zone.

(C) A licensee subject to subsections (i) - (l) of this section, this subsection, and subsections (n) - (q) of this section shall also have a means to detect unauthorized removal of the radioactive material from the security zone. This detection capability must provide:

(i) for category 1 quantities of radioactive material, immediate detection of any attempted unauthorized removal of the radioactive material from the security zone. Such immediate detection capability must be provided by:

(I) electronic sensors linked to an alarm;

(II) continuous monitored video surveillance; or

(III) direct visual surveillance.

(ii) For category 2 quantities of radioactive material, weekly verification through physical checks, tamper indicating devices, use, or other means to ensure that the radioactive material is present.

(2) Assessment. Licensees shall immediately assess each actual or attempted unauthorized entry into the security zone to determine whether the unauthorized access was an actual or attempted theft, sabotage, or diversion.

(3) Personnel communications and data transmission. For personnel and automated or electronic systems supporting the licensee's monitoring, detection, and assessment systems, licensees shall:

(A) maintain continuous capability for personnel communication and electronic data transmission and processing among site security systems; and

(B) provide an alternative communication capability for personnel, and an alternative data transmission and processing capability, in the event of a loss of the primary means of communication or data transmission and processing. Alternative communications and data transmission systems may not be subject to the same failure modes as the primary systems.

(4) Response. Licensees shall immediately respond to any actual or attempted unauthorized access to the security zones, or actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material at licensee facilities or temporary job sites. For any unauthorized access involving an actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material, the licensee's response shall include requesting, without delay, an armed response from the LLEA.

(n) Maintenance and testing.

(1) Each licensee subject to subsections (i) - (m) of this section, this subsection, and subsections (o) - (q) of this section shall implement a maintenance and testing program to ensure that intrusion alarms, associated communication systems, and other physical components of the systems used to secure or detect unauthorized access to radioactive material are maintained in operable condition and capable of performing their intended function when needed. The equipment relied on to meet the security requirements of this section must be inspected and tested for operability and performance at the manufacturer's suggested frequency. If there is no manufacturer's suggested frequency, the testing must be performed at least annually, not to exceed 12 months.

(2) The licensee shall maintain records on the maintenance and testing activities for three years.

(o) Requirements for mobile devices. Each licensee that possesses mobile devices containing category 1 or category 2 quantities of radioactive material must:

(1) have two independent physical controls that form tangible barriers to secure the material from unauthorized removal when the device is not under direct control and constant surveillance by the licensee; and

(2) for devices in or on a vehicle or trailer, unless the health and safety requirements for a site prohibit the disabling of the vehicle, the licensee shall utilize a method to disable the vehicle or trailer when not under direct control and constant surveillance by the licensee. Licensees shall not rely on the removal of an ignition key to meet this requirement.

(p) Security program review.

(1) Each licensee shall be responsible for the continuing effectiveness of the security program. Each licensee shall ensure that the security program is reviewed to confirm compliance with the requirements of subsections (i) - (o) of this section, this subsection, and subsection (q) of this section and that comprehensive actions are taken to correct any noncompliance that is identified. The review must include the radioactive material security program content and implementation. Each licensee shall periodically (at least annually) review the security program content and implementation.

(2) The results of the review, along with any recommendations, must be documented. Each review report must identify conditions that are adverse to the proper performance of the security program, the cause of the condition(s), and, when appropriate, recommend corrective actions, and corrective actions taken. The licensee shall review the findings and take any additional corrective actions necessary to preclude repetition of the condition, including reassessment of the deficient areas where indicated.

(3) The licensee shall maintain the review documentation for three years.

(q) Reporting of events.

(1) The licensee shall immediately notify the LLEA after determining that an unauthorized entry resulted in an actual or attempted theft, sabotage, or diversion of a category 1 or category 2 quantity of radioactive material. As soon as possible after initiating a response, but not at the expense of causing delay or interfering with the LLEA response to the event, the licensee shall notify the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-8224. In no case shall the notification to the commission or the NRC be later than four hours after the discovery of any attempted or actual theft, sabotage, or diversion.

(2) The licensee shall assess any suspicious activity related to possible theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material and notify the LLEA as appropriate. As soon as possible but not later than four hours after notifying the LLEA, the licensee shall notify the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-8224.

(3) The initial telephonic notification required by paragraph (1) of this subsection must be followed, within a period of 30 days, by a written report submitted to the executive director. The report must include sufficient information for commission analysis and evaluation, including identification of any necessary corrective actions to prevent future instances.

(r) Additional requirements for transfer of category 1 and category 2 quantities of radioactive material. A licensee transferring a category 1 or category 2 quantity of radioactive material to a licensee of the commission, the NRC, or an Agreement State shall meet the license verification provisions listed in this subsection instead of those listed in §336.331(d) of this title (relating to Transfer of Radioactive Material):

(1) Any licensee transferring category 1 quantities of radioactive material to a licensee of the commission, the NRC, or an Agreement State, prior to conducting such transfer, shall verify with the NRC's license verification system or the license issuing authority that the transferee's license authorizes the receipt of the type, form, and quantity of radioactive material to be transferred and that the licensee is authorized to receive radioactive material at the location requested for delivery. If the verification is conducted by contacting the license issuing authority, the transferor shall document the verification. For transfers within the same organization, the licensee does not need to verify the transfer.

(2) Any licensee transferring category 2 quantities of radioactive material to a licensee of the commission, the NRC, or an Agreement State, prior to conducting such transfer, shall verify with the NRC's license verification system or the license issuing authority that the transferee's license authorizes the receipt of the type, form, and quantity of radioactive material to be transferred. If the verification is conducted by contacting the license issuing authority, the transferor shall document the verification. For transfers within the same organization, the licensee does not need to verify the transfer.

(3) In an emergency where the licensee cannot reach the license issuing authority and the license verification system is nonfunctional, the licensee may accept a written certification by the transferee that it is authorized by license to receive the type, form, and quantity of radioactive material to be transferred. The certification must include the license number, current revision number, issuing agency, expiration date, and for a category 1 shipment the authorized address. The licensee shall keep a copy of the certification. The certification must be confirmed by use of the NRC's license verification system or by contacting the license issuing authority by the end of the next business day.

(4) The transferor shall keep a copy of the verification documentation as a record for three years.

(s) Applicability of physical protection of category 1 and category 2 quantities of radioactive material during transit. The shipping licensee shall be responsible for meeting the requirements of subsection (r) of this section, this subsection, and subsections (t) - (w) of this section unless the receiving licensee has agreed in writing to arrange for the in-transit physical protection required under subsection (r) of this section, this subsection, and subsections (t) - (w) of this section.

