PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [Square brackets and strikethrough] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION
PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 354. MEDICAID HEALTH SERVICES
SUBCHAPTER A. PURCHASED HEALTH SERVICES
DIVISION 3. MEDICAID HOME HEALTH SERVICES

1 TAC §§354.1031, 354.1035, 354.1037, 354.1039, 354.1040, 354.1043

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes amendments to §354.1031, concerning General; §354.1035, concerning Recipient Qualifications for Home Health Services; §354.1037, concerning Written Plan of Care; §354.1039, Home Health Services Benefits and Limitations; §354.1040, concerning Requirements for Wheeled Mobility Systems; and §354.1043, concerning Competitive Procurement of Durable Medical Equipment (DME) and Supplies.

BACKGROUND AND PURPOSE

The purpose of the proposal is in response to recent federal legislation that prompted the Centers for Medicare & Medicaid Services (CMS) to issue interim final rule, CMS-5531-IFC (Interim Final Rule with Comment), to expand the healthcare workforce during the COVID-19 pandemic. CMS-5531-IFC is a permanent federal regulation that is not subject to the COVID-19 Public Health Emergency and became effective on May 8, 2020, with a retroactive application date of March 1, 2020.

To align the Medicaid home health services rules with CMS-5531-IFC, this proposal changes the requirement that a plan of care for covered Medicaid home health services can only be recommended, signed, and dated by a recipient's physician and allows a physician assistant (PA) or an advanced practice registered nurse who is licensed as a certified nurse practitioner (CNP) or clinical nurse specialist (CNS) to order home health services as described in the proposed rules.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §354.1031 adds definitions of "allowed practitioner," "durable medical equipment (DME)," "HHSC," and "supplies." The proposed amendment revises the definitions of "home health aide," "home health agency," "home health services," and "plan of care." The proposed amendment deletes the definitions of "Department," "Medicare fee schedule," "expendable medical supply acquisition fee," and "expendable medical supplies."

The proposed amendment to §354.1035 adds "allowed practitioner" to allow a PA, CNP, or CNS to order home health services.

The proposed amendment to §354.1037 adds "allowed practitioner" to allow a PA, CNP, or CNS to order home health services.

The proposed amendment to §354.1039 revises the title of the section to "Benefits and Limitations of Home Health Services" and adds "allowed practitioner" to allow a PA, CNP, or CNS to order home health services. The proposed amendment reorganizes the section for readability and updates terminology to align with new definitions in §354.1031. The proposed amendment also adds a legally authorized representative and a court appointed guardian to the list of persons who have been or could be taught to administer injections to a recipient in subsection (b)(3)(D). The proposed amendment includes minor editorial changes that improve clarity.

The proposed amendment to §354.1040 adds "allowed practitioner" in subsection (e)(1). The proposed amendment updates references to state law, and includes minor editorial changes.

The proposed amendment to §354.1043 adds "allowed practitioner" in paragraph (1)(B). The proposed amendment replaces "department" with "HHSC" and includes minor editorial changes.

FISCAL NOTE

Trey Wood, HHSC Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

1. the proposed rules will not create or eliminate a government program;
2. implementation of the proposed rules will not affect the number of HHSC employee positions;
3. implementation of the proposed rules will result in no assumed change in future legislative appropriations;
4. the proposed rules will not affect fees paid to HHSC;
5. the proposed rules will not create a new rule;
The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021, which provides HHSC with the authority to administer the federal medical assistance program in Texas and to adopt rules and standards for program administration.

The amendments affect recent federal legislation implemented during the COVID-19 pandemic that prompted the Centers for Medicare & Medicaid Services (CMS) to issue interim final rule, CMS-5531-IFC, to expand the healthcare workforce during the COVID-19 Pandemic. CMS-5531-IFC is a permanent federal regulation that is not subject to the COVID-19 Public Health Emergency and became effective on May 8, 2020 with a retroactive application date of March 1, 2020.

§354.1031. General.

(a) Purpose. The purpose of this division [subchapter] is to establish rules for the Title XIX (Medicaid) home health services benefit [benefits].

(b) Definitions. The following words and terms when used in this division [subchapter] [shall] have the following meanings, unless the context clearly indicates otherwise.

(1) Allowed practitioner--An individual:

(A) that maintains a valid and registered prescriptive authority agreement in accordance with Texas Occupations Code, Chapter 157, Subchapter B; and

(B) is licensed as:

(i) a physician assistant under Texas Occupations Code, Chapter 204; or

(ii) an advanced practice registered nurse licensed by the Texas Board of Nursing as a:

(I) certified nurse practitioner; or

(II) clinical nurse specialist.

(2) Durable medical equipment (DME)--Equipment and appliances that are primarily and customarily used to serve a medical purpose, generally are not useful to an individual in the absence of a disability, illness or injury, can withstand repeated use, and can be reusable or removable.

(3) HHSC--The Texas Health and Human Services Commission or its designee.

(4) Home health aide--An individual who meets the Medicare home health agency personnel qualifications and training requirements established for home health aides in 42 CFR §484.80.

(5) Home health aide services--Services which can be provided by a qualified home health aide, including those listed in 42 CFR §484.80.

(6) Home health agency--A public or private agency or organization, licensed by the State of Texas to provide home health services and qualified to participate as a Medicare home health agency under 42 CFR, Part 484, Subparts A - C (relating to Home Health Services).

(7) [44] Home health services--Covered services, DME [equipment, appliances] and supplies which are provided to a quali-
fied Medicaid recipient [recipients] at the recipient's [their] place of residence by home health agency staff [or] providers of DME and [durable medical equipment, or expendable medical] supplies under [federal regulations] 42 CFR §440.70 and §354.1037 of this division [title] (relating to Written Plan of Care) and §354.1039 of this division [title] (relating to Benefits and Limitations of Home Health Services [Benefits and Limitations]).

(8) Intermittent--Home health aide or skilled nursing services provided less than on a daily basis, less than eight hours per day.

(9) Part-time--Home health aide or skilled nursing services provided any number of days per week, less than eight hours per day.

[(2) Home health agency--A public or private agency or organization, licensed by the state to provide home health services and qualified to participate as a Medicare home health agency under 42 CFR, Part 484, §§484.1-484.52 (Conditions for Participation of Home Health Agencies).]

(10) [(2) Plan of care--A written regimen established and periodically reviewed by a physician or an allowed practitioner in consultation with home health agency staff, which meets the plan of care standards at 42 CFR §484.60 (§484.118) and §354.1037 of this division [title].

(11) Supplies--Health care related items that are required to address an individual's medical disability, illness, or injury and are:

(A) consumable or disposable; or

(B) cannot withstand repeated use by more than one individual.

[(4) Home health aide--An individual who meets the Medicare home health agency personnel qualifications and training requirements established for home health aides at 42 CFR §484.4 and §484.36.]

[(5) Home health aide services--Services which can be provided by a qualified home health aide, including those listed at 42 CFR §484.36.]

[(6) Department--The Texas Department of Health and or its designee.]

[(7) Part-time--Home health aide or skilled nursing services provided any number of days per week less than eight hours per day.

[(8) Intermittent--Home health aide or skilled nursing services provided less than on a daily basis less than eight hours per day.]

[(9) Medicare fee schedule--The fee schedule established by the Medicare program for expendable medical supplies and durable medical equipment.]

[(10) Expendable medical supply acquisition fee--The fee determined by the department or its designee by periodic sampling of suppliers or from information provided in manufacturer's publications, whenever is lesser.]

[(11) Expendable medical supplies--Medical supplies which meet one or both of the following criteria:

(A) the typical term of use is within one year of purchase; or

(B) reimbursement is made at a cost more than $1,000.]

[(12) Durable medical equipment--Machinery and/or equipment which meets one or both of the following criteria:

(A) the projected term of use is more than one year; or

(B) reimbursement is made at a cost more than $4,000.]


(a) An eligible Medicaid recipient must meet the following requirements to qualify for Medicaid home health services:

(1) An eligible recipient must be under the continuing care and medical supervision of a physician or an allowed practitioner who has established a plan of care or submitted a request form for the recipient in accordance with §354.1037 or §354.1039 of this division [title] (relating to Written Plan of Care and Benefits and Limitations of Home Health Services [Benefits and Limitations]). A recipient [Recipients] must be seen by the recipient's [their] physician or allowed practitioner within 30 days prior to the start of home health services. This [physician] visit may be waived when a diagnosis has already been established by the physician or allowed practitioner and the recipient is under the continuing care and medical supervision of the physician or allowed practitioner. Any waiver must be based on the physician's or allowed practitioner's statement that an additional evaluation visit is not medically necessary.

(2) An eligible recipient must have a medical need for covered home health services as documented in the recipient's plan of care or request form for the recipient in accordance with §354.1037 or §354.1039 of this division [of this title (relating to Written Plan of Care and Home Health Services Benefits and Limitations)]; and

(3) An eligible recipient must receive services that meet the recipient's existing medical needs, subject to §354.1039 of this division [of this title (relating to Home Health Services Benefits and Limitations)] and that can be safely provided in the recipient's home.

(b) The home health service, supply, or item of durable medical equipment [or appliance] must:

(1) be prior authorized by HHSC [the department], unless otherwise specified by HHSC [the department];

(2) be prescribed by a physician or an allowed practitioner who is currently licensed;

(3) be medically necessary, as documented in the plan of care or [and/or] the request form for the recipient, in accordance with §354.1037 and §354.1039 of this division [of this title (relating to Written Plan of Care and Home Health Services Benefits and Limitations)];

(4) be provided to a recipient in the recipient's [their] place of residence; and

(5) meet accepted industry standards for safety where applicable.

§354.1037. Written Plan of Care.

(a) A plan of care must be recommended, signed and dated by the recipient's [attending] physician or allowed practitioner.

(b) The plan of care must contain the following information:

(1) all pertinent diagnoses;

(2) mental status;

(3) types of services, including amount, duration and frequency;

(4) equipment required;

(5) prognosis;
(6) rehabilitation potential;
(7) functional limitations;
(8) activities permitted;
(9) nutritional requirements;
(10) medications;
(11) treatments, including amount and frequency;
(12) safety measures to protect against injury;
(13) instructions for timely discharge or referral; and
(14) date the recipient was last seen by the physician or allowed practitioner.

(c) Orders [Physician orders] for therapy services must include:

1. the specific procedures and modalities to be used;
2. the amount, frequency, and duration; and
3. the therapist who participated in developing the plan of care.

(d) The plan of care must be reviewed by the physician or allowed practitioner and the home health agency personnel as often as the severity of the recipient's patient's condition requires or at least once every 60 days.

(1) The plan of care must [shall] be initiated by a [the] registered nurse.

§354.1039. Benefits and Limitations of Home Health Services [Benefits and Limitations].

(a) HHSC [The Health and Human Services Commission or its designee (HHSC)] determines authorization requirements and limitations for covered home health services [service benefits]. The home health agency is responsible for obtaining prior authorization where specified for the home health [healthcare] service, supply, or item of durable medical equipment (DME)[, or appliance]. Home health services [service benefits] include the following:

1. Skilled nursing. Nursing services provided by a registered nurse (RN) or licensed vocational nurse (LVN) licensed by the Texas Board of Nursing provided on a part-time or intermittent basis and furnished through an enrolled home health agency are covered home health services [benefits]. Billable nursing visits may [also] include:

   (A) nursing visits required to teach the recipient, the primary caregiver, a family member, or a [and/or] neighbor how to administer or assist in a service or activity that is necessary to the care and [and/or] treatment of the recipient in a home setting; and

   (B) RN visits for skilled nursing observation, assessment, and evaluation, provided:

   (i) a physician or an allowed practitioner specifically requests that an RN visits [a nurse visit] the recipient for this purpose; and[.]

   (ii) the request reflects the need for the assessment visit.

   (ii) The physician's request must reflect the need for the assessment visit.]

   (ii) Nursing visits for the primary purpose of assessing a recipient's care needs to develop a plan of care are considered administrative and are not billable; and

   [(C) RN visits for general supervision of nursing care provided by a home health aide and/or others over whom the RN is administratively or professionally responsible.]

2. Home health aide services. Home health aide services to provide personal care under the supervision of an RN, a licensed physical therapist (PT), or a licensed [an] occupational therapist (OT) employed by the home health agency are covered home health services [benefits].

   (A) The primary purpose of a home health aide visit must be to provide personal care services.

   (B) Duties of a home health aide include:

   (i) the performance of simple procedures such as personal care, ambulation, exercise, range of motion, safe transfer, positioning, and household services essential to health care at home;

   (ii) assistance with medications that are ordinarily self-administered;

   (iii) reporting changes in the recipient's patient's condition and needs; and

   (iv) completing appropriate records.

   (C) Written instructions for home health aide services must be prepared by an RN, a PT, or an OT, [or therapist] as appropriate.

   (D) The requirements for home health aide supervision are as follows:

   (i) When only home health aide services are being furnished to a recipient, an RN must make a supervisory visit to the recipient's residence at least once every 60 days. These supervisory visits must occur when the aide is furnishing patient care.

   (ii) When skilled nursing care, PT, or OT are also being furnished to a recipient, an RN must make a supervisory visit to the recipient's residence at least every two weeks.

   (iii) When only PT or OT is furnished in addition to the home health aide services, the appropriate skilled therapist may make the supervisory visits in place of an RN.

   (E) Visits made primarily for performing housekeeping services are not covered services.

3. Supplies [Medical supplies]. Supplies [Medical supplies] are a covered home health services benefit [benefits] if they meet the following criteria.

   (A) Supplies [Medical supplies] must be:

   (i) documented in the recipient's plan of care as medically necessary and used for medical or therapeutic purposes;

   (ii) supplied:

   (I) through an enrolled home health agency in compliance with the recipient's plan of care; or

   (II) by an enrolled medical supplier under written, signed, and dated physician's or allowed practitioner's prescription; and
(iii) prior authorized unless otherwise specified by HHSC.

(B) Items which are not listed in subparagraph (C) of this paragraph may be medically necessary for the treatment or therapy of a qualified recipient [recipients]. If a prior authorization request is received for these items, consideration will be given to the request. Approval for reasonable amounts of the requested items may be given if circumstances justify the exception and the need is documented.

(C) Covered items include:

(i) colostomy and ileostomy care supplies;

(ii) urinary catheters, appliances and related supplies;

(iii) pressure pads including elbow and heel protectors;

(iv) incontinent supplies to include incontinent pads or diapers for a recipient [client] over the age of four for medical necessity as determined by the physician or allowed practitioner;

(v) crutch and cane tips;

(vi) irrigation sets;

(vii) supports and abdominal binders (not to include braces, orthotics, or prosthetics);

(viii) medicine chest supplies not requiring a prescription (not to include vitamins or personal care items such as soap or shampoos);

(ix) syringes, needles, IV tubing, or and/or IV administration setups; including IV solutions generally used for hydration or prescriptive additives;

(x) dressing supplies;

(xi) thermometers;

(xii) suction catheters;

(xiii) oxygen and related respiratory care supplies; or

(xiv) feeding related supplies.

(4) DME [Durable medical equipment (DME)]. DME [Durable Medical Equipment] must meet the following requirements to qualify for reimbursement under Medicaid home health services.

(A) DME must:

(i) be medically necessary and the appropriateness of the medical [health care service, supply] equipment[s] or appliance prescribed by the physician or allowed practitioner for the treatment of the individual recipient [and delivered] in the recipient's [his] place of residence must be documented in:

(I) the plan of care; or [and/or]

(II) the request form described in subsection (b)(2) of this section;

(ii) be prior authorized unless otherwise specified by HHSC;

(iii) meet the recipient's existing medical and treatment needs;

(iv) be considered safe for use in the home; and

(v) be provided through an:

(I) enrolled home health agency under a current physician's or allowed practitioner's plan of care; or

(II) enrolled DME supplier under a written, signed, and dated physician's or allowed practitioner's prescription.

(B) HHSC will determine whether DME will be rented, purchased, or repaired based upon the duration and use needs of the recipient.

(i) Periodic rental payments are made only for the lesser of:

(I) the period of time the equipment is medically necessary; or

(II) when the total monthly rental payments equal the reasonable purchase cost for the equipment.

(ii) Purchase is justified when the estimated duration of need multiplied by the rental payments would exceed the reasonable purchase cost of the equipment or it is otherwise more practical to purchase the equipment.

(iii) Repair of DME [durable medical equipment and appliances] will be considered based on the age of the item and the cost to repair the item.

(I) A request for repair of DME [durable medical equipment or appliances] must include an itemized estimated cost list of the repairs. Rental equipment may be provided to replace purchased DME [medical equipment or appliances] for the period of time it will take to make necessary repairs to purchased DME [medical equipment or appliances].

(II) Repairs will not be authorized in situations where the equipment has been abused or neglected by the recipient or the recipient's legally authorized representative (LAR), court appointed guardian, [patient, patient's] family, or caregiver.

(III) Routine maintenance of rental equipment is the responsibility of the provider.

(C) Covered DME that may be rented, purchased, or repaired includes [medical appliances and equipment (rental, purchase, or repairs) include]:

(i) non-customized manual or powered wheelchairs, including medically justified seating, supports, and equipment;

(ii) non-customized including medically justified seating, supports, and equipment, or

(iii) [IV] customized manual or power wheelchairs, specifically tailored or individualized, powered wheelchairs, including appropriate medically justified seating, supports, and equipment not to exceed an amount specified by HHSC: [IV]

(iii) [IV] canes, crutches, walkers, and trapeze bars;

(iv) [IV] bed pans, urinals, bedside commode chairs, elevated commode seats, and bath chairs/benches/seats;

(v) [IV] electric and non-electric hospital beds and mattresses;

(vi) [IV] air flotation or air pressure mattresses and cushions;

(vii) [IV] bed side rails and bed trays;

(viii) [IV] reasonable and appropriate appliances for measuring blood pressure and blood glucose suitable to the recipient's medical situation to include replacement parts and supplies;
Therapy

(4) [Optionally lift] lifts for assisting recipient to ambulate within residence;

(5) [Optionally lift] pumps for feeding tubes and IV administration; and

(6) [Optionally lift] respiratory or oxygen related equipment.

(D) DME [Medical equipment or appliances] not listed in subparagraph (C) of this paragraph may, in exceptional circumstances, be considered for payment when it can be medically substantiated as a part of the treatment plan that such service would serve a specific medical purpose on an individual case basis.

(5) Physical therapy. To be payable as a home health benefit, physical therapy services must:

(A) be provided by a physical therapist who is currently licensed by the Texas Board of Physical Therapy Examiners, or physical therapist assistant who is licensed by the Texas Board of Physical Therapy Examiners who assists and is supervised by a licensed physical therapist;

(B) be for the treatment of an acute musculoskeletal or neuromuscular condition or an acute exacerbation of a chronic musculoskeletal or neuromuscular condition;

(C) be expected to improve the recipient's [patient's] condition in a reasonable and generally predictable period of time, based on the physician's or allowed practitioner's assessment of the recipient's [patient's] restorative potential after any needed consultation with the physical therapist; and

(D) not be provided when the recipient [patient] has reached the maximum level of improvement. Repetitive services designed to maintain function once the maximum level of improvement has been reached are not a benefit. Services related to activities for the general good and welfare of a recipient [patient] such as general exercises to promote overall fitness and flexibility and activities to provide diversion or general motivation are not reimbursable.

(6) Occupational therapy. To be payable as a home health benefit, occupational therapy services must be:

(A) provided by an occupational therapist [one] who is currently licensed by the Texas Board of Occupational Therapy Examiners or by an occupational therapist assistant who is licensed by the Texas Board of Occupational Therapy Examiners to assist in the practice of occupational therapy and is supervised by an occupational therapist;

(B) for the evaluation and function-oriented treatment of a recipient [individuals] whose ability to function in life roles is impaired by recent or current physical illness, injury, or condition; and

(C) specific goal-directed [goal directed] activities to achieve a functional level of mobility and communication and to prevent further dysfunction within a reasonable length of time based on the occupational therapist's evaluation and the physician's or allowed practitioner's assessment and plan of care.

(7) Insulin syringes and needles. Insulin syringes and needles must meet the following requirements to qualify for reimbursement under Medicaid home health services.

(A) Pharmacies enrolled in the Medicaid Vendor Drug Program may dispense insulin syringes and needles to an eligible Medicaid recipient [recipient] with a physician's or an allowed practitioner's prescription.

(B) Prior authorization is not required for an eligible recipient to obtain insulin syringes and needles.

(C) Insulin syringes and needles obtained in accordance with this section will be reimbursed through the Medicaid Vendor Drug Program.

(D) A physician's or an allowed practitioner's plan of care is not required for an eligible recipient to obtain insulin syringes and needles under this section.

(8) Diabetic supplies and related testing equipment. Diabetic supplies and related testing equipment must meet the following requirements to qualify for reimbursement under Medicaid home health services.

(A) Diabetic supplies and related testing equipment must be prescribed by a physician or an allowed practitioner.

(B) Prior authorization is required unless otherwise specified by HHSC.

(b) Home health service limitations include the following.

(1) Recipient [Patient] supervision.

(A) A recipient [Patient] must be seen by the recipient's [physician] or allowed practitioner, [if consistent with sub-paragraph (C) of this paragraph, a nurse practitioner, clinical nurse specialist, or physician assistant] within 30 days prior to the start of home health services. This requirement [physician visit] may be waived when a diagnosis has already been established by the attending practitioner or an allowed practitioner and the recipient [patient] is currently undergoing active medical care and treatment. Such a waiver is based on the physician's or allowed practitioner's statement that an additional evaluation visit is not medically necessary.

(B) A recipient [Patients] receiving home health care services must remain under the care and supervision of a physician or an allowed practitioner who reviews and revises the plan of care at least every 60 days or more frequently as the physician or allowed practitioner determines necessary.

([C] If the face-to-face encounter is performed by a nurse practitioner, clinical nurse specialist, or physician assistant, the practitioner must communicate the clinical findings of that encounter to the ordering physician, and the physician ordering the services must—)

[•] record the date of the face-to-face encounter and the practitioner who conducted the encounter;

[•] affirm that the face-to-face encounter is related to the primary reason the patient requires home health services and that the encounter occurred within 30 days prior to the start of home health services; and

[•] include the clinical findings of the encounter in the patient's medical record.

(2) Time limited prior authorizations.

(A) Prior authorizations for payment of home health services may be issued by HHSC for a service period not to exceed 60 days on any given authorization. Specific authorizations may be limited to a time period less than the established maximum. When the need for home health services exceeds 60 days, or when there is a change in the service plan, the provider must obtain prior approval and retain the physician's or allowed practitioner's signed and dated orders with the revised plan of care.

(B) The provider must [shall] be notified by HHSC in writing of the authorization or denial [or denial] of requested services.

47 TexReg 3366  June 10, 2022  Texas Register
(C) Prior authorization requests for covered Medicaid home health services must include the following information:

(i) the [Texas] Medicaid identification form with the following information about the recipient:

(II) full name, age, and address;

(III) Medical Assistance Program Identification number;

(IV) health insurance claim number (where applicable); and

(ii) the physician's or allowed practitioner's written, signed, and dated plan of care (submitted by the provider if requested);

(iii) the clinical record data (completed and submitted by the provider if requested);

(iv) a description of the home or living environment;

(v) a composition of the family/caregiver;

(vi) observations pertinent to the overall plan of care in the home; and

(vii) the type of service the recipient [patient] is receiving from other community or state agencies.

(D) If inadequate or incomplete information is provided, the provider will be requested to furnish additional documentation as required by HHSC to make a decision on the request.

(3) Medication administration. Nursing visits for the purpose of administering medications are not covered if:

(A) the medication is not considered medically necessary to the treatment of the recipient's [individual's] illness;

(B) the administration of medication exceeds the therapeutic frequency or duration by accepted standards of medical practice;

(C) there is not a medical reason prohibiting the administration of the medication by mouth; or

(D) the recipient [patient], a primary caregiver, a family member, a legally authorized representative (LAR), a court appointed guardian, or [and/or] a neighbor of the recipient has been taught or can be taught to administer intramuscular (IM) and intravenous (IV) injections.

(4) Prior approval. Services or supplies furnished without prior approval, unless otherwise specified by HHSC, are not covered home health services [benefits].

(5) Recipient residence. Services, equipment, or supplies furnished to a recipient who is a resident or patient in a hospital, skilled nursing facility, or intermediate care facility are not covered home health services [benefits].

(6) Non-billable services. Skilled nursing services that are considered administrative and are not billable include:

(A) nursing visits for the primary purpose of assessing a recipient's care needs to develop a plan of care; and

(B) RN visits for general supervision of nursing care provided by a home health aide or others over whom the RN is professionally responsible.

(c) Home health services are subject to utilization review, which includes the following:

(1) the physician or allowed practitioner is responsible for retaining in the recipient's [client's] record a copy of the plan of care or [and/or] a copy of the request form documenting the medical necessity of the home health care service, supply, or item of DME [equipment, or appliance] and how it meets the recipient's health care needs;

(2) the home health services provider is responsible for documenting the amount, duration, and scope of services in the recipient's plan of care, the DME and supply [equipment/supply] order request form, and the recipient's [client] record based on the physician's or allowed practitioner's orders; This information is subject to retrospective review; and

(3) HHSC may conduct retrospective [establish] random, and targeted reviews [utilization review processes] to ensure the appropriate utilization of home health services [benefits] and to monitor the cost effectiveness of home health services.

§354.1040. Requirements for Wheeled Mobility Systems.

(a) Purpose. This section details the requirements for receiving reimbursement for the provision of, or the performance of a major modification to, a wheeled mobility system. This section implements Texas Human Resources Code §32.0425 [§32.0424 of the Human Resources Code].

(b) Definitions. The following words and terms when used in this section [shall] have the following meanings, unless the context clearly indicates otherwise.

(1) Occupational therapist (OT)—A person licensed by the Texas Board of Occupational Therapy Examiners to practice occupational therapy, as defined in Texas Occupations Code §454.002(4), [of the Texas Occupations Code] (relating to Definitions).

(2) Physical therapist (PT)—A person licensed by the Texas Board of Physical Therapy Examiners to practice physical therapy, as defined in §354.1121 of this subchapter [chapter] (relating to Definitions).

(3) Qualified rehabilitation professional (QRP)—A person who holds one or more of the following certifications:

(A) [Holds] a certification as an assistive technology professional or a rehabilitation engineering technologist issued by, and in good standing with, the Rehabilitation Engineering and Assistive Technology Society of North America (RESNA);

(B) [Holds] a certification as a seating and mobility specialist issued by, and in good standing with, RESNA; or [and/or]

(C) [Holds] a certification as a certified rehabilitation technology supplier issued by, and in good standing with, the National Registry of Rehabilitation Technology Suppliers (NRRTS).

(4) Wheeled Mobility System—An item of durable medical equipment (DME) that is a customized powered or manual mobility device or a feature or component of the device, including [the following]:

(A) seated [Seated] positioning components;

(B) powered [Powered] or manual seating options;

(C) specialty [Specialty] driving controls;

(D) multiple [Multiple] adjustment frame;

(E) nonstandard [Nonstandard] performance options; and

(F) other [Other] complex or specialized components.

(c) Roles and responsibilities. The following persons, when referenced in this section, shall have the following roles in the provision
of, or the performance of a major modification to, a wheeled mobility system, unless the context clearly indicates otherwise.

1. Occupational therapist (OT) -- The OT [occupational therapist] is responsible for completing the clinical assessment of a recipient required for obtaining a wheeled mobility system. The assessment must [shall] include detailed documentation of medical need for specific mobility or seating equipment and all necessary accessories.

2. Physical therapist (PT) -- The PT [physical therapist] is responsible for completing the clinical assessment of a recipient required for obtaining a wheeled mobility system. The assessment must [shall] include detailed documentation of medical need for specific mobility or seating equipment and all necessary accessories.

3. Qualified rehabilitation professional (QRP) -- The QRP is required to:

   A. be [Be] present for and involved in the clinical assessment of the recipient;

   B. be [Be] present at the time of delivery of the wheeled mobility system to direct the fitting of the wheeled mobility system to ensure that the system is appropriate for the recipient; and

   C. verify [Verify] that the wheeled mobility system functions correctly relative to the recipient.

4. A person that is licensed as an OT or [and/or] a PT, and is also certified as a QRP, may perform either the role of the therapist or the QRP during the clinical assessment of the recipient [client], but cannot serve in both roles at the same time.

   d. Benefits. Wheeled mobility systems are a covered home health services [Medicaid] benefit when the following criteria are met.

   1. All the requirements for DME, as detailed in §354.1039 of this division [chapter] (relating to Benefits and Limitations of Home Health Services [Benefits and Limitations]) are met.

   2. The wheeled [Wheeled] mobility system is [systems are] provided by an enrolled DME supplier that directly employs or contracts with a QRP.

   3. An enrolled DME supplier obtains prior authorization for a wheeled mobility system [systems] from HHSC [the Texas Health and Human Services Commission (HHSC) or its designee].

   e. Prior authorization requirements. The following documentation must be submitted in a manner approved by HHSC [or its designee] to obtain prior authorization for a wheeled mobility system.

   1. A signed and dated physician's or allowed practitioner's prescription, or other such documentation as directed by HHSC, that details a wheeled mobility system, including all necessary components, [needed by] the recipient.

   2. A clinical assessment that includes detailed documentation of medical need for specific mobility or seating equipment and all necessary accessories, signed and dated by an OT or PT authorized to perform the assessment.

   3. Documentation in a form or manner directed by HHSC [or its designee] attesting that a QRP was present for and involved in the clinical assessment of the recipient.

   4. Any other documentation deemed necessary by HHSC [or its designee] to adequately explain the medical necessity of the requested equipment.

   f. Requirements for reimbursement. Reimbursement for the provision of, or the performance of a major modification to, a wheeled mobility system will be considered only when:

   1. the [The] system is delivered to a recipient by a Medicaid-enrolled DME provider that directly employs or contracts with, a QRP, and the QRP was present and involved in the clinical assessment of the recipient for the requested wheeled mobility system; and

   2. at [At] the time the wheeled mobility system is delivered to the recipient, the QRP is present and responsible for:

      A. directing the fitting to ensure that the system is appropriate for the recipient; and

      B. verifying that the system functions correctly relative to the recipient.

   g. Documentation requirements for reimbursement. The following documentation must be submitted by the enrolled DME supplier with the claim for consideration of reimbursement for a wheeled mobility system in a manner approved by HHSC [or its designee].

   1. A signed and dated HHSC DME Certification and Receipt Form as required in §354.1185 of this subchapter [chapter] (relating to Provider Compliance with Durable Medical Equipment (DME) Certification Requirements).

   2. Documentation in a form and manner as directed by HHSC [or its designee] attesting that a QRP was present at the time of delivery and:

      A. directed the fitting of the wheeled mobility system to ensure that the system was appropriate for the recipient; and

      B. verified that the system mobility system functions correctly relative to the recipient.

   h. Effective dates for services provided. The provisions of this section apply to the following services:

   1. wheeled [Wheeled] mobility systems delivered on or after September 1, 2011;

   2. a [A] major modification to a wheeled mobility system provided on or after September 1, 2011; and

   3. QRP functions, including participating in a clinical assessment of a recipient [client] and directing the fitting of a wheeled mobility system, related to the provision of, or a major modification to, a wheeled mobility system when:

      A. the wheeled mobility system is delivered on or after September 1, 2011; and

      B. the QRP functions are performed after the effective date of the associated rates as determined by HHSC.

§354.1043. Competitive Procurement of Durable Medical Equipment (DME) and Supplies.

HHSC [The Texas Department of Health (department)] may establish a process for procuring DME and supplies that encourages competition and results in savings to HHSC [the department].

(1) The categories or individual types of DME and supplies that HHSC [which the department] may procure through a competitive process will be determined by HHSC [the department] using the following criteria:

A. the DME or supplies are used by a recipient [recipients] in sufficient quantities to encourage the competitive process and be cost effective for HHSC [the department];

B. the DME or supplies can be timely, safely, and effectively dispensed or provided by a prime vendor or contractor with a physician's or an allowed practitioner's prescription or order.
(i) without the necessity of fitting or instruction on its use; or

(ii) fitting and instruction can be provided by the prime vendor or contractor in compliance with HHSC [department] criteria;

(C) dispensing or providing the DME or supplies through a prime vendor or contractor will not limit or impair the accessibility and availability of the DME or supplies to the recipient [recipients] requiring the DME or supplies;

(D) dispensing or providing the DME or supplies through a prime vendor or contractor will not result in the recipient [recipients] receiving those DME or supplies in an unusable condition; and

(E) acquiring the DME or supplies through a prime vendor or contractor using a competitive process will result in cost savings to HHSC's [the department].

(2) HHSC [the department] may limit the number of providers with whom it will contract using the following criteria:

(A) all providers must submit a complete response to each section of HHSC's [the department's] procurement offer which will be used to evaluate provider qualifications, DME and supplies specifications, and accessibility and pricing provisions. Providers who fail to submit complete responses will be excluded from evaluation and consideration;

(B) the number of providers may be limited to only the number required to ensure statewide accessibility to the DME and supplies being procured; and

(C) the number of qualified providers will be limited to those providers who submit competitive responses which will result in savings to HHSC [the department].

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

Filed with the Office of the Secretary of State on May 24, 2022.

TRD-202202009
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 438-2934

TITILE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER C. INFRASTRUCTURE AND RELIABILITY

The Public Utility Commission of Texas (commission) proposes the repeal of 16 Texas Administrative Code (TAC) §25.55 relating to Weather Emergency Preparedness and proposes new 16 TAC §25.55 relating to Weather Emergency Preparedness. New 16 TAC §25.55 will require generation entities and transmission service providers (TSPs) in the ERCOT power region to maintain preparation standards for both winter and summer seasons. The new rule will also require the Electric Reliability Council of Texas, Inc. (ERCOT) to conduct on-site inspections of generation resources and transmission facilities in the ERCOT region.

New 16 TAC §25.55 implements §13 and §16 of Senate Bill 3 from the 87th Regular Session of the Texas Legislature, which amended Public Utility Authority Act (PURA) §35.0021 relating to Emergency Weather Preparedness and §38.075 relating to Emergency Weather Preparedness.

The commission also requests comment from interested persons on the following areas:

1. For Transmission Service Providers (TSPs) that provide comment on proposed §25.55, provide information related to wind-loading design criteria for the 345 kV network.

2. Does proposed 25.55(e) and proposed 25.55(h) appropriately define "repeated or major weather-related forced interruptions of service"?

Comments responding to these questions should be filed in accordance with the instructions below under “Public Comments.”

Growth Impact Statement

The agency provides the following governmental growth impact statement for the proposed rule, as required by Texas Government Code §2001.0221. The agency has determined that for each year of the first five years that the proposed rule is in effect, the following statements will apply:

(1) the proposed rule will not create a government program and will not eliminate a government program;

(2) implementation of the proposed rule will not require the creation of new employee positions and will not require the elimination of existing employee positions;

(3) implementation of the proposed rule will not require an increase and will not require a decrease in future legislative appropriations to the agency;

(4) the proposed rule will not require an increase and will not require a decrease in fees paid to the agency;

(5) the proposed rule will not, in effect, create a new regulation, because it is replacing a similar regulation;

(6) the proposed rule will repeal an existing regulation, but it will replace that regulation with a similar regulation;

(7) the same number of individuals will be subject to the proposed rule’s applicability as were subject to the applicability of the rule it is being proposed to replace; and

(8) the proposed rule will not affect this state’s economy.

Fiscal Impact on Small and Micro-Businesses and Rural Communities

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of implementing the proposed rule. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Texas Government Code §2006.002(c).

Takings Impact Analysis
The commission has determined that the proposed rule will not be a taking of private property as defined in chapter 2007 of the Texas Government Code.

Fiscal Impact on State and Local Government

Ramya Ramaswamy, senior engineering specialist with the market analysis division, has determined that for the first five-year period the proposed rule will be in effect, there will be no fiscal implications for the state or for units of local government under Texas Government Code §2001.024(a)(4) as a result of enforcing or administering the section.

Public Benefits

Ms. Ramaswamy has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be the improved ability of the electric grid to withstand extreme winter and summer weather events in the future. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. Ms. Ramaswamy has determined that the economic costs to persons required to comply with the proposed rule will vary on an individual basis, depending on the current weather preparation readiness of the facilities and generation resources to which the rule is applicable.

Local Employment Impact Statement

For each year of the first five years the proposed section is in effect, there should be no effect on a local economy; therefore, no local employment impact statement is required under Texas Government Code §2001.022.

Costs to Regulated Persons

Texas Government Code §2001.0045(b) does not apply to this rulemaking because the commission is expressly excluded under subsection §2001.0045(c)(7).

Public Hearing

The commission staff will conduct a public hearing on this rulemaking on July 1, 2022, at 9:00 a.m. in the Commissioners' Hearing Room, 7th floor, William B. Travis Building if requested in accordance with Texas Government Code §2001.029. The request for a public hearing must be received by June 23, 2022. If no request for public hearing is received and the commission staff cancels the hearing, it will file in this project a notification of the cancellation of the hearing prior to the scheduled date for the hearing.

Public Comments

Interested persons may file comments electronically through the interchange on the commission's website. Comments must be filed by June 23, 2022. Comments should be organized in a manner consistent with the organization of the proposed rules. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to modify the proposed rules on adoption. All comments should refer to Project Number 53401.

Each set of comments should include a standalone executive summary as the last page of the filing. This executive summary must be clearly labeled with the submitting entity's name and should include a bulleted list covering each substantive recommendation made in the comments.

16 TAC §25.55

Statutory Authority

The rule is proposed under the following provisions of PURA: §14.001, which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §14.002, which provides the Public Utility Commission with the authority to make adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction. The rule is also proposed under §35.0021, which requires the commission to adopt rules that require each provider of electric generation service in the ERCOT power region to implement measures to prepare the provider’s generation assets to provide adequate electric generation service during a weather emergency; and §38.075, which requires the commission to adopt rules to require each electric cooperative, municipally owned utility, and transmission and distribution utility providing transmission service in the ERCOT power region to implement measures to prepare its facilities to maintain service quality and reliability during a weather emergency.


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

Filed with the Office of the Secretary of State on May 26, 2022.

TRD-202202050

Andrea Gonzalez

Rules Coordinator

Public Utility Commission of Texas

Earliest possible date of adoption: July 10, 2022

For further information, please call: (512) 936-7244

16 TAC §25.55

Statutory Authority

The rule is proposed under the following provisions of PURA: §14.001, which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §14.002, which provides the Public Utility Commission with the authority to make adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction. The rule is also proposed under §35.0021, which requires the commission to adopt rules that require each provider of electric generation service in the ERCOT power region to implement measures to prepare the provider's generation assets to provide adequate electric generation service during a weather emergency; and §38.075, which requires the commission to adopt rules to require each electric cooperative, municipally owned utility, and transmission and distribution utility providing transmission service in the ERCOT power region to implement measures to prepare its facilities to maintain service quality and reliability during a weather emergency.


(a) Application. This section applies to the Electric Reliability Council of Texas, Inc. (ERCOT) and to generation entities and transmission service providers (TSPs) in the ERCOT power region.

(1) A generation resource with an ERCOT-approved notice of suspension of operations for the summer season or winter season is not required to comply with this section until the return to service date identified in its notice of change of generation resource designation required under the ERCOT protocols.

(2) A new generation resource or transmission facility that is scheduled to begin commercial operations during the summer season or winter season must meet the requirements of this section prior to the commercial operations date established in the ERCOT interconnection process for generation resources or initial energization for transmission facilities, as applicable.

(b) Definitions. In this section, the following definitions apply unless the context indicates otherwise.

(1) Energy storage resource--An energy storage system registered with ERCOT as an energy storage resource for the purpose of providing energy or ancillary services to the ERCOT grid and associated facilities controlled by the generation entity that are behind the system's point of interconnection, necessary for the operation of the system, and not part of a manufacturing process that is separate from the generation of electricity.

(2) Generation entity--An ERCOT-registered resource entity acting on behalf of an ERCOT-registered generation resource or energy storage resource.

(3) Generation resource--A generator registered with ERCOT as a generation resource and capable of providing energy or ancillary services to the ERCOT grid, as well as associated facilities controlled by the generation entity that are behind the generator's point of interconnection, necessary for the operation of the generation, and not part of a manufacturing process that is separate from the generation of electricity.

(4) Inspection--Activities that ERCOT or its agents engage in to determine whether a generation entity is in compliance with all or parts of subsection (c) of this section, or whether a TSP is in compliance with all or parts of subsection (d) of this section. An inspection may include site visits, assessments of procedures, interviews, and review of information provided by a generation entity or TSP in response to a request by ERCOT, including review of evaluations conducted by the generation entity or TSP or its contractor.

(5) Major weather-related forced interruption of service--The loss of 7,500 megawatt-hours of generation service or transmission capability occurring as a result of a weather emergency.

(6) Repeated weather-related forced interruption of service--Three or more of any combination of the following occurrences as a result of a weather emergency within any three year period: a failure to start, a forced outage, or a deration of more than fifty percent of the nameplate capacity of a generation resource or a transmission facility.

(7) Resource--A generation resource or energy storage resource.

(8) Summer season--June 1 to September 30 each year.

(9) Transmission facility--A transmission-voltage element inside the fence surrounding a TSP's high-voltage switching station or substation.

(10) Weather critical component--Any component of a resource or transmission facility that is susceptible to fail during a weather emergency, the occurrence of which failure is likely to significantly hinder the ability of the resource or transmission facility to function as intended or, for a resource, is likely to lead to a trip, derate, or failure to start.

(11) Weather emergency--A situation resulting from weather conditions that produces significant risk for a TSP that firm load must be shed or a situation for which ERCOT provides advance notice to market participants involving weather-related risks to the ERCOT power region.

(12) Weather emergency preparation measures--Measures that a generation entity or TSP takes to support the function of a resource or transmission facility during a weather emergency.

(13) Winter season--December 1 to March 31 each year.

(c) Weather emergency preparedness reliability standards for a generation entity.

(1) Winter season preparations. By December 1 each year, a generation entity must complete the following winter weather emergency preparation measures for each resource under its control. A generation entity must maintain these measures throughout the winter season. A generation entity must update its winter weather emergency preparation measures no later than one year after ERCOT files a historical weather study report under subsection (i) of this section.

(A) Implement weather emergency preparation measures reasonably expected to ensure the sustained operation of all cold weather critical components during winter weather conditions. Such measures include, as appropriate for the resource:

(i) Installation of adequate wind breaks and other structural preparations as needed for resources susceptible to outages or derates caused by wind;

(ii) Installation of insulation and enclosures for all cold weather critical components;

(iii) Inspection of existing thermal insulation and associated forms of water-proofing for damage or degradation, and repair of damaged or degraded insulation and associated forms of water-proofing;

(iv) Assurance of the availability and appropriate safekeeping of sufficient chemicals, auxiliary fuels, and other materials necessary for sustained operations during a winter weather emergency;

(v) Assurance of the operability of instrument air moisture prevention systems;

(vi) Maintenance of freeze proof equipment for all cold weather critical components, including fuel delivery systems controlled by the generation entity, and testing freeze protection equipment on a monthly basis from November 1 through March 31; and

(vii) Installation of monitoring systems for all cold weather critical components, including circuitry that provides freeze protection or prevents instrument air moisture;

(B) Beginning in 2023, implement weather emergency preparation measures, in addition to the weather emergency preparation measures required by subparagraph (A) of this paragraph, reasonably expected to ensure sustained operation of the resource during the lesser of the minimum ambient temperature at which the resource has experienced sustained operations or the 95th percentile minimum average 72-hour temperature reported in ERCOT’s historical weather study,
required under subsection (i) of this section, for the weather zone in which the resource is located.

(C) Review the adequacy of staffing plans to be used during a winter weather emergency and revise the staffing plans, as appropriate.

(D) Train relevant operational personnel on winter weather preparations and operations.

(2) Summer season preparations. By June 1 each year, a generation entity must complete the following summer weather emergency preparation measures for each resource under its control. A generation entity must maintain these measures throughout the summer season. A generation entity must update its summer weather emergency preparation measures no later than one year after ERCOT files a historical weather study report under subsection (i) of this section.

(A) Implement weather emergency preparation measures reasonably expected to ensure the sustained operation of all hot weather critical components during summer weather conditions. Such measures include, as appropriate for the resource:

(i) Identification of regulatory and legal limitations of cooling capacity, water withdrawal, maximum discharge temperatures, and rights for additional water supply;

(ii) Assurance of adequate water supplies for cooling towers, reservoirs, heat exchangers, and adequate cooling capacity of the water supplies used in the cooling towers, reservoirs, and heat exchangers;

(iii) Assurance of availability and appropriate safekeeping of adequate equipment to remove heat and moisture from all hot weather critical components;

(iv) Assurance of the availability of sufficient chemicals, coolants, auxiliary fuels, and other materials necessary for sustained operations during a summer weather emergency;

(v) Maintenance of all hot weather critical components, including air flow or cooling systems, and testing of all components on a monthly basis from May 1 through September 30; and

(vi) Installation of monitoring systems for all hot weather critical components.

(B) Beginning in 2023, implement weather emergency preparation measures, in addition to the weather emergency preparation measures required by subparagraph (A) of this paragraph, reasonably expected to ensure sustained operation of the resource during the greater of the maximum ambient temperature at which the resource has experienced sustained operations or the 95th percentile maximum average 72-hour temperature reported in ERCOT’s historical weather study, required under subsection (i) of this section, for the weather zone in which the resource is located.

(C) Review the adequacy of staffing plans to be used during a summer weather emergency and revise the staffing plans, as appropriate.

(D) Train relevant operational personnel on summer weather preparations and operations.

(3) Declaration of preparedness. A generation entity must submit to ERCOT, on a form prescribed by ERCOT, the following declarations of weather preparedness:

(A) No earlier than November 1 and no later than December 1 of each year, a generation entity must submit a declaration of winter weather preparedness that:

(i) Identifies every resource under the entity’s control for which the declaration is being submitted;

(ii) Summarizes all activities engaged in by the generation entity to complete the requirements of paragraph (1) of this subsection;

(iii) Provides the minimum ambient temperature at which each resource has experienced sustained operations, as measured at the resource site or the weather station nearest to the resource site;

(iv) Includes any additional information required by the ERCOT protocols; and

(v) Includes a notarized attestation sworn to by the generation entity’s highest-ranking representative, official, or officer with binding authority over the generation entity attesting to the completion of all applicable activities described in paragraph (1) of this subsection, and to the accuracy and veracity of the information described in subparagraph (A) of this paragraph.

(B) No earlier than May 1 and no later than June 1 of each year, a generation entity must submit a declaration of summer weather preparedness that at a minimum:

(i) Identifies every resource under the entity’s control for which the declaration is being submitted;

(ii) Summarizes all activities engaged in by the generation entity to complete the requirements of paragraph (2) of this subsection;

(iii) Provides the maximum ambient temperature at which each resource has experienced sustained operations, as measured at the resource site or the weather station nearest to the resource site;

(iv) Includes any additional information required by the ERCOT protocols; and

(v) Includes a notarized attestation sworn to by the generation entity’s highest-ranking representative, official, or officer with binding authority over the generation entity attesting to the completion of all applicable activities described in paragraph (2) of this subsection, and to the accuracy and veracity of the information described in subparagraph (B) of this paragraph.

(C) A generation entity must submit the appropriate declaration of preparedness to ERCOT prior to returning a mothballed or decommissioned resource to service during the winter or summer season.

(4) No later than December 20 of each year, ERCOT must file with the commission a compliance report that addresses whether each generation entity has submitted the declaration of winter weather preparedness required by paragraph (3)(A) of this subsection for each resource under the generation entity’s control.

(5) No later than June 20 of each year, ERCOT must file with the commission a compliance report that addresses whether each generation entity has submitted the declaration of summer weather preparedness required by paragraph (3)(B) of this subsection for each resource under the generation entity’s control.

(d) ERCOT inspection of resources.

(1) ERCOT must conduct inspections of resources and may prioritize inspections based on factors such as whether a resource is critical for electric grid reliability; has experienced a forced outage, forced derate, or failure to start related to weather emergency conditions; or has other vulnerabilities related to weather emergency conditions. ERCOT must determine, in consultation with commission staff, the number, extent, and content of inspections, provided that every re-
source interconnected to the ERCOT power region must be inspected at least once every three years. ERCOT must develop, in consultation with commission staff, a winter weather inspection checklist and a summer weather inspection checklist for use during resource inspections. Inspections may be conducted by ERCOT's employees or contractors.

(A) ERCOT must provide each generation entity at least 48 hours' notice of an inspection unless otherwise agreed by the generation entity and ERCOT. Upon provision of the required notice, a generation entity must grant access to its facility to ERCOT and to commission staff, including an employee of a contractor designated by ERCOT or the commission.

(B) During the inspection, a generation entity must provide ERCOT and commission staff access to any part of the facility upon request. A generation entity must provide access to inspection, maintenance, and other records associated with weather emergency preparation measures and must make the generation entity's staff available to answer questions. A generation entity may escort ERCOT and commission staff at all times during an inspection. During the inspection, ERCOT or commission staff may take photographs or video recordings of any part of the facility and may conduct interviews of facility personnel designated by the generation entity.

(2) ERCOT inspection report

(A) ERCOT must provide a report on its inspection of a resource to the generation entity. The inspection report must address whether the generation entity has complied with the requirements in subsection (c)(1) or (2) of this section.

(B) If the generation entity has not complied with a requirement in subsection (c)(1) or (2) of this section, ERCOT must provide the generation entity a reasonable period to cure the identified deficiencies.

(i) The cure period determined by ERCOT must consider what weather emergency preparation measures the generation entity may be reasonably expected to have taken before ERCOT's inspection, the reliability risk of the resource's noncompliance, and the complexity of the measures needed to cure the deficiency.

(ii) The generation entity may request ERCOT provide a longer period to cure the identified deficiencies. The request must be accompanied by documentation that supports the request.

(iii) ERCOT, in consultation with commission staff, will determine the final cure period after considering a request for a longer period to cure the identified deficiencies.

(C) ERCOT must report to commission staff any generation entity that does not remedy the deficiencies identified under subparagraph (A) of this paragraph within the cure period determined by ERCOT under subparagraph (B) of this paragraph.

(D) A generation entity reported by ERCOT to commission staff under subparagraph (C) of this paragraph will be subject to enforcement investigation under §22.246 (relating to Administrative Penalties) of this title. A violation of this section is a Class A violation under §25.8(b)(3)(A) (relating to Classification System for Violations of Statutes, Rules, and Orders Applicable to Electric Service Providers) and may be subject to a penalty not to exceed $1,000,000 per violation per day.

(e) Weather-related failures by a generation entity to provide service. A generation entity with a resource that experiences repeated or major weather-related forced interruptions of service must contract with a qualified professional engineer to assess its weather emergency preparation measures, plans, procedures, and operations. The qualified professional engineer must not be an employee of the generation entity or its affiliate. The qualified professional engineer must not have participated in previous assessments for the resource for at least five years, unless the generation entity provides documentation that no other qualified professional engineers are reasonably available for engagement. The qualified professional engineer must conduct a root cause analysis of the failure and develop a corrective action plan to address any weather-related causes of the failure. The generation entity must submit the qualified professional engineer's assessment to the commission and ERCOT. A generation entity to which this subsection applies may be subject to additional inspections by ERCOT. ERCOT must refer to commission staff for investigation any generation entity that does not comply with a provision of this subsection.

(f) Weather emergency preparedness reliability standards for a TSP

(1) Winter season preparations. By December 1 each year, a TSP must complete the following winter weather preparation measures for its transmission facilities. A TSP must maintain these measures throughout the winter season. A TSP must update its winter weather preparation measures no later than one year after ERCOT files a historical weather study report under subsection (i) of this section.

(A) Implement weather emergency preparation measures reasonably expected to ensure the sustained operation of all cold weather critical components during winter weather conditions. Such measures include, as appropriate for the facility:

(i) Confirmation of the operability of all systems and subsystems containing all cold weather critical components;

(ii) Confirmation that the sulfur hexafluoride gas in breakers and metering and other electrical equipment is at the correct pressure and temperature to operate safely during winter weather emergencies, and perform annual maintenance that tests sulfur hexafluoride breaker heaters and supporting circuitry to assure that they are functional; and

(iii) Confirmation of the operability of power transformers and auto transformers in winter weather emergencies by:

(I) Inspecting heaters in the control cabinets;

(II) Verification that main tank oil levels are appropriate for actual oil temperature;

(III) Inspecting bushing oil levels;

(IV) Inspecting the nitrogen pressure, if necessary; and

(V) Verification of proper oil quality such that moisture and dissolved gases are within acceptable ranges for winter weather conditions.

(B) Beginning in 2023, implement weather emergency preparation measures, in addition to the weather emergency preparation measures required by paragraph (A) of this subsection, reasonably expected to ensure the sustained operation of the TSP's transmission facilities during the lesser of the minimum ambient temperature at which the facility has experienced sustained operations or the 95th percentile minimum average 72-hour temperature reported in ERCOT's historical weather study, required under subsection (i) of this section, for the weather zone in which the facility is located.

(C) Review the adequacy of staffing plans to be used during a winter weather emergency and revise the staffing plans, as appropriate.

(D) Train relevant operational personnel on winter weather preparations and operations.
(2) Summer season preparations. By June 1 each year, a TSP must complete the following summer weather preparation measures for its transmission facilities. A TSP must maintain these measures throughout the summer season. A TSP must update its summer weather preparation measures no later than one year after ERCOT files a historical weather study report under subsection (i) of this section.

(A) Implement weather emergency preparation measures reasonably expected to ensure the sustained operation of all hot weather critical components during summer weather conditions. Such measures include, as appropriate for the facility:

- (i) Inspecting transformer coolers on a monthly basis between May 1 and September 30;
- (ii) Cleaning transformer coolers on a regular basis during the summer season;
- (iii) Verifying proper cooling fan and pump control capabilities and settings;
- (iv) Confirmation of the availability of sufficient chemicals, coolants, and other materials necessary for sustained operations during a summer weather emergency; and
- (v) Confirmation that sufficient chemicals, coolants, and other materials necessary for sustained operations during a summer weather emergency are protected from heat and drought.

(B) Beginning in 2023, implement weather emergency preparation measures, in addition to the weather emergency preparation measures required by subparagraph (A) of this paragraph, reasonably expected to ensure the sustained operation of the TSP's transmission facilities during the greater of the maximum ambient temperature at which the facility has experienced sustained operations or the 95th percentile maximum average 72-hour temperature reported in ERCOT's historical weather study, required under subsection (i) of this section, for the weather zone in which the facility is located.

(C)Review the adequacy of staffing plans to be used during a summer weather emergency and revise the staffing plans, as appropriate.

(D) Train relevant operational personnel on summer weather preparations and operations.

(3) Declaration of preparedness. A TSP must submit to ERCOT, on a form prescribed by ERCOT, the following declarations of weather preparedness:

(A) No earlier than November 1 and no later than December 1 of each year, a TSP must submit a declaration of winter weather preparedness that:

- (i) Identifies each transmission substation or switchyard under the TSP's control for which the declaration is being submitted;
- (ii) Summarizes all activities engaged in by the TSP to complete the requirements of paragraph (1) of this subsection,
- (iii) Provides the minimum ambient temperature at which each substation or switchyard has experienced sustained operations, as measured at the transmission facility or the weather station nearest to the transmission facility;
- (iv) Includes any additional information required by the ERCOT protocols; and
- (v) Includes a notarized attestation sworn to by the TSP's highest-ranking representative, official, or officer with binding authority over the TSP, attesting to the completion of all activities described in paragraph (1) of this subsection, and to the accuracy and veracity of the information described in subparagraph (A) of this paragraph.

(B) No earlier than May 1 and no later than June 1 of each year, a TSP must submit a declaration of summer weather preparedness that at a minimum:

- (i) Identifies each transmission substation or switchyard under the TSP's control for which the declaration is being submitted;
- (ii) Summarizes all activities engaged in by the TSP to complete the requirements of paragraph (2) of this subsection;
- (iii) Provides maximum ambient temperature at which each substation or switchyard has experienced sustained operations, as measured at the transmission facility or the weather station nearest to the transmission facility;
- (iv) Includes any additional information required by the ERCOT protocols; and
- (v) Includes a notarized attestation sworn to by the TSP's highest-ranking representative, official, or officer with binding authority over the TSP, attesting to the completion of all activities described in paragraph (2) of this subsection, and to the accuracy and veracity of the information described in subparagraph (B) of this paragraph.

(4) No later than December 20 of each year, ERCOT must file with the commission a compliance report that addresses whether each TSP has submitted the declaration of winter weather preparedness required by paragraph (3)(A) of this subsection for all transmission facilities under the TSP's control.

(5) No later than June 20 of each year, ERCOT must file with the commission a compliance report that addresses whether each TSP has submitted the declaration of summer weather preparedness required by paragraph (3)(B) of this subsection for all transmission facilities under the TSP's control.

(g) ERCOT inspections of transmission facilities.

(1) ERCOT must conduct inspections of transmission facilities and may prioritize inspections based on factors such as whether a transmission facility is critical for electric grid reliability; has experienced a forced outage or other failure related to weather emergency conditions; or has other vulnerabilities related to weather emergency conditions. ERCOT must determine, in consultation with commission staff, the number, extent, and content of inspections, as well as develop a risk-based methodology for selecting at least ten percent of substations or switchyards providing transmission service to be inspected at least once every three years. ERCOT must develop, in consultation with commission staff, a winter weather inspection checklist and a summer weather inspection checklist for use during facility inspections. Inspections may be conducted by ERCOT's employees or contractors.

(A) ERCOT must provide each TSP at least 48 hours' notice of an inspection unless otherwise agreed by the TSP and ERCOT. Upon provision of the required notice, a TSP must grant access to its facility to ERCOT and commission staff, including an employee of a contractor designated by ERCOT or the commission to conduct, oversee, or observe the inspection.

(B) During the inspection, a TSP must provide ERCOT and commission staff access to any part of the facility upon request. A TSP must provide access to inspection, maintenance, and other records associated with weather preparation measures, and must make the TSP's staff available to answer questions. A TSP may escort ERCOT
and commission staff at all times during an inspection. During the inspection, ERCOT and commission staff may take photographs and video recordings of any part of the facility and may conduct interviews of facility personnel designated by the TSP.

(2) ERCOT inspection report.

(A) ERCOT must provide a report on its inspection of a transmission system or facility to the TSP. The inspection report must address whether the TSP has complied with the requirements in subsection (1)(1) or (2) of this subsection.

(B) If the TSP has not complied with a requirement in subsection (1)(1) or (2) of this subsection, ERCOT must provide the TSP a reasonable period to cure the identified deficiencies.

(i) The cure period determined by ERCOT must consider what weather emergency preparation measures the TSP may reasonably be expected to have taken before ERCOT's inspection, the reliability risk of the TSP's noncompliance, and the complexity of the measures needed to cure the deficiency.

(ii) The TSP may request ERCOT provide a longer period to cure the identified deficiencies. The request must be accompanied by documentation that supports the request.

(iii) ERCOT, in consultation with commission staff, will determine the final cure period after considering a request for a longer period to cure the identified deficiencies.

(C) ERCOT must report to commission staff any TSP that does not remedy the deficiencies identified under subparagraph (A) of this paragraph within the cure period determined by ERCOT under subparagraph (B) of this paragraph.

(D) A TSP reported by ERCOT to commission staff under subparagraph (C) of this paragraph will be subject to enforcement investigation under §22.246 (relating to Administrative Penalties) of this title. A violation of this section is a Class A violation under section §25.8(b)(3)(A) and may be subject to a penalty not to exceed $1,000,000 per violation per day.