(t) Preplanning and coordination of shipment of category 1 or category 2 quantities of radioactive material.

(1) Each licensee that plans to transport, or deliver to a carrier for transport, licensed material that is a category 1 quantity of radioactive material outside the confines of the licensee's facility or other place of use or storage shall:

(A) preplan and coordinate shipment arrival and departure times with the receiving licensee;

(B) preplan and coordinate shipment information with the governor or the governor's designee of any state through which the shipment will pass to:

(i) discuss the state's intention to provide law enforcement escorts; and

(ii) identify safe havens; and

(C) document the preplanning and coordination activities.

(2) Each licensee that plans to transport, or deliver to a carrier for transport, licensed material that is a category 2 quantity of radioactive material outside the confines of the licensee's facility or other place of use or storage shall coordinate the shipment no-later-than arrival time and the expected shipment arrival with the receiving licensee. The licensee shall document the coordination activities.

(3) Each licensee who receives a shipment of a category 2 quantity of radioactive material shall confirm receipt of the shipment with the originator. If the shipment has not arrived by the no-later-than arrival time, the receiving licensee shall notify the originator.

(4) Each licensee, who transports or plans to transport a shipment of a category 2 quantity of radioactive material, and determines that the shipment will arrive after the no-later-than arrival time provided pursuant to paragraph (2) of this subsection, shall promptly notify the receiving licensee of the new no-later-than arrival time.

(5) The licensee shall retain a copy of the documentation for preplanning and coordination and any revision thereof as a record for three years.

(u) Advance notification of shipment of category 1 quantities of radioactive material. As specified in paragraphs (1) and (2) of this subsection, each licensee shall provide advance notification to the NRC, to the executive director, and the governor of a state, or the governor's designee, of the shipment of licensed material in a category 1 quantity, through or across the boundary of the state, before the transport or delivery to a carrier for transport of the licensed material outside the confines of the licensee's facility or other place of use or storage.

(1) Procedures for submitting advance notification.

(A) The notification must be made to the executive director, to the commission, and to the office of each appropriate governor or governor's designee. The contact information, including telephone and mailing addresses, of governors and governors' designees, is available on the NRC's website at <https://scp.nrc.gov/special/designee.pdf>. A list of the contact information is also available upon request from the Director, Division of Materials Safety, Security, State, and Tribal Programs, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

(B) A notification delivered by mail must be post-marked at least seven days before transport of the shipment commences at the shipping facility.

(C) A notification delivered by any means other than mail must reach the commission and the executive director at least four days before the transport of the shipment commences and must reach the office of the governor or the governor's designee at least four days before transport of a shipment within or through the state.

(2) Information to be furnished in advance notification of shipment. Each advance notification of shipment of category 1 quantities of radioactive material must contain the following information, if available at the time of notification:

(A) the name, address, and telephone number of the shipper, carrier, and receiver of the category 1 radioactive material;

(B) the license numbers of the shipper and receiver;

(C) a description of the radioactive material contained in the shipment, including the radionuclides and quantity;

(D) the point of origin of the shipment and the estimated time and date that shipment will commence;

(E) the estimated time and date that the shipment is expected to enter each state along the route;

(F) the estimated time and date of arrival of the shipment at the destination; and

(G) a point of contact, with a telephone number, for current shipment information.

(3) Revision notice.

(A) The licensee shall provide any information not previously available at the time of the initial notification, as soon as the information becomes available but not later than commencement of the shipment, to the governor of the state or the governor's designee, to the executive director, and to the commission.

(B) A licensee shall promptly notify the governor of the state or the governor's designee of any changes to the information provided in accordance with paragraph (2) of this subsection and subparagraph (A) of this paragraph. The licensee shall also immediately notify the commission and the executive director of any such changes.

(4) Cancellation notice. Each licensee who cancels a shipment for which advance notification has been sent shall send a cancellation notice to the governor of each state or to the governor's designee previously notified, to the executive director, and to the commission. The licensee shall send the cancellation notice before the shipment would have commenced or as soon thereafter as possible. The licensee shall state in the notice that it is a cancellation and identify the advance notification that is being canceled.

(5) Records. The licensee shall retain a copy of the advance notification and any revision and cancellation notices as a record for three years.

(6) Protection of information. State officials, State employees, and other individuals, whether or not licensees of the commission, NRC, or an Agreement State, who receive schedule information of the kind specified in paragraph (2) of this subsection shall protect that information against unauthorized disclosure as specified in subsection (j)(4) of this section.

(v) Requirements for physical protection of category 1 and category 2 quantities of radioactive material during shipment.

(1) Shipments by road.

(A) Each licensee who transports, or delivers to a carrier for transport, in a single shipment, a category 1 quantity of radioactive material shall:

(i) Ensure that movement control centers are established that maintain position information from a remote location. These control centers must monitor shipments 24 hours a day, seven days a week, and have the ability to communicate immediately, in an emergency, with the appropriate law enforcement agencies.

(ii) Ensure that redundant communications are established that allow the transport to contact the escort vehicle (when used) and movement control center at all times. Redundant communications may not be subject to the same interference factors as the primary communication.

(iii) Ensure that shipments are continuously and actively monitored by a telemetric position monitoring system or an al-

ternative tracking system reporting to a movement control center. A movement control center must provide positive confirmation of the location, status, and control over the shipment. The movement control center must be prepared to promptly implement preplanned procedures in response to deviations from the authorized route or a notification of actual, attempted, or suspicious activities related to the theft, loss, or diversion of a shipment. These procedures will include, but not be limited to, the identification of and contact information for the appropriate LLEA along the shipment route.

(iv) Provide an individual to accompany the driver for those highway shipments with a driving time period greater than the maximum number of allowable hours of service in a 24-hour duty day as established by the Department of Transportation Federal Motor Carrier Safety Administration. The accompanying individual may be another driver.

(v) Develop written normal and contingency procedures to address:

(I) notifications to the communication center and law enforcement agencies;

(II) communication protocols. Communication protocols must include a strategy for the use of authentication codes and duress codes and provisions for refueling or other stops, detours, and locations where communication is expected to be temporarily lost;

(III) loss of communications; and

(IV) responses to an actual or attempted theft or diversion of a shipment.

(vi) Each licensee who makes arrangements for the shipment of category 1 quantities of radioactive material shall ensure that drivers, accompanying personnel, and movement control center personnel have access to the normal and contingency procedures.

(B) Each licensee that transports category 2 quantities of radioactive material shall maintain constant control and/or surveillance during transit and have the capability for immediate communication to summon appropriate response or assistance.

(C) Each licensee who delivers to a carrier for transport, in a single shipment, a category 2 quantity of radioactive material shall:

(i) use carriers that have established package tracking systems. An established package tracking system is a documented, proven, and reliable system routinely used to transport objects of value. In order for a package tracking system to maintain constant control and/or surveillance, the package tracking system must allow the shipper or transporter to identify when and where the package was last and when it should arrive at the next point of control;

(ii) use carriers that maintain constant control and/or surveillance during transit and have the capability for immediate communication to summon appropriate response or assistance; and

(iii) use carriers that have established tracking systems that require an authorized signature prior to releasing the package for delivery or return.

(2) Shipments by rail.

(A) Each licensee who transports, or delivers to a carrier for transport, in a single shipment, a category 1 quantity of radioactive material shall:

(i) Ensure that rail shipments are monitored by a telemetric position monitoring system or an alternative tracking system reporting to the licensee, third-party, or railroad communications center. The communications center shall provide positive confirmation of

the location of the shipment and its status. The communications center shall implement preplanned procedures in response to deviations from the authorized route or to a notification of actual, attempted, or suspicious activities related to the theft or diversion of a shipment. These procedures will include, but not be limited to, the identification of and contact information for the appropriate LLEA along the shipment route.

(ii) Ensure that periodic reports to the communications center are made at preset intervals.

(B) Each licensee who transports, or delivers to a carrier for transport, in a single shipment, a category 2 quantity of radioactive material shall:

(i) use carriers that have established package tracking systems. An established package tracking system is a documented, proven, and reliable system routinely used to transport objects of value. In order for a package tracking system to maintain constant control and/or surveillance, the package tracking system must allow the shipper or transporter to identify when and where the package was last and when it should arrive at the next point of control;

(ii) use carriers that maintain constant control and/or surveillance during transit and have the capability for immediate communication to summon appropriate response or assistance; and

(iii) use carriers that have established tracking systems that require an authorized signature prior to releasing the package for delivery or return.

(3) Investigations. Each licensee who makes arrangements for the shipment of category 1 quantities of radioactive material shall immediately conduct an investigation upon the discovery that a category 1 shipment is lost or missing. Each licensee who makes arrangements for the shipment of category 2 quantities of radioactive material shall immediately conduct an investigation, in coordination with the receiving licensee, of any shipment that has not arrived by the designated no-later-than arrival time.

(w) Reporting of events.

(1) The shipping licensee shall notify the appropriate LLEA and the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-8224 within one hour of its determination that a shipment of category 1 quantities of radioactive material is lost or missing. The appropriate LLEA would be the law enforcement agency in the area of the shipment's last confirmed location. During the investigation required by subsection (v)(3) of this section, the shipping licensee will provide agreed upon updates to the executive director on the status of the investigation.

(2) The shipping licensee shall notify the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-8224 within four hours of its determination that a shipment of category 2 quantities of radioactive material is lost or missing. If, after 24 hours of its determination that the shipment is lost or missing, the radioactive material has not been located and secured, the licensee shall immediately notify the executive director.

(3) The shipping licensee shall notify the designated LLEA along the shipment route as soon as possible upon discovery of any actual or attempted theft or diversion of a shipment or suspicious activities related to the theft or diversion of a shipment of a category 1 quantity of radioactive material. As soon as possible after notifying the LLEA, the licensee shall notify the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-8224 upon discovery of any actual or attempted theft or diversion of a shipment or any suspicious activity related to the shipment of category 1 radioactive material.

(4) The shipping licensee shall notify the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-8224 as soon as possible upon discovery of any actual or attempted theft or diversion of a shipment or any suspicious activity related to the shipment, of a category 2 quantity of radioactive material.

(5) The shipping licensee shall notify the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-8224 and the LLEA as soon as possible upon recovery of any lost or missing category 1 quantities of radioactive material.

(6) The shipping licensee shall notify the Office of Compliance and Enforcement 24-hour Emergency Response at 1-800-832-8224 as soon as possible upon recovery of any lost or missing category 2 quantities of radioactive material.

(7) The initial telephonic notification required by paragraphs (1) - (4) of this subsection must be followed within a period of 30 days by a written report submitted to the executive director. A written report is not required for notifications on suspicious activities required by paragraphs (3) and (4) of this subsection. The report must set forth the following information:

(A) a description of the licensed material involved, including kind, quantity, and chemical and physical form;

(B) a description of the circumstances under which the loss or theft occurred;

(C) a statement of disposition, or probable disposition, of the licensed material involved;

(D) actions that have been taken, or will be taken, to recover the material; and

(E) procedures or measures that have been, or will be, adopted to ensure against a recurrence of the loss or theft of licensed material.

(8) Subsequent to filing the written report, the licensee shall also report any additional substantive information on the loss or theft within 30 days after the licensee learns of such information.

(x) Form of records. Each record required by this section must be legible throughout the retention period specified in regulation by the licensing authority. The record may be the original or a reproduced copy or a microform, provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawings, and specifications, must include all pertinent information such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

(y) Record retention. Licensees shall maintain the records that are required in this section for the period specified by the appropriate regulation. If a retention period is not otherwise specified, these records must be retained until the executive director terminates the facility's license. All records related to this section may be destroyed upon executive director termination of the facility license.

(z) Category 1 and category 2 radioactive materials. The terbecquerel (TBq) values are the regulatory standard. The curie (Ci) values specified are obtained by converting from the TBq value. The Ci values are provided for practical usefulness only. Figure: 30 TAC §336.357(z) (No 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.

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Charmaine Backens

Deputy Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-0600

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT

CHAPTER 211. ADMINISTRATION

37 TAC §211.27

The Texas Commission on Law Enforcement (Commission) adopts the amended §211.27, concerning Reporting Responsibilities of Individuals with changes to the proposed text as published in the November 5, 2021, issue of the *Texas Register* (46 TexReg 7557). The rule will be republished.

Subsection (a)(6) is amended to clarify the distinction between a dishonorable discharge from the armed forces of the United States and a dishonorable discharge from a law enforcement agency. Subsection (b) is amended to reflect the effective date of the changes.

No comments were received regarding adoption of this amendment.

The amendment was adopted under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority, Texas Occupations Code §1701.153, Reports From Agencies and Schools; Texas Occupations Code §1701.307, Issuance of Officer and County Jailer License; Texas Occupations Code §1701.3075, Qualified Applicant Awaiting Appointment.