(h) Weather-related failures by a TSP to provide service. A TSP with a transmission facility that experiences repeated or major weather-related forced interruptions of service must contract with a qualified professional engineer to assess its weather emergency preparation measures, plans, procedures, and operations. The qualified professional engineer must not be an employee of the TSP or its affiliate. The qualified professional engineer must have participated in previous assessments for this facility for at least five years, unless the TSP provides documentation that no other qualified professional engineers are reasonably available for engagement. The qualified professional engineer must conduct a root cause analysis of the failure and develop a corrective action plan to address any weather-related causes of the failure. The TSP must submit the qualified professional engineer's assessment to the commission and ERCOT. A TSP to which this subsection applies may be subject to additional inspections by ERCOT. ERCOT must refer to commission staff for investigation any TSP that violates this subsection.

(i) ERCOT historical weather study. ERCOT must study historical weather data across each weather zone classified in the ERCOT protocols. ERCOT must file with the commission a report summarizing the results of the historical weather study at least once every five years, beginning no later than November 1, 2026.

(1) At a minimum, ERCOT must calculate the 90th, 95th, and 99th percentiles of:

(A) the daily minimum temperature in each weather zone;

(B) the daily maximum temperature in each weather zone;

(C) the maximum sustained wind speed in each weather zone;

(D) the minimum average 72-hour temperature in each weather zone;

(E) the maximum average 72-hour temperature in each weather zone; and

(F) the minimum average wind chill in each weather zone.

(2) ERCOT may add additional parameters to the historical weather study.

(3) ERCOT must take into consideration weather predictions produced by the office of the state climatologist when preparing the historical weather study.

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

Filed with the Office of the Secretary of State on May 26, 2022.

Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas

Earliest possible date of adoption: July 10, 2022

For further information, please call: (512) 936-7244

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 90. OFFENDER EDUCATION PROGRAMS FOR ALCOHOL AND DRUG-RELATED OFFENSES

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 90, Subchapter A, §90.1; Subchapter B, §90.21; Subchapter D, §90.40; Subchapter E, §§90.51 - 90.54; Subchapter F, §90.80; and Subchapter G, §§90.91 - 90.94; new rules at Subchapter A, §90.10; Subchapter B, §§90.20, 90.22-90.28; Subchapter C, §§90.30 - 90.34; Subchapter D, §§90.41 - 90.49; Subchapter E, §90.50; and Subchapter G, §90.95; and the repeal of existing rules at Subchapter A, §90.10; Subchapter B, §§90.20, 90.22 - 90.27; Subchapter C, §§90.30 - 90.34; Subchapter D, §§90.41 - 90.49; and Subchapter E, §90.50 regarding the Court-Ordered Education Programs. These proposed changes are referred to as "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC Chapter 90 implement new Texas Government Code, Chapter 171, relating to the Court-Ordered Education Programs, formerly known as the Offender Education Programs. The rules also implement Texas Transportation Code,
Chapter 521, §§521.374 - 521.376, regarding the Drug Offender Education Program.

Senate Bill 1480

Senate Bill (SB) 1480, 87th Legislature, Regular Session (2021) changed the landscape of the Court-Ordered Education Programs by consolidating the requirements found in separate statutes previously governing the court-ordered programs into one statutory chapter for easier reference and organization.

This bill represents a significant change in the provision of instruction and the Department's regulatory framework for instructors and program providers associated with delivering court-ordered programs. The court-ordered programs available for persons subject to court orders involving community supervision for drug or alcohol-related offenses under new Texas Government Code, Chapter 171 are: the Alcohol Education Program for Minors (AEPM); the Drug Offender Education Program (DOEP); the DWI Education Program (DWIE) and the DWI Intervention Program (DWII). These programs are referenced under Texas Alcoholic Beverage Code §106.115; Texas Transportation Code §§521.374-721.376; Texas Code of Criminal Procedure, Chapter 42A, Articles 42A.403 and 42A.406; and Texas Code of Criminal Procedure, Chapter 42A, Articles 42A.404 and 42A.406, respectively.

Instructors and program providers will experience significant changes as a result of this bill, which is intended to benefit program participants and the general public, including: (A) online provision of course materials and curriculum by program providers, thus allowing court-ordered program instruction to reach participants throughout the state, and increasing business flexibility and cost savings for instructors and providers; (B) creation of a unified program provider license with one program fee for providers with multiple locations creating efficiencies for Department administration resulting in lower costs; (C) repeal of the requirement for program provider branch locations and program headquarters organizational structure; and (D) introduction of new program fees for program providers and instructors related to licensing and court-ordered program endorsement fees.

The proposed rules implement SB 1480 for the Court-Ordered Education Programs by: (1) amending program definitions within the chapter; (2) prescribing eligibility requirements and minimum qualifications for license applicants; (3) setting the minimum requirements and responsibilities for licensed providers and instructors; (4) establishing program provider and instructor endorsement requirements; (5) mandating minimum standards for online and in-person program provider delivery of court-ordered program curriculum; (6) amending and adding program fees for program providers and instructors as provided by the new statute; (7) updating rule terminology to include new license types, program provider structure changes, and court-ordered program endorsements; (8) imposing criminal penalties for violations involving the misuse of certificates of program completion; and (9) updating rule language to recognize repealed statutory references.

The proposed rules in this rulemaking represent the first phase of the implementation of SB 1480. A subsequent rulemaking completing the implementation of SB 1480 shall occur later and include rule changes on court-ordered program curriculum, program provider reporting, audits and inspections, and continuing education.

The proposed rules also implement Senate Bill (SB) 181, 87th Legislature, Regular Session (2021). SB 181 overlaps with SB 1480, and both bills amend Transportation Code §§521.374, 521.375, and 521.376. The changes, in part, affect the Drug Offender Education Program approved and administered by the Department. Texas Transportation Code §521.374(a)(1), as amended, provides that a person may successfully complete an in-person or online drug offender educational program approved by the Department under Texas Government Code, Chapter 171. Texas Transportation Code §521.375(a) and (b), as amended, requires that the Department to work with the Texas Department of Public Safety (DPS) to jointly adopt rules for the qualification and approval of providers of in-person and online drug offender educational programs approved by the Department. Texas Transportation Code §521.376(a), as amended, assigns certain duties to the Department regarding the in-person and online drug offender educational programs approved by the Department. The proposed rules implement SB 181 and SB 1480 related to the Drug Offender Education Program approved and administered by the Department.

As a result of the legislative changes, the proposed rules include extensive amendments and subsequent repeals and renumbering of rule sections within 16 TAC Chapter 90. Moreover, the proposed rules introduce new rule sections in Subchapters A-E and G to provide greater clarity, interpretation, and implementation of the provisions of SB 1480 and SB 181 relating to the Court-Ordered Education Program.

SECTION-BY-SECTION SUMMARY


The proposed rules amend §90.1, Authority, by deleting repealed statutory references and including a reference to Texas Government Code, Chapter 171 for court-ordered programs for alcohol and drug-related offenses.

The proposed rules add new §90.10, Definitions, which establishes the meaning of the words and terms employed throughout the rule chapter. The new rule replaces existing §90.10 to: (1) include definitions for words and terms introduced by SB 1480; (2) added a definition for "module"; (3) delete definitions for "Administrator", "Branch Office/Site", "Course Size", "Drug Offender", and "Program/Provider Headquarters"; (4) modify terminology for existing definitions consistent with SB 1480; (5) renumber the provisions as needed; and (6) correct rule language.

The proposed rules repeal existing §90.10, Definitions.

Subchapter B, Instructor Requirements.

The proposed rules add new §90.20, Instructor License Required, which introduce changes to instructor licensing structure and the addition of court-ordered endorsements to the instructor license from SB 1480. The new rule replaces existing rule §90.20 to: (1) amend the section header changing the term "certification" to "license"; (2) update rule language to include use of the term "endorsement" to refer to the court-ordered programs consistent with SB 1480; and (3) include requirements for instructors to hold appropriate license endorsements to teach participants at program provider locations.

The proposed rules repeal existing §90.20, Instructor Certification Required.

The proposed rules amend §90.21, Instructor License - Eligibility Requirements, by updating the section header and rule terms consistent with SB 1480, and correct rule language.
The proposed rules add new §90.22, Instructor License - Application for License and First Endorsement, which describes the Department procedure by which an instructor applicant may apply and obtain for a license and an endorsement to instruct a court-ordered program. The new rule will: (1) update the section header and rule terms consistent with SB 1480; (2) identify the new instructor licensing fee; and (3) update terminology in the section header and rule consistent with SB 1480. This rule replaces existing §90.23 and is relocated to more accurately reflect the Department’s current licensing process.

The proposed rules add new §90.23, Instructor License - Instructor Training Course and Examination, which identifies the Department’s training course and examination process that instructor applicants must successfully complete prior to licensure. The new rule will update the section header consistent with SB 1480. This rule replaces existing §90.22 and is relocated to more accurately reflect the Department’s current licensing process.

The proposed rules add new §90.24, Instructor License - Additional Endorsements, to describe the new procedure introduced by SB 1480 by which an instructor may obtain license endorsements to instruct other court-ordered programs, and the endorsement disposition at time of renewal.

The proposed rules add new §90.25, Instructor License Term; Renewals, which describes the license renewal process for the program. The new rule will: (1) specify the two-year term of the license and the concurrent endorsement; (2) describe the Department procedure for license renewal and late renewal; (3) mandate an instructor hold a current license to instruct a specific court-ordered program(s); and (4) update the section header and rule language. This rule replaces existing §90.24.

The proposed rules add new §90.26, Instructor Continuing Education Requirements, which identifies the continuing education requirements by court-ordered program for instructors to meet prior to license renewal. The new rule will: (1) remove the previous minimum teaching requirement of courses during the instructor licensing period to obtain license renewal; (2) replaces the word "attend" with "complete" to recognize the online provision of court-ordered programs as authorized by SB 1480; and (3) updates the rule language and section header. This rule replaces existing §90.25.

The proposed rules add new §90.27, Instructor Continuing Education Audits - All Programs, which describes the Department auditing system and the responsibilities of the instructor to maintain continuing education records, and details the process for instructor reporting of continuing education hours necessary for license renewal. This rule replaces existing §90.26.

The proposed rules add new §90.28, Instructor Responsibilities, which: (1) requires instructors to report their own criminal convictions or those of other instructors; (2) sets notice requirements for changes in instructor name, mailing address, telephone number or email address; (3) shifts instructor course and provider certification requirements for teaching court-ordered programs to new §90.20 and §90.50; and (4) removes the requirement that an instructor provide his/her certification number and Department complaint information to participants. This rule replaces existing §90.27.

The proposed rules repeal existing §90.22, Instructor Certification - Instructor Training Course and Examination.

The proposed rules repeal existing §90.23, Instructor Certification - Application.

The proposed rules repeal existing §90.24, Instructor Certification Term; Renewals.

The proposed rules repeal existing §90.25, Instructor Teaching and Continuing Education Requirements.

The proposed rules repeal existing §90.26, Instructor Continuing Education Audits - All Programs.

The proposed rules repeal existing §90.27, Instructor Responsibilities.

Subchapter C, Program Provider License Requirements.

The existing rules in this subchapter are being repealed to accommodate proposed new rule sections to reflect the licensing changes for program providers in implementing SB 1480.

The proposed rules add new §90.30, Program Provider License Required, which introduce changes to program provider licensing structure and the addition of court-ordered endorsements to the program provider license from SB 1480. The proposed rules allow a program provider to have but one license with up to four court-ordered endorsements to operate. Providers are no longer required to license each location owned. Branch locations have been eliminated by SB 1480. Moreover, providers will now be able to offer or provider instruction statewide with the ability to deliver online service. The new rule replaces existing rule §90.30 to: (1) require program providers have a current license with the applicable endorsement for each court-ordered program offered or provided to participants; (2) ensure each court-ordered program is taught by licensed instructors with the proper endorsement for the program(s) instructed; (3) require that program providers conduct instruction using the Department-approved instructor manuals and curriculum; (4) delete references to "Program/Provider"; (5) allow a program provider to offer or provide a court-ordered program in-person, online, or both, in accordance with SB 1480; and (6) update the rule language and section heading.

The proposed rules add new §90.31, Program Provider License - Application for License and Endorsements, which describes the Department procedure by which a program provider applicant may obtain a license to offer or provide a court-ordered program. The new rule replaces existing rule §90.31 to: (1) require program providers be licensed and possess applicable endorsement(s) for each court-ordered program offered or provided; (2) describe the Department procedure for an applicant to obtain a program provider license; (3) delete references to "headquarters", "administrator", "program/provider" and "branch sites" from license requirements; (4) include new standards for a program provider applicant that intends to offer or provider online instruction to participants; and (5) update the rule language and section heading.

The proposed rules add new §90.32, Program Provider License - Additional Endorsements, which describes the new procedure introduced by SB 1480 by which a program provider may obtain additional license endorsements to offer or provide more than one court-ordered program, and the endorsement disposition at time of renewal. The new rule replaces existing rule §90.32 to: (1) implement SB 1480 by requiring a program provider who offers or provides additional court-ordered program types to hold the appropriate endorsement for each program offered or provided to participants; (2) describe the Department procedure for an applicant to obtain additional endorsements; (3) delete licensing requirements associated with branch sites and headquarters; (4) clarify that endorsements renew with the program provider li-
The proposed rules add new §90.33, Program Provider License Term; Renewal, which describes the program provider license renewal process. The new rule replaces existing rule §90.33 to:
1. specify the two-year term of the license and the concurrent endorsement; 
2. identify the Department procedure for program provider license renewal and late renewal; 
3. delete references to "program/provider"); 
4. mandate a program provider hold a current license to offer or provide a court-ordered program; 
5. clarify that endorsements renew with the program provider license renewal; and 
6. update the rule language and section headers.

The proposed rules add new §90.34, Program Provider License - Change of Address, Ownership and Other Information, which describes the program provider's responsibilities to report to the Department when there is a change in specific information affecting business operations. The new rule replaces existing rule §90.34 to:
1. require a licensee to notify the Department within 30 days of any change in program provider information as noted in the rule; 
2. define what conditions will constitute a change in ownership of the program provider; 
3. delete references to "program/provider"); 
4. require that a program provider maintain a registered agent within the state for service of process; and 
5. update the rule language and section header.

The proposed rules repeal existing §90.30, Program/Provider Certification Requirement.

The proposed rules repeal existing §90.31, Program/Provider Certification Application - Headquarters.

The proposed rules repeal existing §90.32, Program/Provider Certification Application - Branch Sites and Other Locations.

The proposed rules repeal existing §90.33, Program/Provider Certification Term; Renewal.

The proposed rules repeal existing §90.34, Program/Provider Certification - Change of Address and Providing Information.

Subchapter D, Program Requirements - Curriculum, Courses, Classrooms, Certificates.

This subchapter is being revised to add new rules and to make amendments to existing rules. Many of the proposed new rules are like to the existing rules in substance, but the rules are being reorganized and renumbered. The rules in this subchapter will also be part of a subsequent rulemaking regarding court-ordered program curriculum.

The proposed rules amend §90.40, Program Curriculum and Materials - All Programs, to: 
1. identify the course curriculum approved for each online and in-person court-ordered program; 
2. update rule terms consistent with SB 1480; and 
3. correct language.

The proposed rules add new §90.41, Program Rules - Drug Offender Education Program, which addresses the joint rulemaking authority between the Department and the Texas Department of Public Safety (DPS) for the adoption of rules related to the qualification and approval of providers for the Drug Offender Education Program, as required under Transportation Code, Chapter 521, and as amended by SB 1480 and SB 181. This rule replaces existing §90.42.

The proposed rules add new §90.42, General Program and Course Requirements - All Programs, which define the responsibilities for program providers and instructors when presenting instruction to participants for in-person and online court-ordered programs, and updated rule language consistent with SB 1480. This rule replaces existing §90.43.

The proposed rules add new §90.43, Additional Course Requirements for the Drug Offender Education Program, which: 
1. renames "class sessions" to "modules"; 
2. details the course minimums for class instruction hours, duration and number of daily class modules, and administration of course examinations; and 
3. sets the maximum number of participants for the specific court-ordered program. This rule replaces existing §90.44.

The proposed rules add new §90.44, Additional Course Requirements for the Alcohol Education Program for Minors, which: 
1. renames "class sessions" to "modules"; 
2. details the course minimums for class instruction hours, duration and number of daily class modules, and administration of course examinations; and 
3. sets the maximum number of participants for the specific court-ordered program. This rule replaces existing §90.45.

The proposed rules add new §90.45, Additional Course Requirements for the DWI Education Program (DWIE), which: 
1. details the course minimums for class instruction hours, 
2. prescribes the number of daily hours of instruction and administration of course examinations; 
3. increases the maximum number of participants to 30 for the specific court-ordered program; and 
4. addresses the disposition of the certificate of completion to the appropriate court officials and the Texas Department of Public Safety. This rule replaces existing §90.46.

The proposed rules add new §90.46, Additional Course Requirements for the DWI Intervention Programs (DII), which: 
1. renames "class sessions" to "modules"; 
2. details the course minimums for class instruction hours, duration and number of daily and weekly class modules; 
3. sets the maximum number of participants for the specific court-ordered program; and 
4. provides for make-up class modules for excused participant absences, and individual participant sessions with exit interviews; and 
5. addresses the disposition of the certificate of completion to the appropriate court officials and DPS. This rule replaces existing §90.47.

The proposed rules add new §90.47, In-Person Classroom Facilities and Equipment, which: 
1. details the necessary equipment and facilities for an in-person program provider to provide court-ordered program instruction to participants; 
2. prohibits licensees from offering, providing, or instructing an in-person court-ordered program out of a private residence; 
3. requires instructors to be physically present when providing in-person instruction of a court-ordered program; and 
4. bars licensees from presenting any recorded or videotaped material as a part of the course presentation; and 
5. updates the rule language and section header. This rule replaces existing §90.48.

The proposed rules add new §90.48, Online Program Requirements, which defines the requirements for a program provider when offering newly authorized online court-ordered programs to participants. This proposed new rule is added to: 
1. require that online program providers possess sufficient bandwidth and working equipment to allow for instruction of court-ordered programs in real-time; 
2. mandate that online program providers employ Department-approved curriculum and materials under applicable laws and rules; 
3. detail instructor and participant on-camera interaction requirements during instruction sessions, and empower the instructor to remove participants from class who fail to comply with those requirements; 
4. prohibit
the instructor from admitting a participant without fully functional equipment; and (5) impose responsibility on program providers for the administration of and security for pre-course and post-course examination of participants.

The proposed rules add new §90.49, Certificate of Program Completion for Participants, which describes the program provider’s responsibilities surrounding the care, control and issuance of program completion certificates to successful participants taking court-ordered programs. This new rule: (1) details the program provider’s responsibilities for delivery of a certificate of program completion of a court-ordered program to each participant; (2) prohibits delivery of the certificate by electronic means; (3) sets the responsibilities for program providers under which they maintain certificate records, and the care, custody and control of program certificates; (4) describes the process by which a provider may issue duplicate certificates and return unassigned certificates; (5) establishes requirements on a program provider to protect unissued certificates and account for missing certificates with the Department; (6) addresses additional requirements for the DWIE and DWII Programs when delivering certificates of program completion to court officials and DPS; and (7) updates and clarifies the rule language. This rule replaces existing §90.49.

The proposed rules repeal existing §90.41, Program Curriculum and Rules - DWI Education Program. The statutory provisions requiring jointly-approved curriculum and rules for the DWI Education program were repealed by SB 1480.

The proposed rules repeal existing §90.42, Program Rules - Drug Offender Education Program (DOEP).

The proposed rules repeal existing §90.43, General Program and Course Requirements - All Programs.

The proposed rules repeal existing §90.44, Additional Course Requirements for the Drug Offender Education Program.

The proposed rules repeal existing §90.45, Additional Course Requirements for the Alcohol Education Program for Minors.

The proposed rules repeal existing §90.46, Additional Course Requirements for the DWI Education Program.

The proposed rules repeal existing §90.47, Additional Course Requirements for DWI Intervention Programs.

The proposed rules repeal existing §90.48, Classroom Facilities and Equipment.

The proposed rules repeal existing §90.49, Course Completion Certificates for Participants.

Subchapter E, Program Requirements - Administration and Other Responsibilities.

The proposed rules add new §90.50, Program Administration, which define the parameters of program operation for a program provider. This new rule replaces existing §90.50 to: (1) identify the responsibilities for program providers to set course fees, create course schedules and maintain program records for Department audit; (2) set restrictions on the court-ordered program referral policy for program providers and instructors for inquiring participants; (3) require program providers to resolve participant complaints; (4) instruct program providers to provide participants with notice concerning the complaint filing process with the Department; and (5) update the rule language consistent with SB 1480.

The proposed rules repeal existing §90.50, Program Administration.

The proposed rules amend §90.51, Recordkeeping Regarding Course Participants, to: (1) update rule language consistent with SB 1480; (2) clarify the type of address information the program provider is required to collect from participants for its records; (3) correct rule language; and (4) ease record storage requirements for program providers to respond to Department inspections and audits.

The proposed rules amend §90.52, Annual Reports, to update rule language consistent with SB 1480.

The proposed rules amend §90.53, Confidentiality, to update rule language consistent with SB 1480.

The proposed rules amend §90.54, Discrimination Prohibited, to update rule language consistent with SB 1480.

Subchapter F, Fees.

The proposed rules amend §90.80, Fees, which illustrate the new program fees framework established by SB 1480. Under the new framework, (1) initial license and renewal fees are now assessed on instructors, as well as providers; (2) program headquarters and branch location provisions have been eliminated; and (3) the requirements for separate licenses for each court-ordered program have been eliminated. The proposed rules will require a provider or an instructor to obtain one license with the option to add up to four court-ordered program endorsements, one for each program. The endorsement becomes a part of the license for the provider or instructor, and it renews at the same time with the license.

Under the proposed rules, the provider initial license and renewal fee remain unchanged. However, a provider is only required to obtain one license with the option to add up to four endorsements. A provider with multiple locations pays for one unitary license under which all the other locations will operate. The program headquarters and branch location fees have been eliminated. When the provider renews the license, there is one renewal fee that includes the license and the current endorsement(s).

Instructors, under the proposed rules, are now required to pay initial license and renewal fees, pursuant to SB 1480. However, like the provider license regime, an instructor is only required to obtain one license with the option to add up to four endorsements. When the instructor renews the license, there is one renewal fee that includes the license and the current endorsement(s). Consistent with SB 1480, the existing rule is amended to: (1) update rule language in line with SB 1480; (2) eliminate the fees associated with the headquarters and branch location framework which was repealed by SB 1480; (3) add new licensing and endorsement fees for instructors and program providers which reflect the new fee structure and which recognize one license per provider or instructor with up to four court-ordered endorsements; and (4) correct language.

Subchapter G, Enforcement.

The proposed rules amend §90.91, Complaints; Investigations, to update rule language consistent with SB 1480.

The proposed rules amend §90.92, Administrative Penalties and Sanctions, to update statutory citations consistent with SB 1480, and correct language.
The proposed rules amend §90.93, Enforcement Authority, to update statutory citations consistent with SB 1480.

The proposed rules amend §90.94, Additional Conduct Subject to Disciplinary Actions, to: (1) update rule language consistent with SB 1480; (2) add additional prohibited conduct for a program provider or instructor pursuant to Chapter 171, Texas Government Code; and (3) clarify rule language.

The proposed rules add new §90.95, Criminal Penalties, to affix Class A Misdemeanor criminal penalties to any unauthorized person who knowingly sells, transfers, issues, possesses or trades a certificate of program completion or certificate number. This change is pursuant to Texas Government Code, Chapter 171.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Costs - State and Local Governments

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs to state government as a result of enforcing or administering the proposed rules.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there will be an estimated reduction in costs to state government in that the proposed rules change the requirement for each license per program to one license per business or individual, with endorsements for each additional court-ordered program, and endorsements will be renewed concurrently with a license. These changes will result in less licensing entries and records, less renewal applications, and less background checks, which will only be performed for the license applications. The proposed rules will eliminate branch site locations, eliminating the processing of those initial and renewal applications. With the arrival of the opportunity for online courses, it is anticipated there will be a need for physical site locations and less agency resources expended on oversight because fewer locations.

It is estimated there will be a $15,000 reduction in costs to the State each year.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to local government as a result of enforcing or administering the proposed rules.

Revenues - State and Local Governments

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there is no estimated loss in revenue to state government as a result of enforcing or administering the proposed rules.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there will be an estimated increase in revenue in that under the proposed rules, in addition to the revenue received from program provider fees, the Department will be receiving additional revenue from instructor licensing fees. Revenue from instructor license application fees is anticipated to be approximately $24,520 per year for the next five years. The estimated revenues of $80,980 from program provider application fees and $24,520 from instructor application fees totals $105,500 per year, which is $4,105 more than the current revenue average of $101,395.

It is estimated there will be a $4,105 increase in revenue to the State each year.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there is no estimated increase or loss in revenue to local government as a result of enforcing or administering the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rules will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022. Although the proposed rules make changes to the license types in court-ordered programs, the overall number of license holders in the industry, and the number of persons who may wish to obtain a license to operate in the industry, is not expected to change greatly, if at all. Therefore, the proposed rules will not have an impact on any local employment.

PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit, with the adoption of these proposed rules, will be to enhance the industry's ability to serve Texas citizens who require the industry's services with greater ease and will reduce burdens on the providers, instructors, and participants. The proposed rules allow for providers and instructors to conduct classes online. This new element will allow service to rural areas of the state by reducing burdens of travel time, travel costs, and by increasing ease of attendance and compliance with class completion requirements. Additionally, persons residing in urban areas, and those who have difficulty in attending in-person classes for other reasons, will also benefit from online classes and similar ease of class attendance.

Court-ordered program providers and instructors will also receive the benefits and flexibility of being able to provide online classes, and providers may be able to reduce their costs by providing courses online and thereby reducing the need for and cost of physical classroom space. Providers and instructors will also benefit from filing just one renewal application every two years, instead of multiple renewal applications when more than one program license is held.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there could be a reduction in anticipated economic costs to persons who are required to comply with the proposed rules. Under the proposed rules, each provider will need to obtain a provider license for the first program applied for, with an initial fee of $300. For each additional program, the provider chooses to offer, the endorsement fee is $280. However, program providers with branch locations are likely to realize increased savings in that they will not be required to obtain a separate license or certification with associated fees for each ancillary location. Those additional locations under the same ownership will operate under the initial license. Moreover, a program provider license can be renewed for a fee of $200, with no fee to renew endorsements. There was no increase in fees for an initial or renewal program provider license under the proposed rules.

Under the proposed rules, a program provider who holds a license in one of the programs may offer the course online. An endorsement must be obtained by the program provider for any ad-
ditional program offered online. In offering the court-ordered programs online, a program provider has statewide reach to provide services and can choose to avoid all the supplemental expenses associated with obtaining and maintaining traditional physical classroom locations, and thereby increase income potential.

No program provider will be required to pay more for a provider license than is currently being paid. With each additional program a program provider chooses to offer and obtains a license endorsement, the less that program provider will pay in total than previously for an equivalent number of licenses. Additionally, program providers will no longer need to pay a fee for an additional location where a course is offered. The more locations where a program provider offers a course, the less that program provider will pay in total than previously, especially if some of the additional locations are in non-adjacent counties to the program provider’s primary location.

Any specific savings reduction cannot be reasonably estimated because it is affected by a few variables including the number of program providers with branch locations, individual business plans, and a program provider’s choice of curriculum delivery to participants.

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there will be additional costs to some persons who are required to comply with the proposed rules. Currently, instructors are not required to pay an initial application or renewal fee to TDLR to obtain a license. However, under the new statute and proposed rules, instructor applicants must pay an application fee to obtain and renew an instructor license. Under the proposed rules, instructors will pay $50 fee for an initial license, and $45 endorsement fee each for any of the three additional programs the instructor chooses to instruct. The renewal fee for instructor licenses will be $40. However, there is no fee to renew endorsements.

The addition of these new instructor fees imposed by SB 1480 will result in additional costs each year for the first five years the proposed rules are in effect.

FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. Since the agency has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

The proposed rules do have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government; however, the proposed rules fall under the exception for rules that are necessary to implement legislation under §2001.0045(c)(9). Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect, the agency has determined the following:

1. The proposed rules do not create or eliminate a government program.

2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.

3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.

4. The proposed rules do require an increase or decrease in fees paid to the agency. The proposed rules require an increase in fees paid to the agency by requiring fees to be paid for initial and renewal instructor applications, and decrease fees paid to the agency by making the fee for a subsequent provider endorsement less than the fee for a provider license, and removing the initial and renewal fees for additional locations where a course is offered.

5. The proposed rules do create a new regulation. The proposed rules create a new regulation by creating an instructor and provider licenses and creating endorsements to those licenses, and by authorizing programs to be provided online and creating requirements for providing programs online.

6. The proposed rules do expand, limit, or repeal an existing regulation. The proposed rules repeal an existing regulation by repealing provider, instructor, and branch site certifications.

7. The proposed rules do not increase or decrease the number of individuals subject to the rules’ applicability.

8. The proposed rules do not positively or adversely affect this state’s economy.

TAKINGS IMPACT ASSESSMENT

The Department has determined that no private real property interests are affected by the proposed rules and the proposed rules do not restrict, limit, or impose a burden on an owner’s rights to his or her private real property that would otherwise exist in the absence of governmnet action. As a result, the proposed rules do not constitute a taking or require a takings impact assessment under Government Code §2007.043.

PUBLIC COMMENTS

Comments on the proposed rules may be submitted electronically on the Department’s website at https://ga.tdlr.texas.gov:1443/form/gcrules; by facsimile to (512) 475-3032; or by mail to Monica Nuñez, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711. The deadline for comments is 30 days after publication in the Texas Register.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §90.1, §90.10

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapter 51 and Texas Government Code, Chapter 171, which authorize the Texas Commission of Licensing and Regulation, the Department’s governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed rules are also proposed under Texas Transportation
Code, Chapter 521, §521.375, regarding the joint adoption of rules with the Department of Public Safety for the Drug Offender Education Program.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapter 51; Texas Government Code, Chapter 171; Texas Alcoholic Beverage Code §106.115; Texas Transportation Code, §§521.371 - 521.377; Texas Code of Criminal Procedure, Articles 42A.403, 42A.404, 42A.406, 42A.407, 42A.514, and 45.051; and Texas Family Code §53.03 and §54.047. No other statutes, articles, or codes are affected by the proposed rules.