No other code, article, or statute is affected by this adoption.

§211.27. *Reporting Responsibilities of Individuals.*

(a) Within thirty days, a licensee or person meeting the requirements of a licensee shall report to the commission:

- (1) any name change;
- (2) a permanent mailing address other than an agency address;
- (3) all subsequent address changes;
- (4) an arrest, charge, or indictment for a criminal offense above the grade of Class C misdemeanor, or for any Class C misdemeanor involving the duties and responsibilities of office or family violence, including the name of the arresting agency, the style, court, and cause number of the charge or indictment, if any;
- (5) the final disposition of the criminal action; and

(6) receipt of a dishonorable discharge from the armed forces of the United States.

(b) The effective date of this section is June 1, 2022.

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

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Kim Vickers

Executive Director

Texas Commission on Law Enforcement

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For further information, please call: (512) 936-7771



37 TAC §211.30

The Texas Commission on Law Enforcement (Commission) adopts the amended §211.30, concerning Chief Administrator Responsibilities for Class A and B Waivers with changes to the proposed text as published in the November 5, 2021, issue of the *Texas Register* (46 TexReg 7557). The rule will be republished.

Subsection (g) is amended to clarify the transferability of a Class A and B waiver. Subsection (h) is amended to reflect the effective date of the changes.

No comments were received regarding the adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority, Texas Occupations Code §1701.307, Issuance of Officer or County Jailer License.

No other code, article, or statute is affected by this adoption.

§211.30. *Chief Administrator Responsibilities for Class A and B Waivers.*

(a) A chief administrator may request the executive director that an individual be considered for a waiver of either the enrollment or initial licensure requirements regarding an otherwise disqualifying Class A or B misdemeanor conviction or deferred adjudication. An individual is eligible for one waiver request. This request must be submitted at least 45 days prior to a regularly scheduled commission meeting.

(b) A chief administrator is eligible to apply for a waiver five years after the date of conviction or placement on community supervision.

(c) The request must include:

(1) a complete description of the following mitigating factors:

(A) the applicant's history of compliance with the terms of community supervision;

(B) the applicant's continuing rehabilitative efforts not required by the terms of community supervision;

(C) the applicant's employment record;

(D) whether the disposition offense contains an element of actual or threatened bodily injury or coercion against another person under the Texas Penal Code or the law of the jurisdiction where the offense occurred;

(E) the required mental state of the disposition offense;

(F) whether the conduct resulting in the arrest resulted in the loss of or damage to property or bodily injury;

(G) the type and amount of restitution made by the applicant;

(H) the applicant's prior community service;

(I) the applicant's present value to the community;

(J) the applicant's post-arrest accomplishments;

(K) the applicant's age at the time of arrest; and

(L) the applicant's prior military history;

(2) all court and community supervision documents;

(3) the applicant's statement;

(4) all offense reports;

(5) victim(s) statement(s), if applicable;

(6) letters of recommendation;

(7) statement(s) of how the public or community would benefit; and

(8) chief administrator's written statement of intent to hire the applicant as a full time employee.

(d) Commission staff will review the request and notify the chief administrator if the request is incomplete. The chief administrator must provide any missing documents before the request can be scheduled for a commission meeting. Once a completed request is received, it will be placed on the agenda of a regularly scheduled commission meeting.

(e) The chief administrator will be notified of the meeting date and must be present to present the request to the commissioners. The applicant must be present at the meeting to answer questions about the request. Staff will present a report on the review process.

(f) After hearing the request, the commissioners will make a decision and take formal action to approve or deny the request.

(g) If granted, a waiver is issued in the name of the applicant chief administrator, belongs to the sponsoring agency, is nontransferable without approval, and is without effect upon the subject's separation from employment. If separated and in the event of subsequent prospective law enforcement employment, a person may seek another waiver through the prospective hiring agency's chief administrator.

(h) The effective date of this section is June 1, 2022.

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

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Kim Vickers
Executive Director
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CHAPTER 217. ENROLLMENT, LICENSING, APPOINTMENT, AND SEPARATION

37 TAC §217.1

The Texas Commission on Law Enforcement (Commission) adopts an amendment to §217.1, concerning Minimum Standards for Enrollment and Initial Licensure, with changes to the proposed text as published in the November 5, 2021, issue of the *Texas Register* (46 TexReg 7559). The rule will be republished.

Subsection (b)(10)(B) is amended based in part to SB 24 and relates to pre employment procedures and requirements of law enforcement agencies. Subsection (b)(13) is amended to clarify the distinction between a dishonorable discharge from the armed forces of the United States and a dishonorable discharge from a law enforcement agency. Subsection (j) is amended to reflect the effective date of the changes.

No comments were received regarding adoption of this amendment.

The amendment was adopted under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority, Texas Occupations Code §1701.255 Enrollment Qualifications.

No other code, article, or statute is affected by this adoption.

§217.1. Minimum Standards for Enrollment and Initial Licensure.

(a) In order for an individual to enroll in any basic licensing course the provider must have on file documentation, acceptable to the Commission, that the individual meets eligibility for licensure.

(b) The commission shall issue a license to an applicant who meets the following standards:

(1) minimum age requirement:

(A) for peace officers and public security officers, is 21 years of age; or 18 years of age if the applicant has received:

(i) an associate's degree; or 60 semester hours of credit from an accredited college or university; or

(ii) has received an honorable discharge from the armed forces of the United States after at least two years of active service;

(B) for jailers and telecommunicators is 18 years of age;

(2) minimum educational requirements:

(A) has passed a general educational development (GED) test indicating high school graduation level;

(B) holds a high school diploma; or

(C) for enrollment purposes in a basic peace officer academy only, has an honorable discharge from the armed forces of the United States after at least 24 months of active duty service.

(3) is fingerprinted and is subjected to a search of local, state and U.S. national records and fingerprint files to disclose any criminal record;

(4) has never been on court-ordered community supervision or probation for any criminal offense above the grade of Class B misdemeanor or a Class B misdemeanor within the last ten years from the date of the court order;

(5) is not currently charged with any criminal offense for which conviction would be a bar to licensure;

(6) has never been convicted of an offense above the grade of a Class B misdemeanor or a Class B misdemeanor within the last ten years;

(7) has never been convicted or placed on community supervision in any court of an offense involving family violence as defined under Chapter 71, Texas Family Code;

(8) for peace officers, is not prohibited by state or federal law from operating a motor vehicle;

(9) for peace officers, is not prohibited by state or federal law from possessing firearms or ammunition;

(10) has been subjected to a background investigation completed by the enrolling or appointing entity into the applicant's personal history. A background investigation shall include, at a minimum, the following:

(A) An enrolling entity shall:

(i) require completion of the Commission-approved personal history statement; and

(ii) verify that the applicant meets each individual requirement for licensure under this rule based on the personal history statement and any other information known to the enrolling entity; and

(iii) contact all previous enrolling entities.