§90.1. Authority.

This chapter is promulgated under the authority of Occupations Code, Chapter 51; Government Code, Chapter 171; Alcoholic Beverage Code, §106.115 (Alcohol Education Program for Minors); Transportation Code, §§521.374 - 521.376 (Drug Offender Education Program); Code of Criminal Procedure, Chapter 42A, Articles 42A.403[42A.403] and 42A.406 [formerly Chapter 42, Article 42.12, §13(b)] (DWI Education Program); and Code of Criminal Procedure, Chapter 42A, Articles 42A.404[42A.404] and 42A.406 [formerly Chapter 42, Article 42.12, §13(c)] (DWI Intervention Program).

§90.10. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly states otherwise.

(1) Alcohol Education Program for Minors--An alcohol educational program for minors as described in Section 171.0001, Government Code.

(2) Annual Reporting Period--The period of time beginning September 1 of each year and ending August 31 of the following year.

(3) Certificate of Program Completion (Certificate)--A uniform, serially numbered certificate as described in Section 171.0001, Government Code.

(4) Commission--The Texas Commission of Licensing and Regulation.

(5) Continuing Education Hour--At least 50 minutes of participation in an organized, systematic learning experience which deals with and is designed for the acquisition of knowledge, skills, and information on drug or alcohol-related topics, as applicable to the specific court-ordered program instructor license endorsement.

(6) Continuing Education Seminar--A department-approved continuing education seminar, class, or course that may be taken to meet renewal requirements, as applicable to a specific court-ordered program instructor license endorsement.

(7) Course Records--Court-ordered program participants' personal data forms, pre-tests and post-tests, self-assessments, screening instrument(s), homework assignments, action plans, and any other written material required or used in the court-ordered program class instruction.

(8) Course Roster--A form used to record data on all court-ordered program participants enrolled in the course and to record attendance data on those participants at each class throughout the course.

(9) Court-Ordered Education Class (Class)--A module of a court-ordered program course.

(10) Court-Ordered Education Course (Course)--The complete series of court-ordered program class modules.

(11) Court-Ordered Education Program (Program)--The Alcohol Education Program for Minors, Drug Offender Education Program, DWI Education Program, or DWI Intervention Program.

(12) Court-Ordered Education Provider (Program Provider)--A person holding a license from the department to offer or provide a court-ordered program.

(13) Department--The Texas Department of Licensing and Regulation.

(14) Drug Offender Education Program--A drug offense educational program as described in Section 171.0001, Government Code.

(15) DWI--An offense relating to driving or operating a motorized vehicle while intoxicated, as described in Sections 49.04 - 49.08, Penal Code relating to Intoxication and Alcoholic Beverage Offenses.

(16) DWI Education Program--An educational program for intoxication offenses as described in Section 171.0001, Government Code.

(17) DWI Intervention Program--An intervention program for intoxication offenses described in Section 171.0001, Government Code.

(18) Endorsement--A classification received by a program provider or instructor as described in Sections 171.0103 and 171.0153, Government Code, after successful completion of the department licensing process, which allows a licensee to instruct, offer, or provide a specific type of court-ordered program.

(19) Executive Director--The executive director of the department.

(20) Instructor Applicant--A term describing an individual from the period when the individual applies for admission into an instructor training course until the point where a license is granted or denied.

(21) Instructor Licensing Period--The period of time beginning with the date instructor licensure was granted to instruct a specific court-ordered program curriculum and ending after two years after the date the license was issued.

(22) Instructor Training Class--A module of an instructor training course.

(23) Instructor Training Course--The complete series of instructor training class modules.

(24) Minor--A person under the age of 21 years, as described in Section 106.01, Alcohol Beverage Code.

(25) Module--A part of the Court-Ordered Education Program Instructor Manual that covers a single subject or topic within a specific course.

(26) Online Course--A court-ordered education program that is offered or provided in a virtual, real-time, and interactive setting through an internet connection as authorized under this chapter.

(27) Participant--An individual who attends, takes, or completes a court-ordered program.

(28) Screening Instrument--A written device approved by the department and required to be administered to each program participant for the purpose of:

(A) identifying indicators of a potential substance abuse problem; and
(B) making recommendations for further evaluation, where indicated by the screening instrument.

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

Filed with the Office of the Secretary of State on May 27, 2022.

TRD-202202059
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 475-4879

16 TAC §90.10

STATUTORY AUTHORITY

The proposed repeal is proposed under Texas Occupations Code, Chapter 51 and Texas Government Code, Chapter 171, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed repeal is also proposed under Texas Transportation Code, Chapter 521, §521.375, regarding the joint adoption of rules with the Department of Public Safety for the Drug Offender Education Program.

The statutory provisions affected by the proposed repeal are those set forth in Texas Occupations Code, Chapter 51; Texas Government Code, Chapter 171; Texas Alcoholic Beverage Code §106.115; Texas Transportation Code, §§521.371 - 521.377; Texas Code of Criminal Procedure, Articles 42A.403, 42A.404, 42A.406, 42A.407, 42A.514, and 45.051; and Texas Family Code §53.03 and §54.047. No other statutes, articles, or codes are affected by the proposed repeal.

§90.10 Definitions.

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

Filed with the Office of the Secretary of State on May 27, 2022.

TRD-202202066
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 475-4879

16 TAC §§90.20 - 90.28

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapter 51 and Texas Government Code, Chapter 171, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed rules are also proposed under Texas Transportation Code, Chapter 521, §521.375, regarding the joint adoption of rules with the Department of Public Safety for the Drug Offender Education Program.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapter 51; Texas Government Code, Chapter 171; Texas Alcoholic Beverage Code §106.115; Texas Transportation Code, §§521.371 - 521.377; Texas Code of Criminal Procedure, Articles 42A.403,
§90.20. Instructor License Required.

(a) An individual who teaches any court-ordered program must have a current instructor license issued by the department, and the appropriate instructor license endorsement for the specific type of court-ordered program the individual is teaching.

(b) An instructor must instruct only for a program provider that holds an appropriate endorsement for the specific type of court-ordered program that the instructor is teaching.

(c) An instructor must utilize only the department-approved program curriculum for the specific type of program for which the instructor holds an appropriate license endorsement.

(d) An instructor must comply with all requirements of this chapter.

§90.21. Instructor License [Certification] - Eligibility Requirements.

(a) To be eligible for an instructor license and an endorsement in the [to become certified as an Instructor for a] DWI Education Program, Drug Offender Education Program, or Alcohol Education Program for Minors, an individual must:

1. have a minimum of an associate [associate's] degree in the field of psychology, sociology, counseling, social work, criminal justice, education, nursing, or health, [or traffic safety];

2. be a licensed chemical dependency counselor, registered counselor intern, licensed social worker, licensed professional counselor, licensed professional counselor intern, certified teacher, licensed psychologist, licensed physician or psychiatrist, probation or parole officer, adult or child protective services worker, licensed vocational nurse, or licensed registered nurse; or

3. have at least one year of documented experience in case management or education relating to substance abuse and/or mental health.

(b) To be eligible for an instructor license and an endorsement in the [to become certified as an Instructor for a] DWI Intervention Program, an individual must:

1. either:
   - be a licensed chemical dependency counselor, registered counselor intern, licensed social worker, licensed professional counselor, licensed professional counselor intern, licensed psychologist, licensed physician or psychiatrist; or
   - possess, at a minimum, an associate [associate's] degree in the field of psychology, sociology, counseling, social work, criminal justice, education, nursing, or health; and

2. have a minimum of two years of documented experience providing direct client services directly related to the applicable internship, licensing, or education documented under subsection (a)(1) to persons with substance abuse problems or mental disorders.

§90.22. Instructor License - Application for License and First Endorsement.

(a) To apply for an instructor license and the first endorsement for a specific type of court-ordered program, an individual must:

1. submit a completed application on a form prescribed by the department for the specific court-ordered program;

2. submit proof of meeting the eligibility requirements under §90.21 for the specific court-ordered program;

3. successfully pass a criminal history background check by the department; and

4. submit the initial license application and first endorsement fee under §90.80.

(b) If the department determines that the instructor applicant has met the requirements under subsection (a), the instructor applicant may enroll in the department-approved instructor training course for the specific court-ordered program.

(c) Upon successful completion of the department-approved instructor training course, including testing and any retesting, and absent any other reasons for denial, the department shall issue the instructor applicant an instructor license and an endorsement for the specific court-ordered program.

(d) If an applicant fails to complete all licensure requirements within one year of the Department's receipt of the initial instructor license application, the applicant must reapply and pay any applicable fees.

§90.23. Instructor License - Instructor Training Course and Examination.

(a) To become an instructor for a specific type of court-ordered program, an individual must select and successfully complete the applicable department-approved instructor training course.

(b) An instructor applicant must pay the department's authorized representative an instructor training course fee after acceptance into the instructor training course.

(c) An instructor applicant must complete each class module of the instructor training course in its entirety.

(d) An instructor applicant must pass both the participant teaching presentation and the written exam to successfully complete the instructor training course.

(e) A passing score of 70 percent or above for the written exam and a "Pass" designation on the participant teaching presentation for the instructor training course is required for each instructor applicant.

(f) Any instructor applicant who does not pass the participant teaching presentation or the written exam at the instructor training course will have one additional opportunity to pass the written exam or participant teaching presentation, as applicable, within 30 days after the date of completing the instructor training course, or as otherwise directed by the department.

(g) If the instructor applicant does not pass the applicable written exam or participant teaching presentation the second time, the instructor applicant will not have successfully completed the instructor training course and must reapply for the applicable training and pay the applicable fee.

(h) Any instructor applicant who does not successfully complete the instructor training course, including any permitted retesting, will be required to return the curriculum manual to the department by no later than the end of the class module at which unsuccessful completion of the course is determined or at the time of retest, whichever is later.

§90.24. Instructor License - Additional Endorsements.

(a) An instructor who intends to instruct more than one type of court-ordered program must be licensed and must hold an endorsement for each type of court-ordered program.

(b) To obtain an endorsement to instruct an additional type of court-ordered program, the instructor must:
(1) successfully complete the application requirements under §90.22, except for §90.22(a)(4), for the specific court-ordered program;

(2) successfully complete the instructor training course and examination under §90.23 for the specific court-ordered program; and

(3) submit the additional endorsement fee under §90.80.

(c) Each endorsement will attach to the license and will be renewed as part of a successful renewal of the license.

§90.25. Instructor License Term; Renewals.

(a) An instructor license is valid for a two-year period beginning on the date of issuance of the initial license and may be renewed biennially. Each endorsement attached to the license will have the same term as the license.

(b) To renew an instructor license, the instructor must:

(1) submit a completed renewal application on a form prescribed by the department;

(2) complete the continuing education requirements for the specific court-ordered program curriculum specified under §90.26;

(3) comply with the continuing education audit process described under §90.27, if selected for an audit;

(4) successfully pass a criminal history background check performed by the department; and

(5) submit the instructor license renewal fee under §90.80.

(c) The department will issue a renewal license to an instructor meeting all the requirements for renewal.

(d) A person who fails to complete the renewal requirements before the instructor license expires will no longer hold a current license and may not instruct any court-ordered program. A person whose instructor license has expired may late renew the license in accordance with the procedures set out under §60.83.

(e) A person may not instruct any court-ordered program with an expired instructor license.

(f) The endorsement for the specific court-ordered program is attached to the license and will be renewed as part of a successful renewal of the license.

§90.26. Instructor Continuing Education Requirements.

(a) Drug Offender Education Instructor Requirements.

(1) Each Drug Offender Education instructor must complete at least one department-approved Drug Offender Education instructor continuing education seminar during each licensing period.

(2) If substantial changes or updates are made to the Drug Offender Education curriculum, instructors for Drug Offender Education must complete any additional department-approved Drug Offender Education instructor continuing education seminar(s) or special meeting(s) for additional instruction as required by the department.

(3) Instructors who are licensed chemical dependency counselors, licensed professional counselors, licensed psychologists, licensed psychiatrists, or licensed social workers may complete 20 hours of continuing education for the respective license that is directly drug-related in lieu of completing the department-approved continuing education seminar. If selected for a continuing education audit under §90.27, proof of these continuing education hours must be submitted to the department in a manner prescribed by the department.

(4) Continuing education hours obtained in a department-approved Drug Offender Education instructor continuing education seminar may be used to fulfill the continuing education requirement of another endorsement.

(b) Alcohol Education Program for Minors Instructor Requirements.

(1) Each Alcohol Education Program for Minors instructor must complete at least one department-approved Alcohol Education Program for Minors instructor continuing education seminar during each licensing period.

(2) If substantial changes or updates are made to the Alcohol Education Program for Minors curriculum, instructors for Alcohol Education Program for Minors must complete any additional department-approved Alcohol Education Program for Minors instructor continuing education seminar(s) or special meeting(s) for additional instruction as required by the department.

(3) Instructors who are licensed chemical dependency counselors, licensed professional counselors, licensed psychologists, licensed psychiatrists, or licensed social workers may complete 20 hours of continuing education for the respective license that is directly alcohol-related, in lieu of completing the department-approved continuing education seminar. If selected for a continuing education audit under §90.27, proof of these continuing education hours must be submitted to the department in a manner prescribed by the department.

(4) Continuing education hours obtained in a department-approved Alcohol Education Program for Minors instructor continuing education seminar may be used to fulfill the continuing education requirement of another program endorsement.

(c) DWI Education Instructor Requirements.

(1) Each DWI Education instructor must complete at least one department-approved DWI Education instructor continuing education seminar during each licensing period.

(2) If substantial changes or updates are made to the DWI Education curriculum, instructors for DWI Education must complete any additional department-approved DWI Education instructor continuing education seminar(s) or special meeting(s) for additional instruction as required by the department.

(3) Instructors who are licensed chemical dependency counselors, licensed professional counselors, licensed psychologists, licensed psychiatrists, or licensed social workers may complete 20 hours of continuing education for the respective license that is directly alcohol-related, in lieu of completing the department-approved continuing education seminar. If selected for a continuing education audit under §90.27, proof of these continuing education hours must be submitted to the department in a manner prescribed by the department.

(4) Continuing education hours obtained in a department-approved DWI Education Instructor continuing education seminar may be used to fulfill the continuing education requirement of another program endorsement.

(d) DWI Intervention Instructor Requirements.

(1) Each DWI Intervention instructor must complete at least one department-approved DWI Intervention instructor continuing education seminar during each licensing period.

(2) If substantial changes or updates are made to the DWI Intervention curriculum, instructors for DWI Intervention must complete any additional department-approved DWI Intervention instructor continuing education seminar(s) or special meeting(s) for additional instruction as required by the department.
(3) Instructors who are licensed chemical dependency counselors, licensed professional counselors, licensed psychologists, licensed psychiatrists, or licensed social workers may complete 20 hours of continuing education for the respective license that is directly alcohol-related, in lieu of completing the department-approved continuing education seminar. If selected for a continuing education audit under §90.27, proof of these continuing education hours must be submitted to the department in a manner prescribed by the department.

(4) Continuing education hours obtained in a department-approved DWI Intervention instructor continuing education seminar may be used to fulfill the continuing education requirement of another program endorsement.

(e) An instructor must pay a continuing education seminar fee for each instructor endorsement to the department’s authorized representative.

§90.27. Instructor Continuing Education Audits - All Programs.

(1) The department shall select for audit a random sample of instructors for each renewal month. Instructors will be notified of the continuing education audit when they receive their renewal documentation;

(2) If selected for an audit, the instructor must submit copies of certificates, transcripts, or other documentation verifying earning of continuing education hours or not to be forwarded to the department at the time of renewal unless the instructor has been selected for audit;

(3) Failure to timely furnish this information or providing false information during the audit process or the renewal process are grounds for disciplinary action against the instructor;

(4) An instructor who is selected for a continuing education audit may renew through the online renewal process, if available. However, the instructor will not be considered renewed until the required continuing education documents are received, accepted, and approved by the department; and

(5) Instructors will not be renewed until the continuing education requirements have been met.

§90.28. Instructor Responsibilities.

(a) Instructors must report, in writing, any felony or misdemeanor conviction against themselves.

(b) An instructor must notify the department within 30 days of any change in the instructor’s name, mailing address, telephone number, or e-mail address.

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

Filed with the Office of the Secretary of State on May 27, 2022.

TRD-202202068

Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 475-4879

♦ ♦ ♦

SUBCHAPTER C. PROGRAM/PROVIDER CERTIFICATION REQUIREMENTS

16 TAC §§90.30 - 90.34

STATUTORY AUTHORITY

The proposed repeals are proposed under Texas Occupations Code, Chapter 51 and Texas Government Code, Chapter 171, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed repeals are also proposed under Texas Transportation Code, Chapter 521, §521.375, regarding the joint adoption of rules with the Department of Public Safety for the Drug Offender Education Program.

The statutory provisions affected by the proposed repeals are those set forth in Texas Occupations Code, Chapter 51; Texas Government Code, Chapter 171; Texas Alcoholic Beverage Code §106.115; Texas Transportation Code, §§521.371 - 521.377; Texas Code of Criminal Procedure, Articles 42A.403, 42A.404, 42A.406, 42A.407, 42A.514, and 45.051; and Texas Family Code §§53.03 and §54.047. No other statutes, articles, or codes are affected by the proposed repeals.

§90.30. Program/Provider Certification Requirement.
§90.31. Program/Provider Certification Application - Headquarters.
§90.32. Program/Provider Certification Application - Branch Sites and Other Locations.
§90.33. Program/Provider Certification Term; Renewal.
§90.34 Program/Provider Certification - Change of Address and Providing Information.

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

Filed with the Office of the Secretary of State on May 27, 2022.

TRD-202202068

Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 475-4879

♦ ♦ ♦

SUBCHAPTER C. PROGRAM PROVIDER LICENSE [PROGRAM/PROVIDER CERTIFICATION] REQUIREMENTS

16 TAC §§90.30 - 90.34

STATUTORY AUTHORITY
The proposed rules are proposed under Texas Occupations Code, Chapter 51 and Texas Government Code, Chapter 171, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed rules are also proposed under Texas Transportation Code, Chapter 521, §521.375, regarding the joint adoption of rules with the Department of Public Safety for the Drug Offender Education Program.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapter 51; Texas Government Code, Chapter 171; Texas Alcoholic Beverage Code §106.115; Texas Transportation Code, §§521.371 - 521.377; Texas Code of Criminal Procedure, Articles 42A.403, 42A.404, 42A.406, 42A.407, 42A.514, and 45.051; and Texas Family Code §53.03 and §54.047. No other statutes, articles, or codes are affected by the proposed rules.

§90.30. Program Provider License Required.

(a) Any person seeking to offer or provide a specific type of a court-ordered program must have a current program provider license with an endorsement for the applicable program issued by the department.

(b) A person holding a current program provider license with the appropriate endorsement from the department is a licensed program provider for the applicable program.

(c) A program provider must ensure that:

(1) each court-ordered program is taught by an instructor with the appropriate endorsement to instruct that specific type of program;

(2) each court-ordered program is conducted in accordance with, and described in, the applicable and department-approved instructor manual under §90.40; and

(3) each court-ordered program utilizes the department-approved curriculum for the specific type of program being taught.

(d) A program provider must comply with all requirements of this chapter.

(e) A program provider may offer or provide a court-ordered program in person, online, or both, in accordance with the requirements in this chapter.

§90.31. Program Provider License - Application for License and Endorsements.

(a) A program provider license is required for each court-ordered program that is offered or provided. A license endorsement is required for each type of court-ordered program that is offered or provided by the program provider.

(b) To apply for a program provider license, a person must:

(1) submit a completed program provider application on a department-prescribed form;

(2) identify each court-ordered program that the program provider intends to offer or provide, and the instructor permitted to give instruction with their current license number and endorsement;

(3) indicate whether each court-ordered program will be offered to participants in person, as an online course, or both; and

(4) submit the program provider initial license application and first endorsement fee specified under §90.80.

(c) In addition to the requirements in subsection (b), an applicant for a program provider license offering or providing online instruction must identify each method that will be used to:

(1) deliver remote classroom instruction, including the platform, technology or program;

(2) track and verify participant attendance, including hours completed; and

(3) conduct pre-course and post-course testing, and exit interviews, if applicable.

(d) If an applicant has met all requirements for the specific type of court-ordered program, the department shall issue a license and endorsement for the specific type of program being offered or provided.

(e) If an applicant fails to complete all licensure requirements within one year of the Department's receipt of the initial program provider license and endorsement application, the applicant must resubmit and pay the applicable fee.

§90.32. Program Provider License - Additional Endorsements.

(a) A program provider who intends to offer or provide more than one type of court-ordered program must be licensed and must hold an endorsement for each type of court-ordered program.

(b) To obtain an endorsement to offer or provide an additional type of court-ordered program, the program provider must:

(1) successfully complete the application requirements under §90.31, except §90.31(b)(4), for each additional court-ordered program;

(2) identify each additional court-ordered program that the program provider intends to offer or provide, and each instructor permitted to give instruction with their current license number and endorsement;

(3) indicate whether each additional court-ordered program will be offered to participants in person, or as an online course, or both; and

(4) submit the additional endorsement fee under §90.80 for each additional court-ordered program.

(c) Each endorsement will attach to the license and will be renewed as part of a successful renewal of the license.

§90.33. Program Provider License Term; Renewal.

(a) A program provider license is valid for a two-year period beginning on the date of issuance and may be renewed biennially. Each endorsement for a specific court-ordered program that is attached to the license has the same term as the license.

(b) To renew a program provider license, a program provider must submit:

(1) a completed program provider renewal application on a form prescribed by the department; and

(2) the program provider license renewal fee specified under §90.80.

(c) The department shall issue a program provider renewal license to a program provider meeting all the requirements for renewal.

(d) A person who fails to submit a complete renewal application and pay the renewal fee before the program provider license expires will no longer hold a current license to offer or provide the applicable court-ordered program. A person whose license has expired may late renew the license in accordance with the procedures set out under §60.83.
§90.34. Program Provider License - Change of Address, Ownership and Other Information.

(a) A program provider must notify the department in writing within 30 days of any change in the program provider's address, telephone number, e-mail address, website address, or change in the registered agent, ownership or instructor.

(b) A change in ownership is considered to have occurred:

1. in the case of ownership by an individual, when more than 50% of the licensed program provider has been sold or transferred;

2. in the case of ownership by a partnership or a corporation, when more than 50% of the licensed program provider, or of the owning partnership or corporation has been sold or transferred; or

3. when the board of directors, officers, shareholders, or similar governing body has been changed to such an extent as to significantly alter the management and control of the program provider.

c) A program provider must maintain a registered agent in the State of Texas. A registered agent's address must not be used as a program provider's physical or mailing address.

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

Filed with the Office of the Secretary of State on May 27, 2022.

TRD-202202061
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 475-4879

SUBCHAPTER D. PROGRAM REQUIREMENTS - CURRICULUM, COURSES, CLASSROOMS, CERTIFICATES

16 TAC §§90.40 - 90.49

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapter 51 and Texas Government Code, Chapter 171, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed rules are also proposed under Texas Transportation Code, Chapter 521, §521.375, regarding the joint adoption of rules with the Department of Public Safety for the Drug Offender Education Program.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapter 51; Texas Government Code, Chapter 171; Texas Alcoholic Beverage Code §106.115; Texas Transportation Code, §§521.371 - 521.377; Texas Code of Criminal Procedure, Articles 42A.403, 42A.404, 42A.406, 42A.407, 42A.514, and 45.051; and Texas Family Code §53.03 and §54.047. No other statutes, articles, or codes are affected by the proposed rules.

§90.40. Program Curriculum and Materials - All Programs.

(a) Court-ordered programs must (Offender Education Programs shall) use the most current [up to date] version of the uniform curricula and of any screening instrument approved by the department. The same curriculum and screening instruments are used for in-person and online court-ordered programs.

(b) The following curricula are approved for the applicable program:

1. Alcohol Education Program for Minors -- the Alcohol Education Program for Minors Instructor [Administrator/Instructor] Manual;


3. DWI Education Program -- the Texas DWI Education Program Instructor [Administrator/Instructor] Manual; and

4. DWI Intervention Program -- the Texas DWI Intervention Program Manual.

(c) Any supplemental media used in a court-ordered program [an Offender Education Program] must have prior written approval from the department. The court-ordered program [Offender Education Program] seeking approval must demonstrate that it meets the following minimum conditions for approval of supplemental media:

1. the instructor [Program] must still use all media required by the applicable approved curriculum for each module;

2. the instructor [Program], with use of the supplemental media, must exceed the minimum number of classes and hours of instruction required per course by the length of any supplemental media; and

3. the content of any supplemental media [medium] must relate directly to the objectives of the curriculum module in which it is used.

§90.41. Program Rules - Drug Offender Education Program.

(a) Pursuant to Transportation Code §521.374(a)(1), the department is responsible for approving a Drug Offender Education Program under rules adopted by the commission and the Texas Department of Public Safety (DPS).

(b) Pursuant to Transportation Code §521.375(a), the commission and DPS are responsible for jointly adopting rules for the qualification and approval of providers of the Drug Offender Education Program under §521.374(a)(1).

(c) For any proposed changes to the educational program rules for the Drug Offender Education Program, the department will notify the designated representatives from DPS and solicit input during the rulemaking process.

§90.42. General Program and Course Requirements - All Programs.

(a) Except where noted, the program and course requirements in this chapter apply to in-person and online court-ordered programs.

(b) All court-ordered programs must use the applicable curriculum approved under §90.40, including all required videos, slides or transparencies, participant workbooks, booklets, and other resources or written materials. The applicable curriculum must be presented in the prescribed manner and sequence.
(c) A single instructor must teach the entire course for all programs, except for DWI Intervention Programs, which may allow team-teaching utilizing no more than two instructors.

(d) Instructors must require participants to complete all class modules within a course in the proper sequence.

(e) The program provider must make provisions for persons unable to read and/or speak English. All classes in a single course must be taught in the same language.

(f) The instructor must screen each participant and offer appropriate referral information to the participant, based upon the numerical score and accompanying referral recommendations on the approved screening instrument required to be administered. The screening instrument must be administered by the instructor, or under the instructor's direct supervision.

(g) The program provider or instructor for each program must make available a current listing or roster of available chemical dependency counseling and treatment resources in the area to each participant whose numerical score and accompanying referral recommendations on the approved screening instrument indicate a potential substance abuse problem requiring further evaluation.

(h) All required registration, initial data collection, and administration of the screening instrument must be completed before commencement of the first class module.

(i) At the end of each course, the instructor for each program must administer a participant course evaluation.

(j) The instructor for all programs must conduct an exit interview with each participant, as outlined in the applicable educational program manual.

§90.43. Additional Course Requirements for the Drug Offender Education Program.

(a) In addition to the requirements under §90.42, each Drug Offender Education Program provider must:

(1) provide a minimum of 15 hours of class instruction per course;

(2) provide a minimum of five class modules of instruction per course;

(3) conduct class modules that are not longer than three hours in length, and not shorter than two hours in length;

(4) conduct no more than one class module per day; and

(5) conduct courses and each class with no more than 30 participants and with no fewer than three participants.

(b) The provider must administer and evaluate pre-course and post-course test instruments for each participant.

§90.45. Additional Course Requirements for the DWI Education Program.

(a) In addition to the requirements under §90.42, each DWI Education Program provider must:

(1) provide a minimum of 12 hours of instruction per course;

(2) provide no more than four hours of instruction in any one day; and

(3) conduct courses and each class with no more than 30 participants and with no fewer than three participants.

(b) The provider must administer and evaluate pre-course and post-course test instruments for each participant.

(c) Within ten working days after completion of the course, the instructor must notify the appropriate community supervision and corrections department and forward a copy of the certificate of completion to the Texas Department of Public Safety (DPS).

(d) If the deadline for completing the course is less than ten working days after the participant's successful completion of the course, the instructor, prior to the deadline, must:

(1) forward a copy of the certificate of completion to DPS; and

(2) notify the appropriate community supervision and corrections department or the court.

§90.46. Additional Course Requirements for DWI Intervention Programs.

(a) For purposes of this section, an individual session is defined as an individual meeting between instructor and participant in which the instructor checks the participant's workbook to monitor homework and student progress and assists with the participant's self-improvement techniques.

(b) In addition to the requirements under §90.42, each DWI Intervention Program provider must:

(1) provide a minimum of 30 hours of class instruction per course;

(2) conduct class modules which are not longer than three hours in length and not shorter than two hours in length;

(3) conduct no more than one class module per day;

(4) conduct no more than two class modules per week;

(5) conduct courses and each class with no more than 15 participants and with no fewer than three participants;

(6) provide make-up class modules for a maximum of two excused absences per participant; and

(7) conduct a minimum of two individual sessions with each participant and an individual exit interview with each participant.

(c) Within ten working days after completion of the course, the instructor must notify the appropriate community supervision and corrections department and forward a copy of the certificate of completion to the Texas Department of Public Safety (DPS).

(d) If the deadline for completing the course is less than ten working days after the participant's successful completion of the course, the instructor, prior to the deadline, must:
§90.47. In-Person Classroom Facilities and Equipment.

(a) Court-ordered programs and instructors must conduct all in-person classes in appropriate classroom facilities and settings that comply with the Americans with Disabilities Act, 42 United States Code, §12101 et seq. The classrooms and setting must be conducive to study and must have:

1. enough tables or desks to accommodate each participant without crowding;
2. enough chairs sufficient to seat each participant;
3. sufficient lighting;
4. appropriate acoustics and climate control; and
5. classroom facilities easily accessible to all class participants.

(b) Program providers and instructors must not conduct in-person class modules at a personal residence. Each instructor that instructs an in-person court-ordered program must be physically present in the classroom with the participants for each class.

(c) Audiovisual equipment must be in good working order and in good condition for use in class instruction.

(d) Television monitors and projection screens must be at least 25 inches diagonally and videos and slides/transparencies must be maintained in a high-quality condition.

(e) Slides/transparencies and videos must be displayed in a manner which produces a clear image and allows all participants to have an unobstructed view.

(f) Program providers and instructors must ensure that no portion of any court-ordered program course is videotaped or otherwise recorded or broadcast.

§90.48. Online Program Requirements.

(a) A program provider that offers or provides an online court-ordered program to participants must:

1. ensure that it has access to internet service with sufficient bandwidth to successfully provide, without interruption to the participants, in such a manner that is conducive to instruction and comprehension;
2. provide instructors with the proper equipment that is in good working order and that allows for virtual, real-time, and interactive presentation of all course materials; and
3. confirm that all classes are instructed using current department-approved curriculum and materials, and that all classes are conducted in accordance with department rules and current laws.

(b) An instructor must ensure that the online classroom camera is clearly focused on the instructor at all times, and that all participants remain on their cameras throughout the entire class. Instructors and participants are allowed to be off camera during course break periods.

(c) An instructor must take the attendance of participants on the course roster and confirm audio and visual function of the participant's equipment from each participant before the start of each class. The instructor must not admit any participant into an online class if the participant does not have functioning audio and video capability on his or her equipment.

(d) A program provider must not enroll a participant into an online court-ordered program if the participant does not have compatible equipment that can allow the participant to take, attend, or complete the program.

(e) An instructor must remove any participant from class who fails to remain visible on the participant's camera and report the incident to the program provider at the end of the class. The program provider must record the incident in the course records. The instructor or the program provider must not present a certificate to any participant who fails to complete a court-ordered program.

(f) The online program provider is responsible for the administration of pre-course testing to participants, where applicable, and ensure the validity and security of post-course testing using the same or similar methods and procedures as would be used for in-person court-ordered programs.

§90.49. Certificate of Program Completion for Participants.

(a) A program provider must ensure that the instructor provides each participant who successfully completes the applicable court-ordered program a certificate of program completion prescribed by the department within five days of successful completion. If an exit interview is required, the program will not be deemed to be successfully completed and a certificate of program completion must not be issued until the exit interview has been conducted.

(b) A program provider that offers or provides a court-ordered program may provide the certificate to the participant by regular mail or present it to the participant after successful completion of the course. A program provider shall not provide a certificate to a participant by electronic means.

(c) Certificates shall only be issued by the department to the program provider. All program providers must maintain an ascending numerical accounting record of all issued and unissued certificates.

(d) The program provider is responsible for ensuring that an original certificate of program completion is issued to each participant who successfully completes a program. The program provider must retain one copy of the certificate in its records.

(e) Each program provider must develop procedures for issuing duplicate certificates.

1. The procedures must ensure that the duplicate certificate is a new certificate, is clearly identified as being a duplicate of a previously issued certificate and includes the control number of the previously-issued certificate.

2. The court-ordered program must indicate at the bottom of the course roster on which the participant's original control number was recorded that a duplicate certificate was issued and shall show the new control number and date of issuance for the duplicate certificate.

(f) If a program provider allows its license to expire or otherwise loses its license, it must, within 30 days after expiration or other termination of the license, return all unused certificates of program completion to the department.

(g) A program provider is responsible for the certificates in accordance with this subsection.

1. A program provider may request the serially numbered certificates by submitting an order with the department's authorized vendor stating the number of certificates to be purchased and include payment of all appropriate fees.

2. A program provider may not transfer unassigned certificates to a licensed program other than the licensed program for which the certificates were ordered.
The program provider must maintain effective protective measures to ensure that unissued certificates are secure. The program provider must report all unaccounted-for certificates to the department within fifteen (15) working days of the discovery of the incident. In addition, the program provider must investigate the circumstances surrounding the unaccounted-for certificates. A report of the findings of the investigation, including preventative measures for recurrence, must be submitted to the department within thirty (30) days of the discovery.

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

Filed with the Office of the Secretary of State on May 27, 2022.
TRD-202202062
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 475-4879

16 TAC §§90.41 - 90.49

STATUTORY AUTHORITY

The proposed repeals are proposed under Texas Occupations Code, Chapter 51 and Texas Government Code, Chapter 171, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed repeals are also proposed under Texas Transportation Code, Chapter 521, §521.375, regarding the joint adoption of rules with the Department of Public Safety for the Drug Offender Education Program.

The statutory provisions affected by the proposed repeals are those set forth in Texas Occupations Code, Chapter 51; Texas Government Code, Chapter 171; Texas Alcoholic Beverage Code §106.115; Texas Transportation Code, §§521.371 - 521.377; Texas Code of Criminal Procedure, Articles 42A.403, 42A.404, 42A.406, 42A.407, 42A.514, and 45.051; and Texas Family Code §53.03 and §54.047. No other statutes, articles, or codes are affected by the proposed repeals.

§90.41. Program Curriculum and Rules - DWI Education Program.

§90.42. Program Rules - Drug Offender Education Program.

§90.43. General Program and Course Requirements - All Programs.

§90.44. Additional Course Requirements for the Drug Offender Education Program.

§90.45. Additional Course Requirements for the Alcohol Education Program for Minors.

§90.46. Additional Course Requirements for the DWI Education Program.

§90.47. Additional Course Requirements for DWI Intervention Programs.

§90.48. Classroom Facilities and Equipment.

§90.49. Course Completion Certificates for Participants.

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

Filed with the Office of the Secretary of State on May 27, 2022.
TRD-202202069
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 475-4879

SUBCHAPTER E. PROGRAM REQUIREMENTS - ADMINISTRATION AND OTHER RESPONSIBILITIES

16 TAC §90.50

STATUTORY AUTHORITY

The proposed repeal is proposed under Texas Occupations Code, Chapter 51 and Texas Government Code, Chapter 171, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed repeal is also proposed under Texas Transportation Code, Chapter 521, §521.375, regarding the joint adoption of rules with the Department of Public Safety for the Drug Offender Education Program.

The statutory provisions affected by the proposed repeal are those set forth in Texas Occupations Code, Chapter 51; Texas Government Code, Chapter 171; Texas Alcoholic Beverage Code §106.115; Texas Transportation Code, §§521.371 - 521.377; Texas Code of Criminal Procedure, Articles 42A.403, 42A.404, 42A.406, 42A.407, 42A.514, and 45.051; and Texas Family Code §53.03 and §54.047. No other statutes, articles, or codes are affected by the proposed repeal.

§90.50. Program Administration.

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

Filed with the Office of the Secretary of State on May 27, 2022.
TRD-202202070
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 475-4879

16 TAC §§90.50 - 90.54

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapter 51 and Texas Government Code, Chapter 171, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules...
as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed rules are also proposed under Texas Transportation Code, Chapter 521, §521.375, regarding the joint adoption of rules with the Department of Public Safety for the Drug Offender Education Program.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapter 51; Texas Government Code, Chapter 171; Texas Alcoholic Beverage Code §106.115; Texas Transportation Code, §§521.371 - 521.377; Texas Code of Criminal Procedure, Articles 42A.403, 42A.404, 42A.406, 42A.407, 42A.514, and 45.051; and Texas Family Code §53.03 and §54.047. No other statutes, articles, or codes are affected by the proposed rules.

§90.50. Program Administration.

(a) Compliance. A program provider is responsible for all aspects of program compliance with this chapter, including any noncompliance related to the conduct of an instructor, owner, or other personnel.

(b) Course Fees and Schedules.

(1) A program provider must set definite and reasonable course fees. Course fees may not be assessed on a class-by-class basis.

(2) A program provider must maintain, and make available upon request, written course schedules that include the dates, times, and locations where courses will be held, and the fees charged by the program.

(c) Program Records and Audits.

(1) A program provider must maintain, for at least three years, documentation necessary to demonstrate compliance with all applicable requirements of this chapter. This requirement applies to records and documentation created on or after the effective date of this subsection.

(2) Upon request, the program provider must make available or provide to the department during business hours, any of its documents or records, unless otherwise prohibited by law.

(d) Referrals.

(1) If a program provider or instructor offers or provides court-ordered program referral information to an individual who is required to complete a court-ordered program, the program provider or instructor must:

(A) provide the department's phone number and website;

(B) advise the individual concerning the individual's choice to complete any court-ordered program or course approved by the department or use any program provider or instructor licensed by the department with the appropriate endorsement; and

(C) not require or otherwise attempt to influence an individual to choose a particular court-ordered program, course, provider or instructor.

(2) This subsection does not prevent a program provider or instructor from providing information about a specific court-ordered program, course, provider, or instructor when a prospective participant is specifically requesting information about that particular program, course, provider, or instructor.

(e) Complaint Procedures and Notice.

(1) A program provider must establish procedures to resolve participant complaints.

(2) A program provider must provide notice to participants that contains a statement that any complaints against the court-ordered program, program provider, instructor, or any of the program provider's personnel may be directed to the department. The notice must contain the following information: "Regulated by the Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, Telephone: (512) 463-6599, Toll-Free (in Texas): (800) 803-9202, Relay Texas-TDD: (800) 735-2989, https://www.tdlr.texas.gov/complaints/.

§90.51. Recordkeeping Regarding Course Participants.

(a) All program providers [Offender Education Programs/Providers] must collect and maintain the following required information on each course participant:

(1) name;

(2) mailing [street] address, city, and zip code;

(3) e-mail address;

(4) date of birth;

(5) gender;

(6) driver's license number (if any);

(7) grade in school or educational level achieved;

(8) present employment;

(9) date of enrollment;

(10) date of course completion;

(11) dates and attendance record for each class module [session] of the course completed;

(12) certificate of completion number; and

(13) criminal case cause number.

(b) In addition to the requirements in subsection (a), program providers of the Drug Offender Education Programs and the DWI Education Programs must collect and maintain the following required information on each course participant:

(1) individual pre-course [pre] and post-course test scores;

(2) average pre-course [pre] and post-course test scores of course participants;

(3) aggregate percent of knowledge increase between pre-course [pre] and post-course test scores;

(4) each course participant's screening instrument;

(5) each course participant's screening instrument indicator code/score; and

(6) any referral recommendations made to a course participant.

(c) In addition to the requirements in subsection (a), program providers of the DWI Intervention Programs must collect and maintain the following required information on each course participant:

(1) participants' blood alcohol concentration at time of arrest (if known);

(2) the number of prior alcohol/drug-related arrests;

(3) documentation that the agreement form, Alcoholics Anonymous attendance, family/significant other attendance, sessions with individual participants, and exit interview requirements were
completed as outlined in the Texas DWI Intervention Instructor Program Manual;

(4) each course participant’s screening instrument;

(5) each course participant’s screening instrument indicator code/score; and

(6) any referral recommendations made to a course participant.

(d) In addition to the requirements in subsection (a), program providers of the Alcohol Education Program for Minors must collect and maintain the following required information on each course participant:

(1) the name of the referring judge;

(2) individual pre-course [pre-] and post-course test scores;

(3) average pre-course [pre-] and post-course test scores of course participants; and

(4) aggregate percent of knowledge increase between pre-course [pre-] and post-course test scores.

(e) A program provider [An Offender Education Program] must retain each course roster [Course Roster] and a copy of each issued certificate of program completion [Certificate of Completion] for at least three years from the date of course completion.

(f) All other course records [Course Records], as defined under §90.10 and specified in this section, must be retained for a minimum of one year from the date of course completion.

(g) The records in this section must be accessible by the program provider and made available upon request to the department maintained at the Program/Provider’s headquarters.

§90.52. Annual Reports.

(a) A program provider [An Offender Education Program/Provider] must file an annual report for the [time] period beginning September 1 of each year and ending August 31 of the following year. The annual report form must be submitted to the department by September 15 of each year.

(b) An Offender Education Program/Provider must submit the annual report form to the department by September 15 of each year.

(b) [eo] A program provider [An Offender Education Program] must submit the following items on the department-prescribed annual report form:

(1) total number of participants registered for each program [Program] course during the annual reporting period;

(2) total number of participants successfully completing each program [Program] course during the annual reporting period;

(3) total number of courses conducted during the annual reporting period;

(4) names of all instructors permitted to give instruction for the program provider [certified instructors employed by the Offender Education Program] and number of courses conducted by each instructor [instructor] during the annual reporting period;

(5) driver’s license numbers of all participants, or, in the absence of a driver’s license number, the date of birth of each participant completing the course;

(6) average percent of knowledge increase across all courses conducted during the annual reporting period from pre-course tests to post-course tests administered (not required for DWI Intervention Programs); and

(7) percent of total participants during the annual reporting period indicating significant substance abuse problems, based upon the numerical score on the approved screening instrument required to be administered (not required for Alcohol Education Program for Minors).

§90.53. Confidentiality.

All court-ordered programs must [Offender Education Programs shall] abide by and obtain any consent to disclosure required by applicable Federal and State laws regarding confidentiality of patient/client records including, as applicable and without limitation:

(1) 42 United States Code §290dd-2, Confidentiality of Records;

(2) 42 Code of Federal Regulations, Part 2, Confidentiality of Alcohol and Drug Abuse Patient Records; and

(3) Health and Safety Code, Chapter 611, Mental Health Records.

§90.54. Discrimination Prohibited.

A program provider or instructor must not discriminate against participants based on [Offender Education Programs shall be conducted without discrimination based upon the] sex [gender], race, religion, age, national or ethnic origin, or disability [of the participant].

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

Filed with the Office of the Secretary of State on May 27, 2022.

TRD-202202063
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation

Earliest possible date of adoption: July 10, 2022

For further information, please call: (512) 475-4879

SUBCHAPTER F. FEES

16 TAC §90.80

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapter 51 and Texas Government Code, Chapter 171, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed rules are also proposed under Texas Transportation Code, Chapter 521, §§521.375, regarding the joint adoption of rules with the Department of Public Safety for the Drug Offender Education Program.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapter 51; Texas Government Code, Chapter 171; Texas Alcoholic Beverage Code §106.115; Texas Transportation Code, §§521.371 - 521.377; Texas Code of Criminal Procedure, Articles 42A.403, 42A.404, 42A.406, 42A.407, 42A.514, and 45.051; and Texas Family Code §§53.03 and §54.047. No other statutes, articles, or codes are affected by the proposed rules.

§90.80. Fees.

PROPOSED RULES  June 10, 2022  47 TexReg 3393
(a) All fees paid to the department and any charges for program-related materials are non-refundable.

(b) Fees will be assessed in accordance with the following fee schedule:

(1) Program Provider License [Offender Education Program/Provider Certification] Fees (paid to department):
   (A) Initial license application and first endorsement fee, including a new Program in a non-adjacent county to the headquarters--$300 per Program;
   (B) Additional endorsement fee--$280 per endorsement;
   (C) Renewal application fee--$200 per Program;
   (D) Reinstatement of endorsement fee--$280 per endorsement.

(2) Branch Site Fees (paid to department):
   (A) Initial application fee for a branch site (same or adjacent county to the headquarters)--$5 per branch site;
   (B) Branch site renewal application fee--$5 per branch site.

(3) Moving/Change of Headquarters Fees (paid to department):
   (A) Moving headquarters to a location outside of the county--$25;
   (B) Moving headquarters to a location in the same county--$25.

(2) [44] Instructor License [Certification] Fees:
   (A) Initial license initial application and first endorsement fee--$50 [0];
   (B) Additional endorsement fee--$45 per endorsement;
   (C) Renewal renewal application fee--$40 [9];
   (D) Reinstatement of endorsement fee--$45 per endorsement.

(3) [55] Instructor Training Course Fees (paid to the department's authorized representative, as directed by the department's third party contractor)--$425 per course;

(4) [64] Continuing Education Seminar Fees (paid to the department's authorized representative, as directed by the department's third party contractor)--$100 per endorsement [certification] per seminar; and

(5) [77] Fees for Program Course Materials must be paid to the department's authorized representative, as directed by the department's third party contractor.
   (c) A duplicate/replacement fee for a license [certification/certificate] issued under this chapter is $25.
   (d) A dishonored/returned check or payment fee is the fee prescribed under §60.82 of this title (relating to Dishonored Payment Device).
   (e) The fee for a criminal history evaluation letter is the fee prescribed under §60.42 of this title (relating to Criminal History Evaluation Letters).
   (f) Late renewal fees for licenses issued under this chapter are provided under §60.83.

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

Filed with the Office of the Secretary of State on May 27, 2022.
TRD-202202064
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 475-4879

SUBCHAPTER G. ENFORCEMENT
16 TAC §§90.91 - 90.95

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapter 51 and Texas Government Code, Chapter 171, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed rules are also proposed under Texas Transportation Code, Chapter 521, §521.375, regarding the joint adoption of rules with the Department of Public Safety for the Drug Offender Education Program.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapter 51; Texas Government Code, Chapter 171; Texas Alcoholic Beverage Code §106.115; Texas Transportation Code, §§521.371 - 521.377; Texas Code of Criminal Procedure, Articles 42A.403, 42A.404, 42A.406, 42A.407, 42A.514, and 45.051; and Texas Family Code §53.03 and §54.047. No other statutes, articles, or codes are affected by the proposed rules.

§90.91. Complaints: Investigations.

(a) Upon verbal or written request from the department, a program provider, instructor, [an Offender Education Program, Administrator, Instructor] or any person associated with the program [Program], must cooperate with the department and furnish requested information concerning any department investigation of a complaint.

(b) If the department is investigating a complaint, the program provider [Program/Provider, its Administrator, and Instructors] must make available or provide to the department upon request at any reasonable time, any of its documents or records, including all records of any instructor or program provider, [Instructor or Administrator] unless otherwise prohibited by law.

§90.92. Administrative Penalties and Sanctions.

If a person or entity violates any provision of Texas Occupations Code Chapter 51, Texas Government Code, Chapter 171, the statutory provisions identified in §90.1, this chapter, [or] any rule or order of the executive director or commission, proceedings may be instituted to impose administrative penalties, administrative sanctions, or both [in accordance with the provisions of Texas Occupations Code, Chapter 51, the statutory provisions identified in §90.1, and any associated rules.]

§90.93. Enforcement Authority.

The enforcement authority granted under Texas Government Code, Chapter 171, Texas Occupations Code, Chapter 51, the statutory provisions identified in §90.1, and any associated rules may be used to enforce the statutory provisions identified in §90.1 and this chapter.
§90.94. Additional Conduct Subject to Disciplinary Actions.

(a) The department may deny, refuse to renew, or revoke the application or the license [certification] of a program provider or an instructor [an Offender Education Program or of an Instructor] if the applicant for program provider or instructor license [Program or Instructor certification], or the program provider or instructor [Program or Instructor certification holder], or a [Program owner, Instructor, Administrator, or] staff member:

(1) fails or has failed to comply with applicable requirements under this chapter or any other applicable statute or department rule, or an order of the commission or executive director;

(2) falsifies, submits or maintains, or has falsified, submitted, or maintained any substantially false, inaccurate, or incomplete documentation required under this chapter or related to the applicable court-ordered program [Offender Education Program]. This includes submission of any false or misleading statements in an application or other statement or correspondence to the department;

(3) engages or has engaged in conduct or promotes, permits, or has promoted or permitted one or more participants to engage in conduct inconsistent with behaviors and principles taught or advocated under the curriculum prescribed under §90.40;

(4) attends or has attended any instructor [Instructor] training, instructs or is present at any class in a court-ordered program, an Offender Education Program, or performs duties related to a court-ordered program [an Offender Education Program] while under the influence or impaired by alcohol or controlled substances, or provides one or more course participants with, or permits or encourages one or more course participants to use, any alcohol or controlled substance;

(5) permits or engages in misrepresentation, fraud, or deceit regarding a court-ordered program provided or instructed by a program provider or instructor;

(6) [5] engages or has engaged in conduct toward another that is violent or that constitutes abuse, neglect, or exploitation under applicable law; or

(7) [6] engages or has engaged in conduct with respect to a participant that is inequitable, discriminatory, degrading, disrespectful, retaliatory, of a romantic or sexual nature, or which otherwise is or may be harmful to the health, safety, or welfare of a participant, to participants generally, or to the public.

(b) If a person's initial application for provider or instructor license has been denied, or upon renewal, the license has been refused or the license revoked, a provider or instructor, upon reapplication for the license, must demonstrate that the reason(s) for the previous revocation, denial or refusal have been remedied.

[(b) If a Program/Provider or Instructor whose certification has been denied, initially or at renewal, or revoked thereafter reapply, the Program/Provider or Instructor shall be required, with the application, to show that the facts and circumstances that led to revocation, denial, or a refusal to renew no longer serve as a basis for denial.]

§90.95. Criminal Penalties.

(a) Any person who knowingly sells, trades, issues, or otherwise transfers, or possesses with intent to sell, trade, issue, or otherwise transfer, a certificate or certificate number to a person not authorized to possess the certificate or certificate number is subject to criminal prosecution. The offense under this subsection is a Class A misdemeanor under Section 171.0356, Government Code.

(b) A person commits an offense if the person knowingly possesses a certificate or a certificate number that the person is not authorized to possess. The offense under this subsection is a Class A misdemeanor under Section 171.0357, Government Code.

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

Filed with the Office of the Secretary of State on May 27, 2022.

TRD-202202065
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 475-4879

TITLE 22. EXAMINING BOARDS

PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 573. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

22 TAC §573.27

The Texas Board of Veterinary Medical Examiners (Board) proposes this amendment to §573.27, concerning honesty, integrity and fair dealing. The purpose of the proposed amendment is to help clarify for veterinarians that we want to ensure that every single necessary procedure conducted on an animal, no matter how minor it appears or how major it is, must have the authorization of the owner.

John Hargis, General Counsel, has determined that for each year of the first five years that the rule is in effect, there are no anticipated increases or reductions in costs to the state and local governments as a result of enforcing or administering the rule. Mr. Hargis has also determined that for each year of the first five years that the rule is in effect, there is no anticipated impact in revenue to state government as a result of enforcing or administering the rule.

Mr. Hargis has also determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be that every procedure conducted on an animal must have the authorized consent of the owner and that the licensees shall conduct their practice with honesty, integrity and fair dealing. This amendment to this rule makes more conduct inclusive in that minor necessary procedures are subject to the rule and any necessary procedures must be authorized by the animal's owner.

Mr. Hargis has determined that there are no anticipated adverse economic effects on small business, micro-businesses, or rural communities as a result of the rule. Thus, the Board is not required to prepare an economic impact statement or a regulatory flexibility analysis pursuant to §2006.002, Government Code.

According to Mr. Hargis, for the first five years that the rule would be in effect, it is estimated that the proposed rule would not create or eliminate a government program, implementation of the proposed rule would not require the creation of new employee
positions or the elimination of existing employee positions, implementation of the proposed rule would not require an increase or decrease in future legislative appropriations to the agency, the proposed rule would not require an increase in the fees paid to the agency, the proposed rule would not create a new regulation, the proposed rule would expand an existing regulation, the proposed rule would not increase or decrease the number of individuals subject to the rule’s applicability, and the proposed rule would not positively or adversely affect the state’s economy.

The Texas Board of Veterinary Medical Examiners invites comments on the proposed amendment to the rule from any interested persons, including any member of the public. A written statement should be mailed or delivered to Sarah Foran, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Ste. 3-810, Austin, Texas 78701-3942, by facsimile (FAX) to (512) 305-7574, or by email to Sarah.Foran@veterinary.texas.gov. Comments will be accepted for 30 days following publication in the Texas Register. Comments must be received within 30 days after publication of this proposal in order to be considered.

The rule is proposed under the authority of §801.151(a), Occupations Code, which states that the Board may adopt rules necessary to administer the chapter, and the authority of §801.151(b), Occupations Code, which states that the Board may adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity, skills and practice in the veterinary medicine profession.

No other statutes, articles, or codes are affected by the proposal.

§573.27, Honesty, Integrity and Fair Dealing

Licensees shall conduct authorized and necessary medical procedures in their practice with honesty, integrity, and fair dealing in their practice of veterinary medicine.

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

Filed with the Office of the Secretary of State on May 27, 2022.

TRD-202202071
John Hargis
General Counsel
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 693-4500x3

SUBCHAPTER F. RECORDS KEEPING

22 TAC §573.52

The Texas Board of Veterinary Medical Examiners (Board) proposes this amendment to §573.52, concerning Veterinarian Patient Record Keeping.

The purpose of the proposed amendment is to clarify what information is required for complete medical records.

Fiscal Note

John Hargis, General Counsel, has determined that for each year of the first five years that the rule is in effect, there are no anticipated increases or reductions in costs to the state and local governments as a result of enforcing or administering the rule.

Mr. Hargis has also determined that for each year of the first five years that the rule is in effect, there is no anticipated impact in revenue to state government as a result of enforcing or administering the rule.

Public Benefit and Cost Note

Mr. Hargis has also determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be that licensees will have better clarity about the requirements of medical records and that the public will receive better medical records as a result.

Local Employment Impact Statement

Mr. Hargis has determined that the rule will have no impact on local employment or a local economy. Thus, the board is not required to prepare a local employment impact statement pursuant to §2001.022, Government Code.

Economic Impact Statement and Regulatory Flexibility Analysis

Mr. Hargis has determined that there are no anticipated adverse economic effects on small business, micro-businesses, or rural communities as a result of the rule. Thus, the Board is not required to prepare an economic impact statement or a regulatory flexibility analysis pursuant to §2006.002, Government Code.

Takings Impact Assessment

Mr. Hargis has determined that there are no private real property interests affected by the rule. Thus, the board is not required to prepare a takings impact assessment pursuant to §2007.043, Government Code.

Government Growth Impact Statement

For the first five years that the rule would be in effect, it is estimated that: the proposed rule would not create or eliminate a government program; implementation of the proposed rule would not require the creation of new employee positions or the elimination of existing employee positions; implementation of the proposed rule would not require an increase or decrease in future legislative appropriations to the agency; the proposed rule would not require an increase or decrease in the fees paid to the agency; the proposed rule would not create a new regulation; the proposed rule would not expand, limit, or repeal an existing regulation; the proposed rule would not increase or decrease the number of individuals subject to the rule’s applicability; and the proposed rule would not positively or adversely affect the state’s economy.

Request for Public Comments

The Texas Board of Veterinary Medical Examiners invites comments on the proposed amendment to the rule from any interested persons, including any member of the public. A written statement should be mailed or delivered to Sarah Foran, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Ste. 3-810, Austin, Texas 78701-3942, by facsimile (FAX) to (512) 305-7574, or by email to Sarah.Foran@veterinary.texas.gov. Comments will be accepted for 30 days following publication in the Texas Register. Comments must be received within 30 days after publication of this proposal in order to be considered.

Statutory Authority

The rule is proposed under the authority of §801.151(a), Occupations Code, which states that the Board may adopt rules necessary to administer the chapter, and the authority of §801.151(b), Occupations Code, which states that the Board
may adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity, skills, and practice in the veterinary medicine profession.

No other statutes, articles, or codes are affected by the proposal.

§573.52. Veterinarian Patient Record Keeping

(a) A veterinarian performing a physical examination, diagnosis, treatment or surgery on an animal or group of animals shall prepare a written record or computer record concerning the animals containing, at a minimum, the following information [individual records shall be maintained at the veterinarian's place of business, shall be complete, contemporaneous and legible and shall include, but are not limited to]:

(1) name, address, and telephone number of the owner [client];

(2) identity of the animal, herd, or flock; [identification of patient, including name, species, breed, age, sex, and description;]

(3) except for herds or flocks, the age, sex, color, and breed [patient history];

(4) dates of examination, treatment and surgery [dates of visits];

(5) brief history of the condition of each animal, litter, herd, or flock [any immunization records];

(6) examination findings. If required for diagnosis or treatment and is not difficult to obtain: [weight if required for diagnosis or treatment. Weight may be estimated if actual weight is difficult to obtain;]

(A) weight - actual or estimated;

(B) temperature;

(C) pulse;

(D) respiration; and

(E) any additional findings needed for diagnosis;

(7) laboratory and radiographic tests performed and reports [temperature if required for diagnosis or treatment except when treating a herd, flock, or a species, or an individual animal that is difficult to obtain a temperature];

(8) differential diagnosis; referrals/consultations; to/with specialists and the client's response [any laboratory analysis];

(9) procedures performed/treatment given and results [any diagnostic images or written summary of results if unable to save image];

(10) drugs (and their dosages) administered, dispensed, or prescribed [differential diagnosis and/or treatment, if applicable];

(11) surgical procedures shall include a description of the procedure, the name of the surgeon, the type of sedative/anesthetic agent used, the route of administration and the dosage; and [names, dosages, concentration, and routes of administration of each drug prescribed, administered and/or dispensed. If a drug is approved by the United States Food and Drug Administration (FDA) in only one concentration and the veterinarian is administering the FDA-approved drug at the FDA-approved concentration, the veterinarian may omit recording the concentration of the drug administered;]

(12) anesthesia monitoring performed during surgical procedures. [other details necessary to substantiate or document the examination, diagnosis, and treatment provided, and/or surgical procedure performed;]

[(13) any signed acknowledgment required by §§573.14, 573.16, 573.17, and 573.18 of this title (relating to alternate therapies—chiropractic and other forms of musculoskeletal manipulation, alternate therapies—acupuncture, alternate therapies—holistic medicine, and alternate therapies—homeopathy);]

[(14) the identity of the veterinarian who performed or supervised the procedure recorded;]

[(15) any amendment, supplementation, change, or correction in a patient record not made contemporaneously with the act or observation noted by indicating the time and date of the amendment, supplementation, change or correction, and clearly indicating that there has been an amendment, supplementation, change, or correction;]

[(16) the date and substance of any referral recommendations, with reference to the response of the client;]

[(17) the date and substance of any consultation concerning a case with a specialist or other more qualified veterinarian; and]

[(18) copies of any official health documents issued for the animal;]

(b) Individual records must be maintained on each patient, except that records on livestock or litters of animals may be maintained on a per-client basis. Records pertaining to these animals may be kept in a daily log or billing records, provided that the treatment information is substantial enough to identify these animals and the medical care provided.