(B) In addition to subparagraph (A) of this paragraph, a law enforcement agency or law enforcement agency academy shall:

(i) require completion of the Commission-approved personal history statement; and

(ii) meet all requirements enacted in Occupations Code 1701.451, including submission to the Commission of a form confirming all requirements have been met. An in-person review of personnel records is acceptable in lieu of making the personnel records available electronically if a hiring agency and a previous employing law enforcement agency mutually agree to the in-person review.

(11) examined by a physician, selected by the appointing or employing agency, who is licensed by the Texas Medical Board. The physician must be familiar with the duties appropriate to the type of license sought and appointment to be made. The appointee must be declared by that professional, on a form prescribed by the commission, within 180 days before the date of appointment by the agency to be:

(A) physically sound and free from any defect which may adversely affect the performance of duty appropriate to the type of license sought;

(B) show no trace of drug dependency or illegal drug use after a blood test or other medical test; and

(C) for the purpose of meeting the requirements for initial licensure, an individual's satisfactory medical exam that is conducted as a requirement of a basic licensing course may remain valid

for 180 days from the individual's date of graduation from that academy, if accepted by the appointing agency;

(12) examined by a psychologist, selected by the appointing, employing agency, or the academy, who is licensed by the Texas State Board of Examiners of Psychologists. This examination may also be conducted by a psychiatrist licensed by the Texas Medical Board. The psychologist or psychiatrist must be familiar with the duties appropriate to the type of license sought. The individual must be declared by that professional, on a form prescribed by the commission, to be in satisfactory psychological and emotional health to serve as the type of officer for which the license is sought. The examination must be conducted pursuant to professionally recognized standards and methods. The examination process must consist of a review of a job description for the position sought; review of any personal history statements; review of any background documents; at least two instruments, one which measures personality traits and one which measures psychopathology; and a face to face interview conducted after the instruments have been scored. The appointee must be declared by that professional, on a form prescribed by the commission, within 180 days before the date of the appointment by the agency;

(A) the commission may allow for exceptional circumstances where a licensed physician performs the evaluation of psychological and emotional health. This requires the appointing agency to request in writing and receive approval from the commission, prior to the evaluation being completed; or

(B) the examination may be conducted by qualified persons identified by Texas Occupations Code § 501.004. This requires the appointing agency to request in writing and receive approval from the commission, prior to the evaluation being completed; and

(C) for the purpose of meeting the requirements for initial licensure, an individual's satisfactory psychological exam that is conducted as a requirement of a basic licensing course may remain valid for 180 days from the individual's date of graduation from that academy, if accepted by the appointing agency;

(13) has never received a dishonorable discharge from the armed forces of the United States;

(14) has not had a commission license denied by final order or revoked;

(15) is not currently on suspension, or does not have a surrender of license currently in effect;

(16) meets the minimum training standards and passes the commission licensing examination for each license sought;

(17) is a U.S. citizen.

(c) For the purposes of this section, the commission will construe any court-ordered community supervision, probation or conviction for a criminal offense to be its closest equivalent under the Texas Penal Code classification of offenses if the offense arose from:

(1) another penal provision of Texas law; or

(2) a penal provision of any other state, federal, military or foreign jurisdiction.

(d) A classification of an offense as a felony at the time of conviction will never be changed because Texas law has changed or because the offense would not be a felony under current Texas laws.

(e) A person must meet the training and examination requirements:

(1) training for the peace officer license consists of:

(A) the current basic peace officer course(s);

(B) a commission recognized, POST developed, basic law enforcement training course, to include:

(i) out of state licensure or certification; and

(ii) submission of the current eligibility application and fee; or

(C) a commission approved academic alternative program, taken through a licensed academic alternative provider and at least an associate's degree.

(2) training for the jailer license consists of the current basic county corrections course(s) or training recognized under Texas Occupations Code §1701.310;

(3) training for the public security officer license consists of the current basic peace officer course(s);

(4) training for telecommunicator license consists of telecommunicator course; and

(5) passing any examination required for the license sought while the exam approval remains valid.

(f) The commission may issue a provisional license, consistent with Texas Occupations Code §1701.311, to an agency for a person to be appointed by that agency. An agency must submit all required applications currently prescribed by the commission and all required fees before the individual is appointed. Upon the approval of the application, the commission will issue a provisional license. A provisional license is issued in the name of the applicant; however, it is issued to and shall remain in the possession of the agency. Such a license may neither be transferred by the applicant to another agency, nor transferred by the agency to another applicant. A provisional license may not be reissued and expires:

(1) 12 months from the original appointment date;

(2) on leaving the appointing agency; or

(3) on failure to comply with the terms stipulated in the provisional license approval.

(g) The commission may issue a temporary jailer license, consistent with Texas Occupations Code §1701.310. A jailer appointed on a temporary basis shall be enrolled in a basic jailer licensing course on or before the 90th day after their temporary appointment. An agency must submit all required applications currently prescribed by the commission and all required fees before the individual is appointed. Upon the approval of the application, the commission will issue a temporary jailer license. A temporary jailer license may not be renewed and expires:

(1) 12 months from the original appointment date; or

(2) on completion of training and passing of the jailer licensing examination.

(h) The commission may issue a temporary telecommunicator license, consistent with Texas Occupations Code §1701.405. An agency must submit all required applications currently prescribed by the commission and all required fees before the individual is appointed. Upon the approval of the application, the commission will issue a temporary telecommunicator license. A temporary telecommunicator license expires:

(1) 12 months from the original appointment date; or

(2) on completion of training and passing of the telecommunicator licensing examination. On expiration of a temporary license,

a person is not eligible for a new temporary telecommunicator license for one year.

(i) A person who fails to comply with the standards set forth in this section shall not accept the issuance of a license and shall not accept any appointment. If an application for licensure is found to be false or untrue, it is subject to cancellation or recall.

(j) The effective date of this section is June 1, 2022.

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

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CHAPTER 218. CONTINUING EDUCATION

37 TAC §218.3

The Texas Commission on Law Enforcement (Commission) adopts the amendment to §218.3, concerning Legislatively Required Continuing Education for Licensees with changes to the proposed text published in the November 5, 2021, issue of the *Texas Register* (46 TexReg 7561). The rule will be republished.

Subsection (b)(2) is amended to encompass the requirement of cardiopulmonary resuscitation training for telecommunicators additional pursuant to HB 786 (87R). Subsection (k) is amended to reflect the effective date of the changes.

No comments were received regarding adoption of this amendment.

The amendment was adopted under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority, Texas Occupations Code §1701.3071, Issuance of Telecommunicator License, Texas Occupations Code §1701.352, Continuing Education Programs.

No other code, article, or statute is affected by this adoption.

§218.3. *Legislatively Required Continuing Education for Licensees.*

(a) Each licensee shall complete the legislatively mandated continuing education in this chapter. Each appointing agency shall allow the licensee the opportunity to complete the legislatively mandated continuing education in this chapter. This section does not limit the number or hours of continuing education an agency may provide.

(b) Each training unit (2 years)

(1) Peace officers shall complete at least 40 hours of continuing education, to include the corresponding legislative update for that unit.

(2) Telecommunicators shall complete at least 20 hours of continuing education to include cardiopulmonary resuscitation training.

(c) Each training cycle (4 years)

(1) Peace officers who have not yet reached intermediate proficiency certification shall complete: Cultural Diversity (3939), Special Investigative Topics (3232), Crisis Intervention (3843) and De-escalation (1849).

(2) Individuals licensed as reserve law enforcement officers, jailers, or public security officers shall complete Cultural Diversity (3939), unless the person has completed or is otherwise exempted from legislatively required training under another commission license or certificate.

(d) Assignment specific training

(1) Police chiefs: individuals appointed as "chief" or "police chief" of a police department shall complete:

(A) For an individual appointed to that individual's first position as chief, the initial training program for new chiefs provided by the Bill Blackwood Law Enforcement Management Institute, not later than the second anniversary of that individual's appointment or election as chief; and

(B) At least 40 hours of continuing education for chiefs each 24-month unit, as provided by the Bill Blackwood Law Enforcement Management Institute.

(2) Constables: elected or appointed constables shall complete:

(A) For an individual appointed or elected to that individual's first position as constable, the initial training program for new constables provided by the Bill Blackwood Law Enforcement Management Institute, not later than the second anniversary of that individual's appointment or election as constable.

(B) Each 48 month cycle, at least 40 hours of continuing education for constables, as provided by the Bill Blackwood Law Enforcement Management Institute and a 20 hour course of training in civil process to be provided by a public institution of higher education selected by the Commission.

(3) Deputy constables: each deputy constable shall complete a 20 hour course of training in civil process each training cycle. The commission may waive the requirement for this training if the constable, in the format required by TCOLE, requests exemption due to the deputy constable not engaging in civil process as part of their assigned duties.

(4) New supervisors: each peace officer assigned to their first position as a supervisor must complete new supervisor training within one year prior to or one year after appointment as a supervisor.

(5) School-based Law Enforcement Officers: School district peace officers and school resource officers providing law enforcement services at a school district must obtain a school-based law enforcement proficiency certificate within 180 days of the officer's commission or placement in the district or campus of the district.

(6) Eyewitness Identification Officers: peace officers performing the function of eyewitness identification must first complete the Eyewitness Identification training (3286).

(7) Courtroom Security Officers/Persons: any person appointed to perform courtroom security functions at any level shall complete the Courtroom Security course (10999) within 1 year of appointment.

(8) Body-Worn Cameras: peace officers and other persons meeting the requirements of Occupations Code 1701.656 must first complete Body-Worn Camera training (8158).

(9) Officers Carrying Epinephrine Auto-injectors: peace officers meeting the requirements of Occupations Code 1701.702 must first complete epinephrine auto-injector training.

(10) Jailer Firearm Certification: jailers carrying a firearm as part of their assigned duties must first obtain the Jailer Firearms certificate before carrying a firearm.

(11) University Peace Officers, Trauma-Informed Investigation Training: each university or college peace officer shall complete an approved course on trauma-informed investigation into allegations of sexual harassment, sexual assault, dating violence, and stalking.

(e) Miscellaneous training

(1) Human Trafficking: every peace officer first licensed on or after January 1, 2011, must complete Human Trafficking (3270), within 2 years of being licensed.

(2) Canine Encounters: every peace officer first licensed on or after January 1, 2016, must take Canine Encounters (4065), within 2 years of being licensed.

(3) Deaf and Hard of Hearing Drivers: every peace officer licensed on or after March 1, 2016, must complete Deaf and Hard of Hearing Drivers (7887) within 2 years of being licensed.

(4) Civilian Interaction Training: every peace officer licensed before January 1, 2018, must complete Civilian Interaction Training Program (CITP) within 2 years. All other peace officers must complete the course within 2 years of being licensed.

(5) Crisis Intervention Training: every peace officer licensed on or after April 1, 2018, must complete the 40 hour Crisis Intervention Training within 2 years of being licensed.

(6) Mental Health for Jailers: all county jailers must complete Mental Health for Jailers not later than August 31, 2021.

(f) The Commission may choose to accept an equivalent course for any of the courses listed in this chapter, provided the equivalent course is evaluated by commission staff and found to meet or exceed the minimum curriculum requirements of the legislatively mandated course.

(g) The commission shall provide adequate notice to agencies and licensees of impending non-compliance with the legislatively required continuing education.

(h) The chief administrator of an agency that has licensees who are in non-compliance shall, within 30 days of receipt of notice of non-compliance, submit a report to the commission explaining the reasons for such non-compliance.

(i) Licensees shall complete the legislatively mandated continuing education in the first complete training unit, as required, or first complete training cycle, as required, after being licensed.

(j) All peace officers must meet all continuing education requirements except where exempt by law.

(k) The effective date of this section is June 1, 2022.

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

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Executive Director
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CHAPTER 219. PRELICENSING, REACTIVATION, TESTS, AND ENDORSEMENTS

37 TAC §219.1

The Texas Commission on Law Enforcement (Commission) adopts the amendment to §219.1, concerning Eligibility to Take State Examinations with changes to the proposed text as published in the November 5, 2021, issue of the *Texas Register* (46 TexReg 7563). The rule will be republished.

Subsection (g) is amended to clarify the status of a license if not appointed within two years from the date of their successful completion of the licensing exam. Subsection (i) is amended to reflect the effective date of the changes.

No comments were received regarding the adoption of this amendment.

The amendment was adopted under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority, Texas Occupations Code §1701.304, Examination.

No other code, article, or statute is affected by this adoption.