[(b) Maintenance of Patient Records;]

[(1) patient records shall be current and readily available for a minimum of five years from the date of last treatment by the veterinarian;]

[(2) a veterinarian may destroy medical records that relate to any civil, criminal or administrative proceeding only if the veterinarian knows the proceeding has been finally resolved;]

[(3) veterinarians shall retain patient records for such longer length of time than that imposed herein when mandated by other federal or state statute or regulation;]

[(4) patient records are the responsibility and property of the veterinarian or veterinarians who own the veterinary practice, provided however, the client is entitled to a copy of the patient records pertaining to the client's animals;]

[(5) if the veterinarian discontinues his or her practice, the veterinarian may transfer ownership of records to another licensed veterinarian or group of veterinarians only if the veterinarian provides notice consistent with §573.55 of this title (relating to transfer and disposal of patient records) and the veterinarian who assumes ownership of the records shall maintain the records consistent with this chapter;]

[(c) medical records and radiographs are the physical property of the hospital or the proprietor of the practice that prepared them. Records, including radiographs, must be maintained for a minimum of three years after the last visit;]

[(c) when appropriate, veterinarians may substitute the words "herd," "flock" or other collective term in place of the word "patient" in subsections (a) and (b) of this section. Records to be maintained on these animals may be kept in a daily log, or the billing records, provided that the treatment information that is entered is adequate to substantiate the identification of these animals and the medical care provided. In no case does this eliminate the requirement to maintain drug records as specified by state and federal law and board rules;]
(d) Medical records shall be released upon request from a treating veterinarian with a legitimate interest, and shall be returned to the originating practice within a reasonable time if requested. Copies of records must be made available upon request from the owner of an animal at a reasonable cost to the owner and within a reasonable time. A veterinarian may not withhold the release of veterinary medical records for nonpayment of a professional fee.

(e) All regulated substances shall be recorded as required by federal and/or state regulations.

(f) Any signed acknowledgement required by §§573.14, 573.16 - 573.18 (relating to all complementary therapies).

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

Filed with the Office of the Secretary of State on May 27, 2022.

TRD-202202072
John Hargis
General Counsel
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 693-4500x3

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 61. CHRONIC DISEASES

SUBCHAPTER F. DIABETES REGISTRY

25 TAC §61.91

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes the repeal of §61.91, concerning Diabetes Mellitus Glycosylated Hemoglobin Registry.

BACKGROUND AND PURPOSE

The purpose of the proposed repeal of §61.91 is necessary to implement Senate Bill (S.B.) 970, 87th Legislature, Regular Session, 2021, which repealed Texas Health and Safety Code, Chapter 95, Subchapter B, Diabetes Mellitus Registry. S.B. 970 removed the requirement for a diabetes registry.

The registry was established as a pilot program in accordance with House Bill (H.B.) 2132, 80th Legislature, Regular Session, 2007, and H.B. 1363, 81st Legislature, 2009. DSHS coordinated with the San Antonio Metropolitan Health District to establish the pilot registry.

S.B. 510, 82nd Legislature, Regular Session, 2011, amended Chapter 95 by adding Subchapter B, Diabetes Mellitus Registry, to make public health district participation in the diabetes mellitus registry voluntary and designated a public health district solely responsible for the cost of establishing and administering the registry program in their district. As a result, no data has been submitted since 2011.

The repeal of §61.91 is proposed in its entirety to comply with S.B. 970, which eliminated the statutory requirement for a diabetes registry, thus making the rule no longer necessary.

FISCAL NOTE

Donna Sheppard, DSHS Chief Financial Officer, has determined that for each year of the first five years that the repeal will be in effect, enforcing or administering the repeal does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

DSHS has determined that during the first five years that the repeal will be in effect:

(1) the proposed repeal will not create or eliminate a government program;

(2) implementation of the proposed repeal will not affect the number of DSHS employee positions;

(3) implementation of the proposed repeal will result in no assumed change in future legislative appropriations;

(4) the proposed repeal will not affect fees paid to DSHS;

(5) the proposed repeal will not create a new rule;

(6) the proposed repeal will repeal an existing rule;

(7) the proposed repeal will decrease the number of individuals subject to the rule; and

(8) the proposed repeal will not affect the state’s economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Donna Sheppard has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. Under the proposed repeal there are no requirements to alter current business practices and there are no costs imposed.

LOCAL EMPLOYMENT IMPACT

The proposed repeal will not affect a local economy.

COSTS TOregulated PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule does not impose a cost on regulated persons and is necessary to implement legislation that does not specifically state that §2001.0045 applies to the rule.

PUBLIC BENEFIT AND COSTS

Dr. Manda Hall, Associate Commissioner of DSHS Community Health Improvement Division, has determined that the public may benefit from the elimination of reporting responsibilities for the diabetes registry, which are currently voluntary and inconsistent.

Donna Sheppard has also determined that there are no anticipated economic costs to persons impacted by the proposed rule because the rule is being repealed with no associated cost.

TAKINGS IMPACT ASSESSMENT

DSHS has determined that the proposal does not restrict or limit an owner’s right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

47 TexReg 3398  June 10, 2022  Texas Register
PUBLIC COMMENT

Questions about the content of this proposal may be directed to the Diabetes Prevention and Control Program at (512) 776-2834. Written comments on the proposal may be submitted to the Diabetes Prevention and Control Program at P.O. Box 149347, Mail Code 1965, Austin, Texas 78714; 1100 W 49th Street, Mail Code 1965, Austin, Texas 78756; or by e-mail to diabetes@dshs.texas.gov.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 22R021" in the subject line.

STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code §531.0055, and Texas Health and Safety Code, §1001.075, which provides that the Executive Commissioner of HHSC shall adopt rules and policies necessary for the operation and provision of services by the health and human services agencies, and efficient enforcement of Texas Health and Safety Code, §1001.075, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001.

The repeal will implement Texas Government Code, Chapter 531 and Texas Health and Safety Code, Chapter 1001.

§61.91. Diabetes Mellitus Glycosylated Hemoglobin Registry.
The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency’s legal authority to adopt.

Filed with the Office of the Secretary of State on May 23, 2022.
TRD-202202004
Cynthia Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 776-2834

CHAPTER 98. TEXAS HIV MEDICATION PROGRAM

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes the repeal of Texas Administrative Code Title 25, Chapter 98, Subchapter A, §§98.1 - 98.13 and Subchapter C, Division 1, §§98.101 - 98.115, 98.117 - 98.119, and proposes new Subchapter C, Division 1, §§98.101 - 98.109, concerning the Texas HIV Medication Program (THMP).

BACKGROUND AND PURPOSE

The purpose of the proposal is to allow the THMP to comply with the findings and program improvement recommendations noted in the December 2019 program review conducted by the Health Resources and Services Administration (HRSA), the agency that provides federal funding, and the Medication Advisory Committee (MAC) recommendations.

The Texas Administrative Code, Title 25, Chapter 98 provides governing rules for the THMP, which provides medication for the treatment of HIV and its related complications for low-income Texans. Subchapter A establishes the Texas HIV State Pharmacy Assistance Program (SPAP). Subchapter C, Division 1 establishes the general provisions of THMP. DSHS proposes to repeal and replace Subchapter A and Subchapter C, Division 1 to update eligibility requirements for THMP.

SECTION-BY-SECTION SUMMARY

The proposed rules replace Subchapter A and Subchapter C, Division 1 with a consolidated set of rules in Subchapter C, Division 1. This will clarify insurance assistance that THMP may provide, replace a cumbersome program eligibility spenddown process with a universal standard deduction, and update language to be more reflective of current operations. These proposed changes will allow THMP to align with expectations from HRSA and allow all THMP programs to be accurately represented.

The new §§98.101 - 98.109 set forth the purpose, definitions, THMP eligibility criteria, specific program eligibility criteria, eligibility determination process, appeals process and exceptions, THMP benefits, limitations and cost containment, and nondiscrimination and confidentiality requirements for the THMP program.

FISCAL NOTE

Donna Sheppard, DSHS Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules do not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

DSHS has determined that during the first five years that the rules will be in effect:

(1) the proposed rules will not create or eliminate a government program;
(2) implementation of the proposed rules will not affect the number of DSHS employee positions;
(3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;
(4) the proposed rules will not affect fees paid to DSHS;
(5) the proposed rules will create new rules;
(6) the proposed rules will repeal existing rules;
(7) the proposed rules will not change the number of individuals subject to the rules; and
(8) the proposed rules will not affect the state’s economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Donna Sheppard has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rules do not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rules.

PROPOSED RULES  June 10, 2022  47 TexReg 3399
LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect local economies.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas; do not impose a cost on regulated persons; and are necessary to receive a source of federal funds.

PUBLIC BENEFIT AND COSTS

Imelda Garcia, Associate Commissioner, has determined that for each year of the first five years the rules are in effect, the public benefit will be that a client-level income adjustment based on individual medication cost will be changed to a standard deduction that will more equitably adjust all clients' income by the average medication cost for all clients. Additionally, the rules were simplified to improve readability, including merging two subchapters into one subchapter in the Texas Administrative Code.

Donna Sheppard has also determined that for the first five years the rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules because the rules do not change program requirements or eligibility requirements.

TAKINGS IMPACT ASSESSMENT

DSHS has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to the TB/HIV/STD Section, P.O. Box 149347, Mail Code 1873, Austin, Texas 78714-9347; comments may be hand delivered to the TB/HIV/STD Section at 201 W. Howard Lane, Austin, Texas, or emailed to HIVSTD@dshs.texas.gov.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When faxing or emailing comments, please indicate "Comments on Proposed Rule 21R050" in the subject line.

SUBCHAPTER A. TEXAS HIV STATE PHARMACY ASSISTANCE PROGRAM

25 TAC §§98.1 - 98.13

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001. Texas Health and Safety Code §85.016 authorizes the Executive Commissioner to adopt rules concerning Acquired Immune Deficiency Syndrome and Human Immunodeficiency Virus Infection, including those governing the THMP.

The repeals will implement Texas Health and Safety Code, Chapter 85 and Texas Government Code, Chapter 531.

§98.1. Purpose.
§98.2. Definitions.
§98.3. Medication Coverage.
§98.4. Nondiscrimination.
§98.5. General Eligibility Criteria; Renewal.
§98.6. Denial, Non-Renewal, and Termination of Benefits.
§98.7. Applications.
§98.9. Residency, and Residency Documentation, Requirements.
§98.10. Limitations and Benefits Provided.
§98.11. Provision of Service.
§98.13. Confidentiality.

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

Filed with the Office of the Secretary of State on May 23, 2022.

TRD-202202005
Cynthia Hernandez
General Counsel
Department of State Health Services

Earliest possible date of adoption: July 10, 2022

For further information, please call: (737) 255-4599

SUBCHAPTER C. TEXAS HIV MEDICATION PROGRAM

DIVISION 1. GENERAL PROVISIONS

25 TAC §§98.101 - 98.115, 98.117 - 98.119

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001. Texas Health and Safety Code §85.016 authorizes the Executive Commissioner to adopt rules concerning Acquired Immune Deficiency Syndrome and Human Immunodeficiency Virus Infection, including those governing the THMP.

The repeals will implement Texas Health and Safety Code, Chapter 85 and Texas Government Code, Chapter 531.

§98.101. Purpose.
§98.102. Definitions.
§98.103. Medication Coverage.
§98.104. Nondiscrimination.
§98.105. Program Priority.
§98.106. General Eligibility Criteria.
§98.107. Medical Eligibility Criteria.
§98.108. Residency Eligibility Criteria.
§98.110. Application Process; Verification; Renewal.
§98.111. Confidentiality.
§98.112. Program Distribution of Medications.
§98.113. Participating Pharmacies.
§98.114. Prescription Fees.
§98.115. Fiscal Planning.
§98.117. Denial, Non-Renewal, and Termination of Benefits.
§98.118. Appeal Procedures.
§98.119. Exceptions from Appeal Procedures.
The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 23, 2022.
TRD-202202006
Cynthia Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: July 10, 2022
For further information, please call: (737) 255-4599

25 TAC §§98.101 - 98.109
STATUTORY AUTHORITY
The new sections are authorized by Texas Government Code §531.0055, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001. Texas Health and Safety Code §85.016 authorizes the Executive Commissioner to adopt rules concerning Acquired Immune Deficiency Syndrome and Human Immunodeficiency Virus Infection, including those governing the THMP.
The new sections will implement Texas Health and Safety Code, Chapter 85 and Texas Government Code, Chapter 531.

§98.101. Purpose.
This subchapter establishes procedures and eligibility guidelines for programs under the Texas HIV Medication Program (THMP) as required in the Texas Health and Safety Code, §85.063.
(1) THMP operates in accordance with federal AIDS Drug Assistance Program legislation to assist low-income individuals living with HIV with direct medication assistance for medications on the program formulary or costs associated with eligible health insurance policies, including premiums and medication cost-sharing (deductibles, co-payments, and coinsurance) and Medicare prescription drug plans.
(2) Program enrollment and services are subject to available funding.

§98.102. Definitions.
The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.
(1) Applicant--An individual who applies to the department for THMP services.
(2) Commissioner--The Commissioner of the Department of State Health Services.
(3) Department--The Department of State Health Services.
(4) Eligible health insurance policy--A state, federal, or private health insurance policy that is approved by the THMP and covers at least one drug from each class of HIV-antiretroviral medication and covers appropriate primary care services.

(5) Formulary--A list of drugs approved by the department that includes at least one drug from each class of HIV antiretroviral medications. https://www.dshs.texas.gov/hivstd/meds/files/formulary.pdf.

(6) Full-LIS--Full Low-income subsidy. The Social Security Administration provides full-LIS to applicants with income and assets below specified limits.

(7) HIV--Human immunodeficiency virus. Encompassing all stages of HIV, including HIV-related conditions and syndromes.

(8) Legally responsible person--A parent, managing conservator, or other person that is legally responsible for the support of a minor or a ward.

(9) Medicare prescription drug plan--A Medicare Part D prescription drug plan or the prescription drug component of a Medicare Part C Advantage Plan.

(10) Minor--A person who is younger than 18 years of age and who has not been emancipated by a court or who is not married or recognized as an adult by the state of Texas.

(11) Open enrollment--A time period during which one may freely enroll in or change one's selection of a health insurance plan or other benefit plan that is ordinarily subject to restrictions.

(12) Out-of-pocket costs--The premium, copay, coinsurance, and deductible amounts that an individual would be expected to pay when enrolled in a health insurance plan or Medicare prescription drug plan.

(13) Partial-LIS--Partial Low-income subsidy. The Social Security Administration provides partial-LIS to applicants with income and assets above the level of those qualifying for full-LIS, but still below specified limits.

(14) Payor of last resort--A funding source that may be used only after all other available public and private funding sources have been accessed.

(15) Qualifying event--A change of life circumstance that allows an individual to enroll in or change the selection of a health insurance plan or other benefit plan outside of open enrollment.

(16) SPAP--The State Pharmacy Assistance Program. The SPAP is available to low-income individuals living with HIV who also have Medicare Part D.

(17) Texas resident--An individual is considered a Texas resident if that person physically resides in Texas and intends to continue to reside within the state.

(18) THMP--The Texas HIV Medication Program, which includes the AIDS Drug Assistance Program (ADAP), SPAP, and TIAP.

(19) TIAP--Texas Insurance Assistance Program. TIAP provides premium and copay assistance with eligible health insurance policies.

§98.103. THMP Eligibility Criteria.
(a) The department shall give priority to participation in THMP to eligible women and infants and to individuals younger than 18 years of age as specified in 42 U.S.C. 300ff-21, and Texas Health and Safety Code §85.062.

(b) An individual is eligible to participate in THMP if the individual meets the following eligibility criteria:

(1) provides proof of diagnosis of HIV;
(2) is under the care of a physician, physician's assistant, or advanced practice nurse licensed to practice in the United States;

(3) is a Texas resident; and

(4) is at or below 200% of the federal poverty level and meets the financial eligibility criteria established by THMP Policy 220.001 https://www.dshs.texas.gov/hivstd/policy/policies/220-001.shtm; and:

(A) is not covered for approved THMP medications under the Texas Medicaid Program, or has exhausted Medicaid pharmacy benefits for the given month;

(B) does not qualify for assistance, receives less than full coverage, or needs assistance with out-of-pocket costs for approved THMP medications under any state compensation program, qualifying private health insurance policy, or under any other state or federal health benefits program;

(C) meets THMP's payor of last resort criteria that is in accordance with state law, department policy, and corresponding federal grant conditions, in which Ryan White HIV/AIDS Treatment Extension Act of 2009 (Public Law 111-87) (RWHAP) or State Services funds cannot be used as a payment source for any service that can be paid for or charged to any other billable source, and providers are expected to make reasonable efforts to secure other funding instead of RWHAP Part B or State Services funding, whenever possible; and

(D) has an annual income that meets guidance as determined by:

(i) an applicant's annual gross income (if single), or the combined annual gross income of the applicant and the applicant's spouse, minus a standard deduction applied in accordance with program policy;

(ii) for a minor child, the (combined) annual gross income of the child's parent or parents, minus a standard deduction, and only the income of the parent or parents living in the same household as the child at the time of application or renewal is used to determine financial eligibility; and

(iii) for an emancipated minor, financial eligibility is determined as set forth in this paragraph.

§98.104. Specific Program Eligibility Criteria.

(a) AIDS Drug Assistance Program (ADAP). In addition to §98.103 of this title (relating to THMP Eligibility Criteria), an individual must attest that the individual is not enrolled in any state, federal, or private health insurance policies or benefits programs that cover the individual's currently prescribed medications that are on the THMP formulary.

(b) SPAP. In addition to §98.103 of this title, an individual must be enrolled in a Medicare prescription drug plan that covers the individual's current medications that are on the formulary and apply for low-income subsidy (LIS) assistance. Those approved with Full-LIS are disenrolled from the SPAP program, while those with Partial-LIS and who are denied LIS remain eligible for participation in SPAP. Information on Medicare eligibility, Medicare prescription drug plans, and LIS assistance can be found at http://www.medicare.gov.)

(c) TIAP. In addition to §98.103 of this title, an individual must be enrolled in an eligible health insurance policy that covers the individual's current medications on the formulary, as updated. An applicant may be screened for TIAP during open enrollment or when the applicant has experienced a qualifying event.


(a) New applicants to THMP. An individual meeting the eligibility requirements must submit a complete application for benefits to THMP, in the format specified by THMP, certifying that the statements made within the application are factual and true, submitted as instructed, and accompanied by the required supporting documentation. To request an application packet, please follow current procedures on THMP's webpage found at www.dshs.texas.gov/hivstd/meds.

(b) Renewals. An individual must renew enrollment in THMP according to the procedures established by THMP. An individual must demonstrate continuing eligibility using THMP's renewal application and comply with all associated deadlines and requirements for accompanying documents.

(c) Eligibility Determination.

(1) Approved. If approved, the applicant is eligible for THMP services.

(2) Incomplete. Any application that does not meet all requirements of this section is considered incomplete. Incomplete applications are not processed further, and the applicant is contacted concerning the insufficiency of the application.

(3) Pending. THMP may, at the time of application and at any time during enrollment, verify the eligibility status of an enrolled individual to determine if the individual is continuing to meet the eligibility criteria of THMP. The individual must furnish requested documentation to THMP as directed. Until this is completed, the status of enrollment is considered pending.

(4) Denial, non-renewal, and termination of benefits. An individual may be denied enrollment, be denied renewal, or have enrollment in THMP terminated for any of the following reasons:

(A) failure to maintain Texas residency or, upon request, furnish evidence of such;

(B) failure to continue to meet income requirements for eligibility or to provide income data as requested, as THMP shall periodically verify the financial status of an enrolled individual to determine if the individual continues to meet financial eligibility criteria;

(C) failure to initially meet or continue to meet the medical requirements for eligibility;

(D) become eligible for the full-LIS under Medicare Part D;

(E) become incarcerated in a city, county, state, or federal jail or prison, in accordance with Ryan White HIV/AIDS Treatment Extension Act of 2009 (Public Law 111-87), Health Resources and Services Administration (HRSA) Policy Clarification Notice (PCN) #18-02, and Texas Code of Criminal Procedure Article §104.002(a);

(F) admitted or committed to a Texas state hospital or state supported living facility;

(G) determined by THMP that the individual has made a material misstatement or misrepresentation on the individual's application or any document required to support the individual's application or renewal, or on submissions made to comply with subsection (a) or (b) of this section;

(H) failure to notify THMP of changes to permanent home address or insurance coverage;

(I) notified THMP in writing that the individual no longer wants to receive THMP benefits;
(J) failure to request or use services during any period of six consecutive months; or

(K) exhausted THMP program funds.

(d) Denial, modification, suspension, or termination of services. An applicant or individual is governed by the procedures required by §98.106 of this title (relating to Appeal Process and Exceptions).

§98.106. Appeals Process and Exceptions.

(a) An individual whose application is denied or whose services have been terminated by THMP may appeal the department's decision within 60 days of postmark of the notification. An applicant, individual, or person legally responsible for an applicant or individual may initiate the appeal process by notifying the department's HIV/STD Prevention and Care Unit that the individual wishes to dispute the department's decision. The written notice must contain all arguments and supporting documents being put forward for the appeal. The notice should be addressed to the Department of State Health Services, HIV/STD Prevention and Care Unit, Texas HIV Medication Program, Attn: MSJA, Mail Code 1873, P.O. Box 149347, Austin, Texas 78714-3947 or in another manner allowed by the department.

(b) A department review panel will hear the appeal within 30 days of receipt of the written notice. The appellant will be notified by mail of the appeal. The panel shall consist of:

1. the TB/HIV/STD Section Director;
2. the HIV/STD Prevention and Care Unit Manager;
3. the Texas HIV Medication Program Manager; and
4. the Infectious Disease Medical Officer (or equivalent positions, in the event of a department reorganization).

(c) The appellant may present the case in person or in another manner allowed by the department before the panel or rely on the written submissions. The issues on appeal and the arguments in support of those issues are limited to those already submitted in writing. Following review of the materials, and hearing from the appellant (if applicable), the panel will issue a written decision within 60 days of the hearing. The panel's decision shall be final for the eligibility determination that is appealed. The appellant may reapply to the program at any time in the future.

(d) The department is not required to offer an opportunity to dispute the decision to deny, non-renew, or terminate if THMP's actions are the result of the exhaustion of THMP program funds.

§98.107. THMP Benefits.

THMP provides drugs at the best price available, including purchasing health insurance if the criteria are met, and THMP participates in the 340B Drug Pricing Program to ensure program medications are available at the best price.

1. AIDS Drug Assistance Program (ADAP) Medication Coverage.

(A) The medications provided under ADAP are listed on the THMP formulary, found at https://www.dshs.texas.gov/hivstd/meds/files/formulary.pdf.

(B) THMP does not approve the dispensing of ADAP medications in excess of a 90-day supply, or full bottle increments, whichever is greater. The program may also dispense medications in 30-day or 60-day supplies.

(C) Prescribers must attest that certain medications meet specific prescribing requirements, including lab testing, before requesting these medications from THMP. These requirements are outlined in the THMP formulary found at www.dshs.texas.gov/hivstd/meds/document.shtm.

(D) The department may contract with a pharmaceutical wholesaler for purchase of drugs. The department distributes drugs to pharmacies participating in ADAP and to a mail order pharmaceutical distributor for the dispensing of drugs directly to individuals who reside outside areas covered by participating pharmacies.

(E) The department delivers services directly or through external pharmacies approved by THMP that have signed a Memorandum of Agreement with the department.

(F) A dispensing fee may be collected from the department by a participating pharmacy for each prescription dispensed in accordance with the existing Memorandum of Agreement with the department. Eligible individuals shall not be charged any dispensing fees directly by a participating pharmacy.

2. SPAP and TIAP Medication Coverage.

(A) The department may contract with a claims processor to interface with plans that provide eligible health insurance plans on behalf of the programs.

(B) Benefits payable by THMP:

(i) Eligible health insurance policy out-of-pocket expenses, which include deductibles, copays, and coinsurance amounts.

(ii) THMP may assist eligible individuals in obtaining public or private health insurance by providing insurance premium payment assistance to the insurance company, and if paying for such health insurance, it can reasonably be expected to be cost effective for THMP.

§98.108. Limitations and Cost Containment.

(a) In the event of a statewide emergency declared by the Governor, THMP may temporarily adjust program operations to ensure that mission critical functions continue. These cost containment measures will be approved by the Commissioner in writing.

(b) THMP funds must be used as payor of last resort and coordinated with other local, state, and federal funds, including Medicaid and Medicare.

(1) To ensure THMP's expenditures do not exceed the budget, the department analyzes the latest actuarial projections for the upcoming year, including the average annual cost per individual and the projected number of individuals THMP will be able to serve using current budget figures. The department performs this analysis of THMP expenditures every quarter to determine if funds are sufficient to meet projected expenditures.

(2) To make certain that expenditures do not exceed the program's budget, the department may implement the following temporary cost-containment measures as necessary.

(c) If budgetary limitations exist, this information will be shared with stakeholders as soon as possible. The department has discretion to:

1. Restrict or prioritize covered services based upon:

   (A) medical necessity;

   (B) other third-party eligibility and projected third-party payments for the different treatment modalities; or

   (C) caseloads and demands for services based on current or projected data.
(2) Discontinue use of the standard deduction adjusting the applicant's gross annual income described in §98.103(b)(4)(D) of this title (relating to THMP Eligibility Criteria).

(3) Lower the financial eligibility criteria established by THMP policy 220.001 https://www.dshs.texas.gov/hivstd/policy/policies/220-001.shtml to a level that is not lower than 125% of federal poverty level.

(4) Change covered services by adding or deleting specific services or entire categories, making changes proportionally across a category or categories, using a combination of these methods, or establishing a waiting list of eligible applicants.

(d) As funds become available, the department will rescind the cost-containment measures in a manner which the department judges most appropriate given the circumstances at that time.


(a) Nondiscrimination. The department operates the THMP in a manner that allows full participation of individuals, regardless of their race, color, national origin, age, or disability. For purposes of THMP, discrimination based on gender or sexual orientation is prohibited.

(b) Confidentiality. No information that could identify an individual applicant is released except as authorized by law and in accordance with §1.501 of this title (relating to Privacy of Health Information under the Health Insurance Portability and Accountability Act of 1996). An applicant is advised that, in addition to the department, the physicians, pharmacists, and designated Medicare prescription drug plan will be aware of the applicant's diagnosis.

(c) Disclose. The department may use or disclose individual health information to provide, coordinate, or manage health care or related services, as allowed by law. This includes referring the individual to other health care resources. The department may contact a THMP applicant or individual to discuss enrollment benefits, resources for treatment, or other health-related information as appropriate.

(d) Privacy notice. An individual may request a copy of the department's privacy notice by contacting the THMP.

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

Filed with the Office of the Secretary of State on May 23, 2022.
TRD-202202007
Cynthia Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: July 10, 2022
For further information, please call: (737) 255-4599

CHAPTER 157. EMERGENCY MEDICAL CARE
SUBCHAPTER B. EMERGENCY MEDICAL SERVICES PROVIDER LICENSES
25 TAC §157.11
The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes an amendment to §157.11, concerning the Requirements for an EMS Provider License.

BACKGROUND AND PURPOSE
The purpose of the proposed amendment to §157.11 is necessary to comply with Senate Bill (S.B.) 1876, 87th Legislature, Regular Session, 2021, which amended Texas Health and Safety Code §773.112, relating to the emergency transfer of a dialysis patient during a declared disaster. S.B. 1876 requires each emergency medical services (EMS) provider's medical director to approve a protocol to give preference to the emergency transfer of a dialysis patient during a declared disaster.

The amendment was reviewed by the Governor's EMS and Trauma Advisory Council (GETAC), as required by Texas Health and Safety Code §773.012, in public meetings held on November 22, 2021, and February 7, 2022. No comments were received from the advisory council.

SECTION-BY-SECTION SUMMARY
The proposed amendment provides language to §157.11(c)(7)(N) to reference Health and Safety Code §773.112(d). The amendment is based on S.B. 1876, which states that rules shall require that each applicable EMS medical director approve protocols that give preference to the emergency transfer of a dialysis patient from the patient's location directly to an outpatient end-stage renal disease facility during a declared disaster.

FISCAL NOTE
Donna Sheppard, DSHS Chief Financial Officer, has determined that for each year of the first five years that the amendment will be in effect, enforcing or administering the amendment does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT
DSHS has determined that during the first five years that the rule will be in effect:

(1) the proposed amendment will not create or eliminate a government program;

(2) implementation of the amendment will not affect the number of DSHS employee positions;

(3) implementation of the amendment will result in no assumed change in future legislative appropriations;

(4) the proposed amendment will not affect fees paid to DSHS;

(5) the proposed amendment will not create a new rule;

(6) the proposed amendment will expand an existing rule;

(7) the proposed amendment will not change the number of individuals subject to the rule; and

(8) the proposed amendment will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS
Donna Sheppard has also determined that there will be no adverse economic effects on small businesses, micro-businesses, or rural communities. Under the proposed amendment, there are no requirements to alter current business practices and there are no new fees or costs imposed.

LOCAL EMPLOYMENT IMPACT
The proposed amendment will not affect a local economy.

**COSTS TO REGULATED PERSONS**

Texas Government Code §2001.0045 does not apply to this rule because the rule is necessary to protect the health, safety, and welfare of the residents of Texas; does not impose a cost on regulated persons; and is necessary to implement legislation that does not specifically state that §2001.0045 applies to the rule.

**PUBLIC BENEFIT AND COSTS**

Timothy Stevenson, DVM, Ph.D., Associate Commissioner, Consumer Protection Division, has determined that for each year of the first five years the rule is in effect dialysis patients will benefit from the EMS provider’s planning for the dialysis patients’ emergency transfer during a declared disaster. Donna Sheppard has also determined that for each year of the first five years the rule is in effect that there are no anticipated economic costs to persons who are required to comply with the rule.