§219.1. Eligibility to Take State Examinations.

(a) An individual may not take a licensing exam for a license they actively hold.

(b) To be eligible to take a state licensing exam, an individual must:

(1) have successfully completed a commission-approved basic licensing course or academic alternative program;

(2) meet the requirements for reactivation if the individual is currently licensed;

(3) meet the requirements for reinstatement if the individual is currently licensed;

(4) meet the requirements if an individual is an out of state peace officer, federal criminal investigator, or military; or

(5) be eligible to take the county corrections licensing exam as provided in Texas Occupations Code, Chapter 1701, §1701.310.

(c) To maintain eligibility to attempt a licensing exam the applicant must meet the minimum standards for enrollment and initial licensure.

(d) An eligible examinee will be allowed three attempts to pass the examination. All attempts must be completed within 180 days from the completion date of the licensing course. Any remaining attempts become invalid on the 181st day from the completion date of the licensing course, or if the examinee passes the licensing exam. If an attempt is invalidated for any other reason, that attempt will be counted as one of the three attempts.

(e) The examinee must repeat the basic licensing course for the license sought if:

(1) the examinee fails all three attempts to pass the licensing exam;

(2) the examinee fails to complete all three attempts within 180 days from the completion date of the licensing course; or

(3) the examinee is dismissed from an exam for cheating. If dismissed from an exam for cheating, all remaining attempts are invalidated.

(f) An examinee that is required to repeat a basic licensing course under the provisions in subsection (e) of this section will not be allowed to repeat an academic alternative program.

(g) If an individual is not appointed within 2 years from the date of their successful completion of the licensing exam, the license will be placed in an inactive status.

(h) When applicable and in addition to this section, school marshal licenses are subject to the requirements of Chapter 227 of this title.

(i) The effective date of this section is June 1, 2022.

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

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37 TAC §219.11

The Texas Commission on Law Enforcement (Commission) adopts the amendment to §219.11, concerning Reactivation of a License with changes to the proposed text as published in the November 5, 2021, issue of the *Texas Register* (46 TexReg 7564). The rule will be republished.

Subsection (d) is amended to clarify the reactivation of a license. Subsection (i) is amended to reflect the effective date of the changes.

No comments were received regarding the adoption of this amendment.

The amendment was adopted under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority, Texas Occupations Code §1701.316, Reactivation of Peace Officer License, Texas Occupations Code §1701.3161, Reactivation of Peace Officer License; Retired Peace Officers.

No other code, article, or statute is affected by this adoption.

§219.11. Reactivation of a License.

(a) The commission will place all licenses in an inactive status at the end of the most recent training unit or cycle in which the licensee:

- (1) was not appointed at the end of the unit or cycle; and
- (2) did not meet continuing education requirements.

(b) The holder of an inactive license is unlicensed for all purposes.

(c) This section includes any permanent peace officer qualification certificate with an effective date before September 1, 1981.

(d) The requirements to reactivate a license for a peace officer with less than 10 years of full-time service are:

(1) If not appointed within two, but less than five, years from initial licensure:

(A) meet current licensing standards;

(B) successfully complete continuing education requirements, a supplemental peace officer training course, and a skills assessment course;

(C) make application and submit any required fee(s);

and

(D) pass the reactivation exam.

(2) If not appointed within five years of initial licensure:

(A) meet current enrollment standards;

(B) meet current licensing standards;

(C) successfully complete the basic licensing course;

(D) make application and submit any required fee(s);

and

(E) pass the licensing exam.

(3) If less than two years from last appointment:

(A) meet current licensing standards;

(B) successfully complete continuing education requirements; and

(C) make application and submit any required fee(s) in the format currently prescribed by the commission.

(4) If two years but less than five years from last appointment:

(A) meet current licensing standards;

(B) successfully complete continuing education requirements and a supplemental peace officer training course;

(C) make application and submit any required fee(s);

and

(D) pass the licensing exam.

(5) If more than five years but less than ten years from last appointment:

(A) meet current licensing standards;

(B) successfully complete continuing education requirements, a supplemental peace officer training course, and a skills assessment course;

(C) make application and submit any required fee(s);

and

(D) pass the licensing exam.

(6) Ten years or more from last appointment:

(A) meet current enrollment standards;

(B) meet current licensing standards;

(C) successfully complete the basic licensing course;

(D) make application and submit any required fee(s);

and

(E) pass the licensing exam.

(e) The requirements to reactivate a license for a peace officer with 10 years but less than 15 years of full-time service are:

(1) If less than two years from last appointment:

(A) meet current licensing standards;

(B) successfully complete continuing education requirements; and

(C) make application and submit any required fee(s) in the format currently prescribed by the commission.

(2) If two years but less than five years from last appointment:

(A) meet current licensing standards;

(B) successfully complete continuing education requirements, and, if applicable, a supplemental peace officer training course;

and (C) make application and submit any required fee(s);

(D) pass the reactivation exam.

(3) If more than five years from last appointment:

(A) meet current licensing standards;

(B) successfully complete continuing education requirements, and, if applicable, a supplemental peace officer training course and a skills assessment course;

and (C) make application and submit any required fee(s);

(D) pass the reactivation exam.

(f) Unless exempted by Texas Occupations Code Section 1701.356, the requirements to reactivate a license for an honorably retired peace officer are:

(1) meet current licensing standards;

(2) meet current continuing education requirements; and

(3) make application and submit any required fee(s).

(g) School marshal licenses are subject to the reactivation and renewal procedures related to school marshals under Chapter 227 of this title.

(h) The requirements to reactivate a jailer or telecommunicator license are:

(1) If less than two years from last appointment:

(A) meet current licensing standards;

(B) successfully complete continuing education requirements; and

(C) make application and submit any required fee(s) in the format currently prescribed by the commission.

(2) If two years but less than five years from last appointment:

(A) meet current licensing standards;

(B) successfully complete continuing education requirements;

and (C) make application and submit any required fee(s);

(D) pass the licensing exam.

(3) If more than five years from last appointment:

(A) meet current licensing standards;

(B) successfully complete the applicable basic licensing course;

(C) make application and submit any required fee(s); and

(D) pass the licensing exam.

(i) The effective date of this section is June 1, 2022.

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

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Kim Vickers

Executive Director

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CHAPTER 221. PROFICIENCY CERTIFICATES

37 TAC §221.31

The Texas Commission on Law Enforcement (Commission) adopts the repeal to §221.31, concerning Retired Peace Officer and Federal Law Enforcement Office Firearms Proficiency as published in the November 5, 2021, issue of the *Texas Register* (46 TexReg 7566). This rule will not be republished.

This repeal is pursuant to SB 198(87R).

No comments were received regarding adoption of this repeal.

The repeal was adopted under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority.

No other code, article, or statute is affected by this adoption.

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

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CHAPTER 223. ENFORCEMENT

37 TAC §223.19

The Texas Commission on Law Enforcement (Commission) adopts the amendment to §223.19, concerning License Revocation with changes to the proposed text as published in the November 5, 2021, issue of the *Texas Register* (46 TexReg 7566). The rule will be republished.

Subsection (e) is amended to clarify the distinction between a dishonorable discharge from the armed forces of the United States and a dishonorable discharge from a law enforcement agency. Subsection (n) is amended to reflect the effective date of the changes.

No comments were received regarding the adoption of this amendment.

The amendment was adopted under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority.

No other code, article, or statute is affected by this adoption.

§223.19. License Revocation.

(a) The license of a person convicted of a felony shall be immediately revoked.

(b) The license of a person convicted or placed on community supervision for an offense directly related to the duties and responsibilities of any related office held by that person may be revoked. In determining whether an offense directly relates to such office, the commission will consider:

- (1) the nature and seriousness of the crime;
- (2) the relationship of the crime to the purpose for requiring a license for such office;
- (3) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and
- (4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of such office.

(c) The license of a person convicted or placed on community supervision for any offense involving family violence shall be revoked.

(d) The license of a person who is noncompliant for the third time in obtaining continuing education shall be revoked.

(e) The license of a person who has received a dishonorable discharge from the armed forces of the United States shall be revoked.

(f) The license of a person who has made, submitted, caused to be submitted, or filed a false or untruthful report to the commission may be revoked.

(g) The license of a person who has been found to be in unauthorized possession of any commission licensing examination or portion of a commission licensing examination, or a reasonable facsimile shall be revoked.

(h) Revocation permanently bars the person from any future licensing or certification by the commission.

(i) A revoked license cannot be reinstated unless the licensee provides proof of facts supporting the revocation have been negated, such as:

- (1) the felony conviction has been reversed or set aside on direct or collateral appeal, or a pardon based on subsequent proof of innocence has been issued;

(2) the dishonorable or bad conduct discharge has been upgraded to above dishonorable or bad conduct conditions; or

(3) the report alleged to be false or untruthful was found to be truthful.

(j) During the direct appeal of any appropriate conviction, a license may be revoked pending resolution of the mandatory direct appeal. The license will remain revoked unless and until the holder proves that the conviction has been set aside on appeal.

(k) The holder of any revoked license may informally petition the executive director for reinstatement of that license based upon proof by the licensee that the facts supporting the revocation have been negated.

(l) If granted, the executive director shall inform the commissioners of such action no later than at their next regular meeting.

(m) If denied, the holder of a revoked license may petition the commission for a hearing to determine reinstatement based upon the same proof.

(n) The effective date of this section is June 1, 2022.

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

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CHAPTER 227. SCHOOL MARSHALS

37 TAC §227.7

The Texas Commission on Law Enforcement (Commission) adopts the amendment to §227.7, concerning School Marshal Renewals with changes to the proposed text as published in the November 5, 2021, issue of the *Texas Register* (46 TexReg 7567). The rule will be republished.

Subsection (a) is amended to specify the expiration date of a school marshal license pursuant to SB 785 (87R). Subsection (c) is amended to reflect the effective date of the changes.

No comments were received regarding the adoption of this amendment.

The amendment was adopted under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority.

No other code, article, or statute is affected by this adoption.

§227.7. School Marshal Renewals.

(a) A school marshal license expires on August 31 following the second anniversary of the date the commission licenses the person.

(b) The commission may renew the license of a person who has:

(1) successfully completed a renewal course designed and administered by the commission which will not exceed a combined 16 hours of classroom and simulation training;

(2) passed a commission exam;

(3) demonstrated handgun proficiency as required by the commission; and

(4) demonstrated psychological fitness.

(c) The effective date of this section is June 1, 2022.

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

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PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 437. FEES

37 TAC §437.5, §437.15

The Texas Commission on Fire Protection (commission) adopts amendments to 37 Texas Administrative Code Chapter 437, Fees, concerning §437.5, Renewal Fees, and §437.15, International Fire Service Accreditation Congress (IFSAC) Seal Fees.

The amended section is adopted without changes to the text as published in the March 11, 2022, issue of the *Texas Register* (47 TexReg 1217). The rules will not be republished.

The amended section to rule §437.5, Renewal Fees, reduces the annual certification renewal fee from \$75 to \$60. The amendment is an effort to grant relief to municipal departments and individual certification holders when renewing their certifications. Amended section to rule §437.15, International Fire Service Accreditation Congress (IFSAC) Seal, increases the fee for individuals seeking an International Fire Service Accreditation Congress (IFSAC) Seal from \$15 to \$30. IFSAC seals are not required for fire protection licensure by the state and are voluntary.

There was one comment received from the City of Houston Fire Department. The city strongly encouraged the members of the Texas Commission on Fire Protection to approve the proposed fee reduction to enable local fire departments to dedicate additional resources towards equipment and training.

The commission agreed with the City of Houston Fire Department and voted unanimously for final adoption of the proposed fee reduction.

The amended sections are adopted under Texas Government Code §419.008, which authorizes the commission to adopt or

amend rules to perform the duties assigned to the commission. The rule is also adopted under Texas Government Code §419.026, which authorizes the commission to adopt rules establishing fees for certifications.

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

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Mike Wisko

Executive Director

Texas Commission on Fire Protection

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Proposal publication date: March 11, 2022

For further information, please call: (512) 936-3841



CHAPTER 461. INCIDENT COMMANDER

37 TAC §461.1

The Texas Commission on Fire Protection (commission) adopts amendments to 37 Texas Administrative Code Chapter 461, Incident Commander, concerning §461.1, Incident Commander Certification.

The amended section is adopted without changes to the text as published in the March 11, 2022, issue of the *Texas Register* (47 TexReg 1219). The rule will not be republished.

The amended section to rule §461.1 removes the special temporary provision for Incident Commander Certification that expired on its own terms on January 1, 2022.

No comments were received from the public regarding the adoption of the amendments.

The amended section is adopted under Texas Government Code §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission. The rule is also adopted under Texas Government Code §419.032, which authorizes the commission to adopt rules establishing the requirements for certification.

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

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Mike Wisko

Executive Director

Texas Commission on Fire Protection

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