**TAKINGS IMPACT ASSESSMENT**

DSHS has determined that the proposal does not restrict or limit an owner’s right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

**PUBLIC COMMENT**

Written comments on the proposal may be submitted to Jorie Klein, MSN, MHA, BSN, RN, by P.O. Box 149347, Austin, Texas 78714-9347, or street address 1100 West 49th Street, Austin, Texas 78751; or emailed to EMSInfo@dshs.texas.gov.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 22R022" in the subject line.

**STATUTORY AUTHORITY**

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services of the health and human services agencies; Texas Health and Safety Code, Chapter 773, Emergency Health Care Act, which allows DSHS to promulgate rules for the transfer of dialysis patients during a declared disaster; and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies for the operation and provision of health and human services by DSHS and the administration of Texas Health and Safety Code, Chapter 1001.

The amendment will implement Texas Government Code, Chapter 531, and Texas Health and Safety Code, Chapters 773 and 1001.

§157.11. Requirements for an EMS Provider License.

(a) Purpose: Acquiring, issuing, and maintaining an EMS Providers License.

(b) EMS in Texas is a delegated practice, as written in Occupations Code, §157.003.

(c) Application requirements for an Emergency Medical Services (EMS) Provider License.

(1) An applicant for an initial EMS provider license shall submit a completed application to the department on the required official forms, following the department's written process.

(2) The nonrefundable application fee of $500 per provider plus $180 for each EMS vehicle to be operated under the license shall accompany the application.

(3) The department will process the EMS provider license application as per §157.3 of this title (relating to Processing EMS Provider Licenses and Applications for EMS Personnel Certification and Licensure).

(4) An EMS provider holding a valid license or authorization from another state; whose service area adjoins the State of Texas; who has in place a written mutual aid agreement, with a licensed Texas EMS provider, and who when requested to do so by a licensed Texas EMS provider, responds into Texas for emergency mutual aid assistance, may be exempt from holding a Texas EMS provider license, but will be obligated to perform to the same medical standards of care required of EMS providers licensed by their home state.

(5) A fixed-wing or rotor-wing air ambulance provider, appropriately licensed by the state governments of New Mexico, Oklahoma, Arkansas, Kansas, Colorado or Louisiana may apply for a reciprocal issuance of a provider license, and the application would not require staffing by Texas EMS certified or licensed personnel. A nonrefundable administrative fee of $500 per provider in addition to a nonrefundable fee of $180 for each EMS aircraft to be operated in Texas under the reciprocal license shall accompany the application.

(6) An applicant for an EMS provider license that provides emergency prehospital care is exempt from payment of department licensing and authorization fees if the firm is staffed with at least 75% volunteer personnel, has no more than five full-time staff or equivalent, and the firm is recognized as a §501(c)(3) nonprofit corporation by the Internal Revenue Service. An EMS provider who compensates a physician to provide medical supervision may be exempt from the payment of department licensing and authorization fees if all other requirements for fee exemption are met.

(7) Required documents that shall accompany a license application.

(A) Document verifying volunteer status, if applicable.

(B) Map and description of service area, a list of counties and cities in which applicant proposes to provide primary emergency service and a list of all station locations with address and telephone and facsimile transmission numbers for each station.

(C) Declaration of organization type and profit status.

(D) Declaration of Provider Name.

(i) The legal name of the EMS provider cannot include the name of the city, county or regional advisory council within or in part, unless written approval is given by the individual city, county or regional advisory council respectively.

(ii) The EMS provider operational name cannot include the name of the city, county or regional advisory council within or in part, unless written approval is given by the individual city, county or regional advisory council respectively. A proposed provider name is deemed to be deceptively similar to an established licensed EMS...
provider if it meets the conditions listed in the Office of the Secretary of State rule, 1 Texas Administrative Code, §79.39 (relating to Deceptively Similar Name).

(E) Declaration of Ownership.

(F) Declaration of the address for the main location of the business, normal business hours and provide proof of ownership or lease of such location.

(i) The normal business hours must be posted for public viewing.

(ii) A service area map must be provided.

(iii) Only one EMS provider license will be issued to each fixed address.

(iv) The applicant shall attest that no other license EMS provider is at the provided business location or address.

(v) The emergency medical services provider must remain in the same physical location for the period of licensure, unless the department approves a change in location.

(G) Declaration of the administrator of record and any subsequently filed declaration of a new administrator shall declare the following, if the EMS provider is required to have an administrator of record as per Health and Safety Code, §773.0571 or §773.05712.

(i) The administrator of record is not employed or otherwise compensated by another private for-profit EMS provider.

(ii) The administrator of record meets the qualifications required for an emergency medical technician certification or other health care professional license with a direct relationship to EMS and currently holds such certification or license issued by the State of Texas.

(iii) The administrator of record has submitted to a criminal history record check at the applicant's expense as directed in §157.37 of this title (relating to Certification or Licensure of Persons With Criminal Backgrounds).

(iv) The administrator of record has completed an initial education course approved by the department regarding state and federal laws and rules that affect EMS in the following areas:

(I) Health and Safety Code, Chapter 773 and 25 Texas Administrative Code, Chapter 157;

(II) EMS dispatch processes;

(III) EMS billing processes;

(IV) Medical control accountability; and

(V) Quality improvement processes for EMS operations.

(v) The applicant will assure that its administrator of record shall annually complete eight hours of continuing education related to the Texas and federal laws and rules related to EMS.

(vi) An EMS provider that is directly operated by a governmental entity, is exempt from this subparagraph, except for declaration of administrator of record.

(vii) An EMS provider that held a license on September 1, 2013, and has an administrator of record who has at least eight years of experience providing EMS, the administrator of record is exempt from clauses (ii) and (iv) of this subparagraph.

(H) Copies of Doing Business Under Assumed Name Certificates (DBA).

(I) Completed EMS Personnel Form.

(J) Staffing Plan that describes how the EMS provider provides continuous coverage for the service area defined in documents submitted with the EMS provider application. The EMS provider shall have a staffing plan that addresses coverage of the service area or shall have a formal system to manage communication when not providing services after normal business hours.

(K) Completed EMS Vehicle Form.

(L) Declaration of an employed medical director and a copy of the signed contract or agreement with a physician who is currently licensed in the State of Texas, in good standing with the Texas Medical Board, in compliance with Texas Medical Board rules, 22 Texas Administrative Code, Chapter 197, and in compliance with Title 3 of the Texas Occupations Code.

(M) Completed Medical Director Information Form.

(N) Treatment and Transport Protocols and policies addressing the care to be provided to adult, pediatric, and neonatal patients, and as stated in Health and Safety Code §773.112(d), must be approved and signed by the medical director.

(O) A list of equipment as required on the EMS Provider initial and renewal application, with identifiable or legible serial numbers, supplies and medications; approved and signed by the medical director.

(P) The applicant shall attest that all required equipment is permitted to be used by the EMS provider and provide proof of ownership or hold a long-term lease for all equipment necessary for the safe operation.

(Q) The applicant shall attest that each authorized vehicle will have its own set of equipment required for each authorized vehicle to operate at the level of the service for which the provider is authorized.

(R) Description of how the EMS provider will conduct quality assurance in coordination with the EMS provider medical director.

(S) The applicant shall provide an attestation or provide documentation that it and/or its management staff will or continues to participate in the local regional advisory council.

(T) Plan for how the provider will respond to disaster incidents including mass casualty situations in coordination with local and regional plans.

(U) Copies of written Mutual Aid and/or Inter-local Agreements with EMS providers.

(V) Documentation as required for subscription or membership program, if applicable.

(W) Certificate of Insurance, provided by the insurer, identifying the department as the certificate holder and indicating at least minimum motor vehicle liability coverage for each vehicle to be operated and professional liability coverage. If applicant is a government subdivision, submit evidence of financial responsibility by self-insuring to the limit imposed by the tort claims provisions of the Texas Civil Practice and Remedies Code.

(i) The applicant shall maintain motor vehicle liability insurance as required under the Texas Transportation Code.

(ii) The applicant shall maintain professional liability insurance coverage in the minimum amount of $500,000 per occurrence, or as necessary per state law, with a company licensed or deemed
eligible by the Texas Department of Insurance to do business in Texas or acceptable proof of self-insurance or captive insurance in order to secure payment for any loss or damage resulting from any occurrence arising out of, or caused by the care, or lack of care, of a patient.

(X) The applicant shall provide copies of vehicle titles, vehicle lease agreements, copies of exempt registrations if applicant is a government subdivision, or an affidavit identifying applicant as the owner, lessee, or authorized operator for each vehicle to be operated under the license.

(Y) The applicant shall provide documentation of the following, showing that the applicant, including its management staff, possesses sufficient professional experience and qualifications related to EMS:

(i) an attestation that its management staff have read the Texas Emergency Healthcare Act and the department's EMS rules in this chapter;

(ii) proof of one year experience or education provided by a nationally recognized organization on emergency medical dispatch processes;

(iii) proof of one year experience or education provided by a nationally recognized organization on emergency medical dispatch processes;

(iv) proof of one year experience or education provided by a nationally recognized organization concerning EMS billing processes;

(v) proof of one year experience or education provided by a nationally recognized organization on medical control accountability; and

(vi) proof of one year experience or education provided by a nationally recognized organization on quality improvement processes for EMS operations.

(Z) A copy of a letter of credit for the obtaining or renewing of an EMS Providers license, issued by a federally insured bank or savings institution:

(i) in the amount of $100,000 for the initial license and for renewal of the license on the second anniversary of the date the initial license is issued;

(ii) in the amount of $75,000 for renewal of the license on the fourth anniversary of the date the initial license is issued;

(iii) in the amount of $50,000 for renewal of the license on the sixth anniversary of the date the initial license is issued;

(iv) in the amount of $25,000 for renewal of the license on the eighth anniversary of the date the initial license is issued;

(v) that shall include the names of all of the parties involved in the transaction;

(vi) that shall include the names of the persons or entity, who owns the EMS provider operation and to whom the bank is issuing the letter of credit;

(vii) that shall include the name of the person or entity, receiving the letter of credit; and

(viii) an EMS provider that is directly operated by a governmental entity is exempt from this subsection.

(AA) A copy of the surety bond in the amount of $50,000 issued to and provided to the Health and Human Services Commission by the applicant, participating in the medical assistance program operated under Human Resources Code, Chapter 32, the Medicaid managed care program operated under Government Code, Chapter 533, or the child health plan program operated under Health and Safety Code, Chapter 62. An EMS provider that is directly operated by a governmental entity is exempt from this subparagraph.

(BB) Documentation evidencing applicant or management team has not been excluded from participation in the state Medicaid program.

(CC) A copy of a governmental entity letter of approval that shall:

(i) be from the governing body of the municipality in which the applicant is located and is applying to provide EMS;

(ii) be from the commissioner's court of the county in which the applicant is located and is applying to provide EMS, if the applicant is not located in a municipality;

(iii) include the attestation that the addition of another licensed EMS provider will not interfere with or adversely affect the provision of EMS by the licensed EMS providers operating in the municipality or county;

(iv) include the attestation that the addition of another licensed EMS provider will not cause an oversupply of licensed EMS providers in the municipality or county.

(8) Paragraph (7)(CC) of this subsection does not apply to renewal of an EMS provider license or a municipality, county, emergency services district, hospital, or EMS volunteer provider organization in this state that applies for an EMS provider license.

(9) An EMS provider is prohibited from expanding operations to or stationing any EMS vehicles in a municipality or county other than the municipality or county from which the provider obtained the letter of approval under this subsection until after the second anniversary of the date the provider's initial license was issued, unless the expansion or stationing occurs in connection with:

(A) a contract awarded by another municipality or county for the provision of EMS;

(B) an emergency response made in connection with an existing mutual aid agreement; or

(C) an activation of a statewide emergency or disaster response by the department.

(10) Paragraph (9) of this subsection does not apply to renewal of an EMS provider license or a municipality, county, emergency services district, hospital, or EMS volunteer provider organization in this state that applies for an EMS provider license.

(11) Paragraph (9) of this subsection does not apply to fixed or rotor wing EMS providers.

(d) EMS Provider License.

(1) License.

(A) Applicants who have submitted all required documents and who have met all the criteria for licensure will be issued a provider license to be effective for a period of two years from the date of issuance.

(B) Licenses shall be issued in the name of the applicant.
(C) License expiration dates may be adjusted by the department to create licensing periods less than two years for administrative purposes.

(D) An application for an initial license or for the renewal of a license may be denied to a person or legal entity who owns or who has owned any portion of an EMS provider service or who operates/manages or who/which has operated/managed any portion of an EMS provider service which has been sanctioned by or which has a proposed disciplinary action/sanction pending against it by the department or any other local, state or federal agency.

(E) The license will be issued in the form of a certificate which shall be prominently displayed in a public area of the provider's primary place of business.

(F) An EMS Provider License issued by the department shall not be transferable to another person or entity.

(2) Vehicle Authorization.

(A) The department will issue an authorization for each vehicle to be operated by the applicant which meets all criteria for approval as defined in subsection (d) of this section.

(B) A vehicle authorization shall be issued for the following levels of service, and a provider may operate at a higher level of service based on appropriate staffing, equipment and medical direction for that level. A vehicle authorization will include a level of care designation at one of the following levels:

(i) Basic Life Support (BLS);
(ii) BLS with Advanced Life Support (ALS) capability;
(iii) BLS with Mobile Intensive Care Unit (MICU) capability;
(iv) Advanced Life Support (ALS);
(v) ALS with MICU capability;
(vi) Mobile Intensive Care Unit (MICU);
(vii) Air Medical:

(I) Rotor wing; or

(II) Fixed wing; and

(viii) Specialized.

(C) Change of Vehicle Authorization. To change an authorization to a different level the provider shall submit a request with appropriate documentation to the department verifying the provider's ability to perform at the requested level. A fee of $30 shall be required for each new authorization requested. The provider shall allow sufficient time for the department to verify the documentation and conduct necessary inspections before implementing service at the requested authorization level.

(D) Vehicle Authorizations are not required to be specific to particular vehicles and may be interchangeably placed in other vehicles as necessary. The original Vehicle Authorization for the appropriate level of service shall be prominently displayed in the patient compartment of each vehicle.

(E) Vehicle Authorizations are not transferable between providers.

(F) A replacement of a lost or damaged license or authorization may be issued if requested with a nonrefundable fee of $10.

(3) Declaration of Business Operational Name and Administration.

(A) The applicant shall submit a list of all business operational names under which the service is operated. If the applicant intends to operate the service under a name or names different from the name for which the license is issued, the applicant shall submit certified copies of assumed name certificates.

(B) A change in the operational name which the service is operated will require a new application and a prorated fee as determined by the department. A new provider number will be issued.

(C) Name of Administrator or Record must be declared. The applicant shall submit a notarized document declaring the full name of the chief administrator, his/her mailing address and telephone number to whom the department shall address all official communications in regard to the license.

(e) Vehicles.

(1) All EMS vehicles must be adequately constructed, equipped, maintained and operated to render patient care, comfort and transportation of adult, pediatric, and neonatal patients safely and efficiently. A pediatric and neonatal equipment list should be based on endorsed pediatric equipment national standards within the approved equipment list required by the medical director.

(2) EMS vehicles must allow the proper and safe storage and use of all required equipment, supplies and medications and must allow all required procedures to be carried out in a safe and effective manner.

(3) As approved by the department, EMS vehicles must meet a practical efficient minimum national ambulance vehicle body type, dimension and safety criteria standards.

(4) All vehicles shall have an environmental system capable of heating or cooling the patient(s) and staff, in accordance with the manufacturer specifications, within the patient compartment at all times when in service and which allows for protection of medication, according to manufacturer specifications, from extreme temperatures if it becomes environmentally necessary. The provider shall provide evidence of an operational policy which shall list the parenteral pharmaceuticals authorized by the medical director and which shall define the storage and/or FDA recommendations. Compliance with the policy shall be incorporated into the provider's Quality Assurance process and shall be documented on unit readiness reports.

(5) EMS vehicles shall have operational two-way communication capable of contacting appropriate medical resources and as outlined in the current Texas interoperability plan unless the vehicle is designated as being out of service using the form provided by the department.

(6) EMS vehicles shall be in compliance with all applicable federal, state and local requirements unless the vehicle is designated out of service with the form provided by the department.

(7) All EMS vehicles shall have the name of the provider and a current department issued EMS provider license number prominently displayed on both sides of the vehicle in at least 2 inch lettering and in contrasting color. The license number shall have the letters TX prior to the license number. This requirement does not apply to fixed or rotor wing aircraft.

(f) Substitution, replacement and additional EMS vehicles.

(1) The EMS provider shall notify the department within five business days if the EMS provider substitutes or replaces a vehicle. No fee is required for a vehicle substitution or replacement.
(2) The EMS provider shall notify the department if the EMS provider adds a vehicle to the provider's operational fleet prior to making the vehicle response-ready. A vehicle authorization request shall be submitted with a nonrefundable vehicle fee prior to the vehicle being placed into service.

(g) Staffing Plan Required.

(1) The applicant shall submit a completed EMS Personnel Form listing each response person assigned to staff EMS vehicles by name, certification level, and department issued certification/license identification number.

(2) An EMS provider responsible for an emergency response area that is unable to provide continuous coverage within the declared service areas shall publish public notices in local media of its inability to provide continuous response capability and shall include the days and hours of its operation. The EMS provider shall notify all the public safety-answering points and all dispatch centers of the days and hours when unable to provide coverage. The EMS provider shall submit evidence that reasonable attempts to secure coverage from other EMS providers have been made.

(3) The applicant must provide proof at initial and renewal of license that all licensed or certified personnel have completed a jurisprudence examination approved by the department on state and federal laws and rules that affect EMS.

(h) Minimum Staffing Required.

(1) BLS--When response-ready or in-service, authorized EMS vehicles operating at the BLS level shall be staffed at a minimum with two emergency care attendants (ECAs).

(2) BLS with ALS capability--When response-ready or in-service below ALS two ECAs. Full ALS status becomes active when staffed by at least an emergency medical technician (EMT)-Intermediate or AEMT and at least an EMT.

(3) BLS with MICU capability--When response-ready or in-service below MICU two ECAs. Full MICU status becomes active when staffed by at least a certified or licensed paramedic and at least an EMT.

(4) ALS--When response-ready or in-service, authorized EMS vehicles operating at the ALS level shall be staffed at a minimum with one EMT Basic and one AEMT or EMT-Intermediate.

(5) ALS with MICU capability--When response-ready or in-service below MICU shall require one EMT-Intermediate or AEMT and one EMT. Full MICU status becomes active when staffed by at least a certified or licensed paramedic and at least an EMT.

(6) MICU--When response-ready or in-service, authorized EMS vehicles operating at the MICU level shall be staffed at a minimum with one EMT Basic and one certified or licensed EMT-Paramedic.

(7) Specialized--When response-ready or in-service, EMS vehicles authorized to operate for a specialized purpose shall be staffed with a minimum of two personnel appropriately licensed and/or certified as determined by the type and application of the specialized purpose and as approved by the medical director and the department.

(8) For air ambulance staffing requirements refer to §157.12(f) of this title (relating to Rotor-wing Air Ambulance Operations) or §157.13(g) of this title (relating to Fixed-wing Air Ambulance Operations).

(9) When response-ready or in-service, authorized EMS vehicles may operate at a lower level than licensed by the department.

When operating at the BLS level with an ALS/MICU ambulance, the EMS provider must have an approved security plan for the ALS/MICU medication as approved by the EMS provider medical director's protocol and/or policy.

(10) As justified by patient needs, providers may utilize appropriately certified and/or licensed medical personnel in addition to those which are required by their designation levels. In addition to the care rendered by the required staff, the provider shall be accountable for care rendered by any additional personnel.

(i) Treatment and Transport Protocols Required.

(1) The applicant shall submit written delegated standing orders for patient treatment and transport protocols and policies related to patient care which have been approved and signed by the provider's medical director.

(2) The protocols shall have an effective date.

(3) The protocols shall address the use of non-EMS certified or licensed medical personnel who, in addition to the EMS staff, may provide patient care on behalf of the provider and/or in the provider's EMS vehicles.

(4) The protocols shall address the use of all required, additional, and/or specialized medical equipment, supplies, and pharmaceuticals carried on each EMS vehicle in the provider's fleet.

(5) The protocols shall identify delegated procedures for each EMS Certification or license level utilized by the provider.

(6) The protocols shall indicate specific applications, including geographical area and duty status of personnel.

(j) EMS Equipment, supplies, medical devices, parenteral solutions and pharmaceuticals.

(1) The EMS provider shall submit a list, approved and signed by the medical director and fully supportive of and consistent with the protocols, of all medical equipment, supplies, medical devices, parenteral solutions and pharmaceuticals to be carried. The list shall specify the quantities of each item to be carried and shall specify the sizes and types of each item necessary to provide appropriate care for all age ranges appropriate to the needs of their patients. The quantities listed shall be appropriate to the provider's call volume, transport times and restocking capabilities.

(2) All patient care equipment, and medical devices must be operational, appropriately secured in the vehicle at the time of providing patient care and response ready, and supplies shall be clean and fully operational. All patient care powered equipment shall have manual mechanical, spare batteries or an alternative power source, if applicable.

(3) All solutions and pharmaceuticals shall be up to date and shall be stored and maintained in accordance with the manufacturer's and/or U.S. Federal Drug Administration (FDA) recommendations.

(4) The requirements for air ambulance equipment and supplies are listed in 157.12(h) of this title or §157.13(h) of this title.

(k) The following equipment shall be present on each EMS in-service vehicle and on, or immediately available for, each response-ready vehicle as specified in the equipment list as required by the medical director's approved equipment list to include all state required equipment. The equipment list shall include equipment required for treatment and transport of adult, pediatric, and neonatal patients.

(1) Basic Life Support (BLS):
(A) Equipment required to administer the BLS scope of practice and incorporates the knowledge, competencies and basic skills of an EMT/ECA and additional skills as authorized by the EMS provider medical director. All BLS ambulances shall be able to perform treatment and transport patients receiving the following skills:

(i) airway/ventilation/oxygenation;
(ii) cardiovascular circulation;
(iii) immobilization;
(iv) medication administration - routes; and
(v) single and multi-system trauma patients.

(B) oropharyngeal airways;
(C) portable and vehicle mounted suction;
(D) bag valve mask units, oxygen capable;
(E) portable and vehicle mounted oxygen;
(F) oxygen delivery devices;
(G) dressing and bandaging materials;
(H) commercial tourniquet;
(I) rigid cervical immobilization devices;
(J) spinal immobilization devices;
(K) extremity splints;
(L) equipment to meet special patient needs;
(M) equipment for determining and monitoring patient vital signs, condition or response to treatment;
(N) pharmaceuticals, as required by the medical director's protocols;
(O) an external cardiac defibrillator appropriate to the staffing level with two sets of adult and two sets of pediatric pads;
(P) a patient-transport device capable of being secured to the vehicle, and the patient must be fully restrained per manufacturer recommendations; and
(Q) an epinephrine auto injector or similar device capable of treating anaphylaxis.

2 Advanced Life Support (ALS):

(A) equipment required to administer the ALS scope of practice and incorporates the knowledge, competencies and basic and advanced skills of an AEMT and additional skills as authorized by the EMS provider medical director. All ALS ambulances shall be able to perform treatment and transport patients receiving the following skills, including all required BLS equipment to perform treatment and transport patients receiving the following skills:

(i) airway/ventilation/oxygenation;
(ii) cardiovascular circulation;
(iii) immobilization;
(iv) medication administration - routes; and
(v) intravenous (IV) initiation/maintenance fluids.

(B) all required BLS equipment;
(C) advanced airway equipment;
(D) IV equipment and supplies;

(E) pharmaceuticals as required by medical director protocols; and

(F) wave form capnography or state approved carbon dioxide detection equipment must be used after January 1, 2018, when performing or monitoring endotracheal intubation.

3 MICU:

(A) equipment required to administer the knowledge, competencies and advanced skills of a paramedic, and additional skills as authorized by the EMS provider medical director. All MICU ambulances shall be able to perform treatment and transport patients receiving the following skills:

(i) airway/ventilation/oxygenation;
(ii) cardiovascular circulation;
(iii) immobilization;
(iv) medication administration - routes; and
(v) intravenous (IV) initiation/maintenance fluids.

(B) all required BLS and ALS equipment;
(C) with transmitting 12-lead capability cardiac monitor/defibrillator by January 1, 2020; and

(D) pharmaceuticals as required by medical director protocols.

4 BLS with ALS Capability:

(A) all required BLS equipment, even when in service or response ready at the BLS level; and

(B) all required ALS equipment, when in service or response ready at the ALS level.

5 BLS with MICU Capability:

(A) all required BLS equipment, even in service or response ready at the MICU level; and

(B) all required MICU equipment, when in service or response ready at the MICU level.

6 ALS with MICU Capability:

(A) all required ALS equipment, even when in service or response ready at the MICU level; and

(B) all MICU equipment, when in service or response ready at the MICU level.

7 In addition to medical supplies and equipment as defined in subsection (k) of this section, EMS vehicles must also have:

(A) a complete and current copy of written or electronic formatted protocols approved and signed by the medical director; with a current and complete equipment, supply, and medication list available to the crew;

(B) operable emergency warning devices;

(C) personal protective equipment for the EMS vehicle staff, including at least:

(i) protective, non-porous gloves;
(ii) medical eye protection;

(iii) medical respiratory protection must be available per crew member, meeting National Institute for Occupational Safety and Health (NIOSH) approved N95 or greater standards;
(iv) medical protective gowns or equivalent; and
(v) personal cleansing supplies;
(D) sharps container;
(E) biohazard bags;
(F) portable, battery-powered flashlight (not a pen-light);
(G) a mounted, currently inspected, 5 pound ABC fire extinguisher (not applicable to air ambulances);
(H) "No Smoking" signs posted in the patient compartment and cab of vehicle;
(I) a current emergency response guide book, or an electronic version that is available to the crew (for hazardous materials); and
(J) each vehicle will carry 25 triage tags in coordination with the Regional Advisory Council (RAC).

(8) As justified by specific patient needs, and when qualified personnel are available, EMS providers may appropriately utilize equipment in addition to that which is required by their authorization levels. Such equipment must be consistent with protocols and/or patient-specific orders and must correspond to personnel qualifications.

(I) National accreditation. If a provider has been accredited through a national accrediting organization approved by the department and adheres to Texas staffing level requirements, the department may exempt the provider from portions of the license process. In addition to other licensing requirements, accredited providers shall submit:

(1) an accreditation self-study;
(2) a copy of the formal accreditation certificate; and
(3) any correspondence or updates to or from the accrediting organization which impact the provider's status.

(m) Subscription or Membership Services. An EMS provider that operates or intends to operate a subscription or membership program for the provision of EMS within the provider's service area shall meet all the requirements for an EMS provider license as established by the Health and Safety Code, Chapter 773, and the rules adopted thereunder, and shall obtain department approval prior to soliciting, advertising or collecting subscription or membership fees. To obtain department approval for a subscription or membership program, the EMS provider shall:

(1) Obtain written authorization from the highest elected official (County Judge or Mayor) of the political subdivision(s) where subscriptions will be sold. Written authorization must be obtained from each County Judge if subscriptions are to be sold in multiple counties.

(A) The County Judge must provide written authorizations, if subscriptions are to be sold throughout a county.

(B) The Mayor may provide written authorization if subscriptions are sold exclusively within the boundaries of an incorporated town or city.

(C) If an EMS provider is not the primary emergency provider in any area where they are going to sell a subscription plan, written notification must be provided to the participants receiving subscription plan stating that the EMS Provider is not the primary emergency provider in this area. A copy of this documentation should be provided to the primary emergency provider and the department within 30 days before the beginning of any enrollment period.

(2) Submit a copy of the contract used to enroll participants.

(3) The EMS provider shall maintain a current file of all advertising for the service. Submit a copy of all advertising used to promote the subscription service within 30 days before the beginning of any enrollment period.

(4) Comply with all state and federal regulations regarding billing and reimbursement for participants in the subscription service.

(5) Provide evidence of financial responsibility by:

(A) obtaining a surety bond payable to the department in an amount equal to the funds to be subscribed. The surety bond must be on a department bond form and be issued by a company licensed by or eligible to do business in the State of Texas; or

(B) submitting satisfactory evidence of self-insurance an amount equal to the funds to be subscribed if the provider is a function of a governmental entity.

(6) Not deny emergency medical services to non-subscribers or subscribers of non-current status.

(7) Be reviewed at least every year; and the subscription program may be reviewed by the department at any time.

(8) Furnish a list after each enrollment period with the names, addresses, dates of enrollment of each subscriber, and subscription fee paid by each subscriber.

(9) Furnish the department beginning and ending dates of enrollment period(s). Subscription service period shall not exceed one year. Subscribers shall not be charged more than a prorated fee for the remaining subscription service period that they subscribe for.

(10) Furnish the department with the total amount of funds collected each year.

(11) Not offer membership nor accept members into the program who are Medicaid clients.

(n) Responsibilities of the EMS provider. During the license period, the EMS provider's responsibilities shall include:

(1) assuring that all response-ready and in-service vehicles are available 24 hours a day and seven days a week, maintained, operated, equipped and staffed in accordance with the requirements of the provider's license, to include staffing, equipment, supplies, required insurance and additional requirements per the current EMS provider's medical director approved protocols and policies;

(2) each EMS provider shall develop, implement, maintain, and evaluate an effective, ongoing, system-wide, data-driven, interdisciplinary quality assessment and performance improvement program. The program shall be individualized to the provider and shall, at a minimum, include:

(A) the standard of patient care as directed by the medical director's protocols and medical director input into the provider's policies and standard operating procedures;

(B) a complaint management system;

(C) monitoring the quality of patient care provided by the personnel and taking appropriate and immediate corrective action to assure that quality of care is maintained in accordance with the existing standards of care and the provider medical director's signed, approved protocols;
(D) the program shall include, but not be limited to, an ongoing program that achieves measurable improvement in patient care outcomes and reduction of medical errors;

(3) provide an attestation or provide documentation that its management staff will or continue to participate in the local regional advisory council;

(4) when an air ambulance is initiated through any other method than the local 911 system the air service providing the air ambulance is required to notify the local 911 center or the appropriate local response system for the location of the response at time of launch. This would not include interfacility transports or schedule transports;

(5) ensuring that all personnel are currently certified or licensed by the department;

(6) assuring that all personnel, when on an in-service vehicle or when on the scene of an emergency, are prominently identified by, at least, the last name and the first initial of the first name, the certification or license level and the EMS provider's name. A provider may utilize an alternative identification system in incident specific situations that pose a potential for danger if the individuals are identified by name;

(7) assuring the confidentiality of all patient information is in compliance with all federal and state laws;

(8) assuring that Informed Treatment/Transport Refusal forms are signed by all persons refusing service, or documenting incidents when a signed Informed Treatment/Transport Refusal form cannot be obtained;

(9) assuring that patient care reports are completed accurately for all patients and meet standards as outlined in 25 Texas Administrative Code, Chapter 103;

(10) assuring that patient care reports are provided to facilities receiving the patient:

(A) whenever operationally feasible, the report shall be provided to the receiving facility at the time the patient is delivered or a full written or computer generated report shall be delivered to the facility within 24 hours of the delivery of the patient;

(B) if in a response-pending status, an abbreviated documented report shall be provided at the time the patient is delivered and a completed written or computer generated report shall be delivered to the facility within 24 hours of the delivery of the patient;

(C) the abbreviated report shall document, at a minimum, the patient's name, patient's condition upon arrival at the scene; the prehospital care provided; the patient's condition during transport, including signs, symptoms, and responses to treatment during the transport; the call initiation time; dispatch time; scene arrival time; scene departure time; hospital arrival time; and, the identification of the ambulance staff; and

(D) in lieu of subparagraph (C) of this paragraph, personnel may follow the Regional Advisory Council's process for providing abbreviated documentation to the receiving facility.

(11) assuring that all pharmaceuticals are stored according to conditions specified in the pharmaceutical storage policy approved by the EMS provider's medical director;

(12) assuring that staff completes a readiness inspection as written by the EMS provider's policy;

(13) assuring that there is a preventive maintenance plan for vehicles and equipment.

(14) assuring that staff has reviewed policies and procedures as approved by the EMS Provider and the EMS Provider Medical Director;

(15) Maintenance of medical reports.

(A) A licensed EMS provider shall maintain adequate medical reports of a patient for a minimum of seven years from the anniversary date of the date of last treatment by the EMS provider.

(B) If a patient was younger than 18 years of age when last treated by the provider, the medical reports of the patient shall be maintained by the EMS provider until the patient reaches age 21 or for seven years from the date of last treatment, whichever is longer.

(C) An EMS provider may destroy medical records that relate to any civil, criminal or administrative proceeding only if the provider knows the proceeding has been finally resolved.

(D) EMS providers shall retain medical records for a longer length of time than that imposed herein when mandated by other federal or state statute or regulation.

(E) EMS providers may transfer ownership of records to another licensed EMS provider only if the EMS provider, in writing, assumes ownership of the records and maintains the records consistent with this chapter.

(F) Destruction of medical records shall be done in a manner that ensures continued confidentiality.

(G) At the time of initial licensing and at each license renewal, the EMS provider and medical director must attest or provide documentation to the department a plan for the going out of business, selling, transferring the business to ensure the maintenance of the medical record as outlined in subparagraph (E) of this paragraph.

(H) The emergency medical services provider must maintain all patient care records in the physical location that is the provider's primary place of business, unless the department approves an alternate location.

(16) assuring that all requested patient records are made promptly available to the medical director, hospital or department when requested;

(17) assuring that current protocols, equipment, supply and medication lists, and the correct original Vehicle Authorization at the appropriate level are maintained on each response-ready vehicle;

(18) monitoring and enforcing compliance with all policies and protocols;

(19) assuring provisions for the appropriate disposal of medical and/or biohazardous waste materials;

(20) assuring ongoing compliance with the terms of first responder agreements;

(21) assuring that all documents, reports or information provided to the department and hospital are current, accurate and complete;

(22) assuring compliance with all federal and state laws and regulations and all local ordinances, policies and codes at all times;

(23) assuring that all response data required by the department is submitted in accordance with §103.5 of this title (relating to Reporting Requirements for EMS Providers);

(24) assuring that, whenever there is a change in the EMS provider's name or the service's operational assumed name, the printed
name on the vehicles are changed accordingly within 30 days of the change;

(25) assuring that the department is notified within 30 business days whenever:
   (A) a vehicle is sold, substituted or replaced;
   (B) there is a change in the level of service;
   (C) there is a change in the declared service area as written on an initial or renewal application;
   (D) there is a change in the official business mailing address;
   (E) there is a change in the physical location of the business and/or substations;
   (F) there is a change in the physical location of patient report file storage, to assure that the department has access to these records at all times; and
   (G) there is a change of the administrator of record.
(26) assuring that when a change of the medical director has occurred the department is notified within one business day;
(27) develop, implement and enforce written operating policies and procedures required under this chapter and/or adopted by the licensee. Assure that each employee (including volunteers) is provided a copy upon employment and whenever such policies and/or procedures are changed. A copy of the written operating policies and procedures shall be made available to the department on request. Policies at a minimum shall adequately address:
   (A) personal protective equipment;
   (B) immunizations available to staff;
   (C) infection control procedures;
   (D) management of possible exposure to communicable disease;
   (E) emergency vehicle operation;
   (F) contact information for the designated infection control officer for whom education based on U.S. Code, Title 42, Chapter 6A, Subchapter XXIV, Part G, §300ff-136 has been documented.
   (G) credentialing of new response personnel before being assigned primary care responsibilities. The credentialing process shall include as a minimum:
      (i) a comprehensive orientation session of the services, policies and procedures, treatment and transport protocols, safety precautions, and the quality management process; and
      (ii) an internship period in which all new personnel practice under the supervision of, and are evaluated by, another more experienced person.
   (H) appropriate documentation of patient care; and
   (I) vehicle checks, equipment, and readiness inspections;
   (J) the security of medications, fluids and controlled substances in compliance with local, state and federal laws or rules.
(28) assuring that manufacturers’ operating instructions for all critical patient care electronic and/or technical equipment utilized by the provider are available for all response personnel;

(29) assuring that the department is notified within five business days of a collision involving an in-service or response ready EMS vehicle that results in vehicle damage whenever:
   (A) the vehicle is rendered disabled and inoperable at the scene of the occurrence; or
   (B) there is a patient on board.
(30) assuring that the department is notified within one business day of a collision involving an in-service or response ready EMS vehicle that results in vehicle damage whenever there is personal injury or death to any person;
(31) maintaining motor vehicle liability insurance as required under the Texas Transportation Code;
(32) maintaining professional liability insurance coverage in the minimum amount of $500,000 per occurrence, with a company licensed or deemed eligible by the Texas Department of Insurance to do business in Texas in order to secure payment for any loss or damage resulting from any occurrence arising out of, or caused by the care, or lack of care, of a patient;
(33) insuring continuous coverage for the service area defined in documents submitted with the EMS provider application;
(34) responding to requests for assistance from the highest elected official of a political subdivision or from the department during a declared emergency or mass casualty situation according to national, state, regional and/or local plans, when authorized;
(35) providing written notice to the department, RAC and Emergency Medical Task Force, if the EMS provider will make staff and equipment available during a declared emergency or mass casualty situation, for a state or national mission, when authorized;
(36) assuring all EMS personnel receive continuing education on the provider's anaphylaxis treatment protocols. The provider shall maintain education and training records to include date, time, and location of such education or training for all its EMS personnel;
(37) immediately notify the department in writing when operations cease in any service area;
(38) assure that all patients transported by stretcher must be in a department authorized EMS vehicle; and
(39) develop or adopt and then implement policies, procedures and protocols necessary for its operations as an EMS provider, and enforce all such policies, procedures and protocols.
   (o) License renewal process.
      (1) It shall be the responsibility of the provider to request license renewal application information.
      (2) EMS providers shall submit a completed application, all other required documentation and a nonrefundable license renewal fee, no later than 90 days prior to the expiration date of the current license.
         (A) When a complete application is received by the department 90 or more days prior to the expiration date of the current license that is to be renewed, the applicant shall submit a nonrefundable application fee of $400 per provider plus $180 for each EMS vehicle.
         (B) When a complete application is received by the department 60 or more days, but less than 90 days prior to the expiration date of the current license that is to be renewed, the applicant shall submit a nonrefundable application fee of $450 per provider plus $180 for each EMS vehicle.
(C) When a complete application is received by the department less than 60 days prior to the expiration of the current license, the applicant shall submit a nonrefundable application fee of $500 per provider plus $180 for each EMS vehicle.

(D) If the application for renewal is received by the department after the expiration date of the current license, it is deemed to be untimely filed and that license expires on its expiration date. The EMS provider will be required to file a new initial application and follow the initial application process.

(E) An EMS provider may not operate after its license has expired.

(p) Provisional License. The department may issue an EMS provisional license if an urgent need exists in a service area when the department finds that the applicant is in substantial compliance with the provisions of this section and if the public interest would be served. A provisional license shall be effective for no more than 30 days from the date of issuance.

(1) An EMS provider may apply for a provisional license by submitting a written request and a nonrefundable fee of $30.

(2) A provisional license issued by the department may be revoked at any time by the department, with written notice to the provider, when the department finds that the provider is failing to provide appropriate service in accordance with this section or that the provider is in violation of any of the requirements of this chapter.

(q) Advertisements.

(1) Any advertising by an EMS provider shall not be misleading, false, or deceptive. When an EMS provider advertises in Texas and/or conducts business in Texas by regularly transporting patients from, or within Texas, the provider shall be required to have a Texas EMS Provider License.

(2) An EMS provider shall not advertise levels of patient care which it cannot provide at all times. The provider shall not use a name, logo, art work, phrase or language that could mislead the public to believe a higher level of care is being provided.

(3) An EMS provider that has more than five paid staff, but is composed of at least 75% volunteer EMS personnel may advertise as a volunteer service.

(r) Surveys/Inspections and Investigations.

(1) The department may conduct scheduled or unannounced on-site inspection or investigation of a provider's vehicles, office(s), headquarter(s) and/or station(s) (hereinafter operations), at any reasonable time, including while services are being provided, to ensure compliance with Health and Safety Code, Chapter 773 and this chapter.

(2) An applicant or licensee, by applying for or holding a license, consents to entry and inspection or investigation of any of its operations by the department, as provided for by the Health and Safety Code, Chapter 773 and this chapter.

(3) Department's inspections or investigations to evaluate an EMS provider's compliance with the requirements of the Health and Safety Code, Chapter 773 and this chapter, may include:

(A) initial, prelicensure and change in status inspections for the issuance of a new license;

(B) routine inspection conducted at the departments' discretion or prior to renewal;

(C) follow-up on-site inspection, conducted to evaluate implementation of a plan of correction for deficiencies cited during a department investigation or inspection;

(D) a complaint investigation, conducted in response to a report or complaint, as described in subsection (u) of this section, relating to complaint investigations; and

(E) an inspection to determine if a person, company, or organization is offering or providing EMS service(s) without a license, or to determine if EMS vehicles are being staffed by persons who do not hold Texas EMS certification or license.

(4) The provider and medical director shall cooperate with any department investigation or inspection, and shall, consistent with applicable law, permit the department to examine the provider's grounds, buildings, books, records and other documents and information maintained by or on behalf of the provider, that are necessary to evaluate compliance with applicable statutes, rules, plans of correction and orders with which the EMS provider is required to comply. The EMS provider shall permit the department, consistent with applicable law, to interview members of the governing authority, personnel and patients.

(5) The EMS provider shall, consistent with applicable law, permit the department to copy or reproduce, or shall provide photocopies to the department of any requested records or documents. If it is necessary for the department to remove records or other information (other than photocopies) from the provider's premises, the department will provide the EMS provider's governing authority or designee with a written statement of this fact, describing the information being removed and when it is expected to be returned. The department will make a reasonable effort, consistent with the circumstances, to return the records the same day.

(6) The department will hold an entrance conference with the EMS provider, governing authority or designee before beginning the inspection or investigation, to explain, consistent with applicable law, the nature, scope and estimated time schedule of the inspection or investigation.

(7) Except for a complaint investigation or a follow-up visit, an inspection will include an evaluation of compliance with the Health and Safety Code, Chapter 773 and the rules of this chapter. During the inspection, the department representative will, unless otherwise provided for by law, inform the EMS provider's governing authority or designee of the preliminary findings and give the provider a reasonable opportunity to submit additional facts or other information to the department representative in response to those findings.

(8) When the inspection is complete, the department will hold an exit conference with the provider, unless otherwise provided for by law, to inform the provider, to the extent permitted by law, of any preliminary findings of the inspection or investigation and to give the EMS provider the opportunity to provide additional information regarding the deficiencies cited. If no deficiencies are identified at the time of inspection, a statement indicating this fact may be left with the EMS provider's governing authority or designee. Such a statement does not constitute a department finding or certification that the facility is in compliance.

(9) If deficiencies are cited:

(A) the department will provide the EMS provider's administrator of record and medical director with a written deficiency report no more than 30 calendar days after the exit conference.

(B) The EMS provider's governing authority, designee, or person in charge at the time shall sign an acknowledgement of the in-
pection and receipt of the written deficiency report and return it to the department. The signature does not indicate the EMS provider's agreement with, or admission to the cited deficiencies unless the agreement or admission is explicitly stated.

(C) No later than 30 calendar days after the EMS provider's receipt of the deficiency report, the EMS provider shall return a written plan of correction to the department for each deficiency, including time frames for implementation, together with any additional evidence of compliance the EMS provider may have, regarding any cited deficiency. The department will determine if the written plan of correction and proposed timeframes for implementation are acceptable. If the plan is not acceptable, the department will notify the provider in writing no later than 30 days after receipt and request a modified plan. The EMS provider shall modify and resubmit the plan of correction no later than 30 calendar days after the EMS provider's receipt of the request. The EMS provider shall correct the identified deficiencies and submit documentation to the department verifying completion of the corrective action within the timeframes set forth in the plan of correction accepted by the department, or as otherwise specified by the department. The provider will be deemed to have received the deficiency report or other department correspondence mailed under this subparagraph three days after mailing.

(D) Regardless of the EMS provider's compliance with this subsection, the department's acceptance of the provider's plan of correction, or the provider's utilization of an informal compliance group review under paragraph (10) of this subsection, the department may, at any time, propose to take action as appropriate under §157.16 of this title (relating to Emergency Suspension, Suspension, Probation, Revocation, Denial of a Provider License or Administrative Penalties).

(10) The department inspector will inform the provider's chief executive officer, designee, or person in charge at the time of the inspection, of the provider's right to an informal compliance group review, when there is disagreement with deficiencies cited by the inspector or investigator, that the provider was unable to resolve through submission of information to the inspector or additional information bearing on the deficiencies cited.

(11) The department shall refer issues and complaints relating to the conduct or actions by licensed professionals to their appropriate licensing boards.

(12) All initial applicants and their medical director shall be required to have an initial compliance survey by the department that evaluates all aspects of the applicant's proposed operations including clinical care components and an inspection of all vehicles prior to the issuance of a license.

(13) At renewal, randomly, or in response to a complaint, the department may conduct an unannounced compliance survey that includes inspection of a provider's vehicles, operations and/or records to ensure compliance with this title at any time, including nights or weekends.

(14) If a re-survey/inspection to ensure correction of a deficiency is conducted, the provider shall pay a nonrefundable fee of $30 per vehicle needing a re-inspection.

(s) Specialty Care Transports. A Specialty Care Transport is defined as the interfacility transfer by a department licensed EMS provider of a critically ill or injured patient requiring specialized interventions, monitoring and/or staffing. To qualify to function as a Specialty Care Transport the following minimum criteria shall be met:

(1) Qualifying Interventions:

(A) patients with one or more of the following IV infusions: vasopressors; vasoactive compounds; antiarrhythmics; fibrinolytics; tocolytics; blood or blood products and/or any other parenteral pharmaceutical unique to the patient's special health care needs; and

(B) one or more of the following special monitors or procedures: mechanical ventilation; multiple monitors; cardiac balloon pump; external cardiac support (ventricular assist devices, etc); any other specialized device, vehicle or procedure unique to the patient's health care needs.

(2) Equipment. All specialized equipment and supplies appropriate to the required interventions shall be available at the time of the transport.

(3) Minimum Required Staffing. One currently certified EMT-Basic and one currently certified or licensed paramedic with the additional training as defined in paragraph (4) of this subsection; or, a currently certified EMT-Basic and a currently certified or licensed paramedic accompanied by at least one of the following: a Registered Nurse with special knowledge of the patient's care needs; a certified Respiratory Therapist; a licensed physician; or, any other licensed health care professional designated by the transferring physician.

(4) Additional Required Education and Training for Certified/Licensed Paramedics: Evidence of successful completion of post-paramedic education, training and appropriate periodic skills verification in management of patients on ventilators, 12 lead EKG and/or other critical care monitoring devices, drug infusion pumps, and cardiac and/or other critical care medications, or any other specialized procedures or devices determined at the discretion of the EMS provider's medical director.

(t) For all initial applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with the initial application and renewal application processing through Texas Online.

(u) Complaint Investigations.

(1) Upon request, all licensed EMS Providers shall make available for a patient or its legal guardian a written statement supplied by the department, identifying the department as the responsible agency for conducting EMS provider and EMS personnel complaint investigations. The statement shall inform persons that they may direct a complaint to the Department of State Health Services, EMS Compliance Group, by phone, or by email. The statement shall provide the most current contact information, including the appropriate department group, address, local and toll-free telephone number, and email address for filing a complaint.

(2) The department evaluates all complaints made against EMS providers and/or EMS personnel. Any complaint submitted to the department shall be submitted by telephone, electronically, or in writing, using the department's current contact information for that purpose, as described in paragraph (1) of this subsection.

(3) The department will document, evaluate and prioritize complaints and information received, based on the seriousness of the alleged violation and the level of risk to patients, personnel and/or the public.

(A) Allegations determined to be within the department's regulatory jurisdiction relating to emergency medical services are authorized for investigation under this chapter. Complaints received that are outside the department's jurisdiction may be referred to another appropriate agency for response.
(B) The investigation is conducted on-site, by telephone and/or through written correspondence.

(4) The department conducts a prompt and thorough investigation of all reports or complaint allegations that may pose a threat of harm to the health and safety of patients or participants. Reports or complaints received by the department concerning alleged abuse, neglect and exploitation will be addressed in accordance with Human Resources Code, Chapter 48 and Family Code, §261.101(d).

(5) The department evaluates complaint allegations that do not pose a significant risk of harm to patients. Based on the nature and severity of the alleged incident, the department determines whether to investigate the complaint directly or to require the provider to conduct an internal investigation and submit its findings and supporting evidence to the department.

(A) The findings of an EMS provider’s internal investigation will be reviewed by the department and may result in an additional investigation by the department, a request for a plan of correction to be completed by the provider in accordance with subsection (q) of this section (relating to inspections and investigations) and/or a proposal to take action against the provider under §157.16 of this title.

(B) The EMS provider under investigation shall provide department staff access to all documents, evidence and individuals related to the alleged violation, including all evidence and documentation relating to any internal investigations.

(6) Once an internal EMS provider investigation and/or department investigation is complete, the department reviews the evidence from the investigation to evaluate whether the evidence substantiates the complaint and what corrective action, if any, is needed.

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

Filed with the Office of the Secretary of State on May 24, 2022.

TRD-202202008
Cynthia Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 484-5470

CHAPTER 229. FOOD AND DRUG

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes amendments to §229.661, concerning Cottage Food Production Operations and §§229.702 - 229.704, concerning Farmers’ Markets.

BACKGROUND AND PURPOSE

The purpose of the proposal is to comply with amendments to Texas Health and Safety Code Chapter 437, Regulation of Food Service Establishments, Retail Food Stores, Mobile Food Units, And Roadside Food Vendors as promulgated in Senate Bill (S.B.) 617, 87th Legislature, Regular Session, 2021. S.B. 617 clarifies who may sell products at a farmers’ market by changing the definition of "farmers’ market" at Texas Health and Safety Code §437.020(a)(1) and adding a new definition for "food producer" at Texas Health and Safety Code §437.020(a)(3). The two definitions effectively prohibit a jurisdiction from construing the statute to exclude non-farmers or non-farm-related vendors and products from farmers’ markets within its jurisdiction.

S.B. 617 also amends Texas Health and Safety Code §437.0065, which clarifies which food vendors may be permitted to sell food at a farmers’ market and necessitates amendment of the statutory parameters for permitting in §229.703. This includes a $100/per annum cap on a single permit that is valid at any farmers’ market in the jurisdiction of the permitting authority.

In addition, it is necessary to make editorial changes to the rules due to the changes of the Retail Food Establishment rules in 25 TAC, Chapter 228, which includes the adoption by reference of the U.S. Food and Drug Administration Food Code 2017 (Food Code). Rule citations in Chapter 229, Subchapters EE and FF are changed from Chapter 228 to the Food Code. The revisions update the definition of "food establishment" in §229.661(b)(9); change cooking times and requirements; and update references to "time and temperature control for safety food (TCS food)" in §229.704. Other editorial changes are made for consistency and clarity throughout the subchapters.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §229.661(b)(7) changes the definition of "farmers’ market" to correspond with the amended definition at Texas Health and Safety Code §437.020(a)(1).

The proposed amendment to §229.661(b)(9) changes the definition of "food establishment" to correspond with the definition contained in the Food Code.

The proposed amendment adds Subpart F to the previous citation from the Code of Federal Regulations at §229.661(d)(5).

The proposed amendment to §229.702(2) adds a definition of "farmer” to clarify the term in the rules.

The proposed amendment to §229.702(3) changes the definition of "farmers’ market” to correspond with Texas Health and Safety Code §437.020(a)(1). In addition, DSHS added verbiage for clarification.

The proposed amendments to §229.702(4) and (11) change the rule citations from the former Retail Food Establishment rules to the Food Code.

New §229.702(6) adds a new definition for "food producer" to correspond with the new definition at Texas Health and Safety Code §437.020(a)(3).

The proposed amendment to §229.702(8) deletes the definition of "producer," which is replaced by the new definition of "food producer" at §229.702(6).

Section 229.702(2) - (10) are renumbered to paragraphs (3) - (11) to account for the addition of new paragraphs (2) and (6) and the deletion of previous paragraph (8).

The proposed amendment to §229.703 clarifies requirements for a permit to sell food at a farmers’ market to correspond with Texas Health and Safety Code §437.0065.

The proposed amendments to §229.704 change references to "potentially hazardous food" to the more current usage that is "Time and temperature control for safety (TCS food)." The proposed amendment to §229.704(c) deletes the phrase "at all times" to avoid redundancy.

The proposed amendments to §229.704(d)(1) and (2) change cooking times to reflect requirements in the Food Code.
The proposed amendments to §229.704(d)(5)(A) and (f) change the rule citations from the former Retail Food Establishment rules to the Food Code.

The proposed amendments add the word "Texas" for clarity in the Health and Safety Code and agency names throughout the subchapters.

FISCAL NOTE

Donna Sheppard, Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules do not have foreseeable implications relating to costs or revenues of the state.

Donna Sheppard has also determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules may have foreseeable implications relating to costs or revenues of local and county governments due to the cap of $100 permitting fee that food vendors will pay to the local governments. DSHS is unable to estimate the number of businesses operating or about to operate at farmers' markets in local health departments.

GOVERNMENT GROWTH IMPACT STATEMENT

DSHS has determined that during the first five years that the rules will be in effect:

1. the proposed rules will not create or eliminate a government program;
2. implementation of the proposed rules will not affect the number of DSHS employee positions;
3. implementation of the proposed rules will result in no assumed change in future legislative appropriations;
4. the proposed rules will not affect fees paid to DSHS;
5. the proposed rules will not create a new rule;
6. the proposed rules will expand existing rules;
7. the proposed rules will increase the number of individuals subject to the rules due to the requirement that food producers may sell food products at farmers' markets; and
8. the proposed rules will have a positive effect on the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Donna Sheppard has also determined that any adverse economic effect due to rural communities being required to comply with the $100 per annum fee limitation will be at least partially mitigated by expanded access to farmers' markets by non-farm-related vendors in some jurisdictions that previously interpreted the farmers' market language in Texas Health and Safety Code, Chapter 437 and 25 TAC Chapter 229, Subchapter FF to prevent them access.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas and are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

PUBLIC BENEFIT AND COSTS

Dr. Timothy Stevenson, Associate Commissioner, Consumer Protection Division, has determined that for each year of the first five years the rules are in effect, the public benefit will be expansion of access to farmers' markets to non-farm-related vendors in some jurisdictions that previously interpreted the farmers' market statute and rules so as to prevent them access. This provides a potential new market to some "food producers" and greater diversity of goods to consumers who buy food products at farmers' markets.

Donna Sheppard has also determined that for the first five years the rules are in effect, persons who are required to comply with the proposed rules may incur economic costs because of the $100 per annum cost of the permit that will accompany greater accessibility to farmers' markets.

TAKINGS IMPACT ASSESSMENT

DSHS has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written Comments on the proposal may be submitted to Joe Williams or Jason Guzman at DSHS Consumer Protection Division/Public Sanitation and Retail Food Safety Branch, Mail Code 1987, P.O. Box 149347, Austin, Texas 78714-9347, hand-delivered to 1100 West 49th Street, M428.6, Austin, Texas 78756, by voicemail to (512) 834-6753, by fax to (512) 834-6683, or by email to foodestablishments@dshs.texas.gov.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. CST on the last working day of the comment period; or (3) faxed or emailed before midnight CST on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When faxing or emailing comments, please indicate "Comments on Proposed Rule 22R004" in the subject line.

SUBCHAPTER EE. COTTAGE FOOD PRODUCTION OPERATIONS

25 TAC §229.661

STATUTORY AUTHORITY

The proposed amendment is authorized by Texas Government Code, §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the efficient enforcement of Texas Health and Safety Code, Chapter 437; and Texas Health and Safety Code, §1001.075, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001.

The proposed amendment implements Texas Government Code, Chapter 531 and Texas Health and Safety Code, Chapters 437 and 1001.

§229.661. Cottage Food Production Operations.

(a) Purpose. The purpose of this section is to implement Texas Health and Safety Code, Chapter 437, related to cottage food produc-
tion operations, which requires the department to adopt rules for labeling and production of foods by cottage food production operations.

(b) Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Acidified canned goods means food with a finished equilibrium pH value of 4.6 or less that is thermally processed before being placed in an airtight container.

(2) Baked good means a food item prepared by baking the item in an oven, which includes cakes, breads, Danishes, donuts, pastries, pies, and other items that are prepared by baking.

(3) Cottage food production operation (operator) means an individual, operating out of the individual’s home, who

(A) produces at the individual's home:

(i) a baked good that is not a time and temperature control for safety food (TCS food), as defined in paragraph (13) of this subsection;

(ii) candy;

(iii) coated and uncoated nuts;

(iv) unroasted nut butters;

(v) fruit butters;

(vi) a canned jam or jelly;

(vii) a fruit pie;

(viii) dehydrated fruit or vegetables, including dried beans;

(ix) popcorn and popcorn snacks;

(x) cereal, including granola;

(xi) dry mix;

(xii) vinegar;

(xiii) pickled fruit or vegetables, including beets and carrots, that are preserved in vinegar, brine, or a similar solution at an equilibrium pH value of 4.6 or less;

(xiv) mustard;

(xv) roasted coffee or dry tea;

(xvi) a dried herb or dried-herb mix;

(xvii) plant-based acidified canned goods;

(xviii) fermented vegetable products, including products that are refrigerated to preserve quality;

(xix) frozen raw and uncut fruit or vegetables; or

(xx) any other food that is not a TCS food, as defined in paragraph (13) of this subsection.

(B) has an annual gross income of $50,000 or less from the sale of food described by subparagraph (A) of this paragraph;

(C) sells foods produced under subparagraph (A) of this paragraph only directly to consumers; and

(D) delivers products to the consumer at the point of sale or another location designated by the consumer.

(4) Department means the Texas Department of State Health Services.

(5) Executive Commissioner means the Executive Commissioner of the Texas Health and Human Services Commission.

(6) Farm stand means a premises owned and operated by a producer of agricultural food products at which the producer or other persons may offer for sale produce or foods described in paragraph (3) of this subsection.

(7) Farmers’ market means a designated location used for a recurring event at which a majority of the vendors are farmers or other food producers who sell food directly to consumers. A farmers’ market must include vendors who meet the definition of “farmer” defined at §229.702(2) of this title (relating to Definitions) and may include vendors who meet the definition of “food producer” as defined at §229.702(6) of this title. [A designated location used primarily for the distribution and sale directly to consumers of food by farmers or other producers—

(8) Fermented vegetable product means a low-acid vegetable food product subjected to the action of certain microorganisms that produce acid during their growth and reduce the pH value of the food to 4.6 or less.

(9) Food establishment means:

(A) Food establishment is an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption; and

(i) stores, prepares, packages, serves, or vends food directly to the consumer, or otherwise provides food for human consumption, such as a restaurant, [;] retail food store, [;] satellite or catered feeding location, [;] catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people, [;] market, [;] vending machine location, [;] self-service food market, conveyance used to transport people, [;] institution, [;] or food bank; and

(ii) relinquishes possession of food to a consumer directly, or indirectly through a delivery service, such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

(B) Food establishment includes:

(i) an element of the operation, such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location, unless the vending or feeding location is permitted by the regulatory authority; and

(ii) an operation that is conducted in a mobile, stationary, temporary, or permanent facility or location and [;] where consumption is on or off the premises, [;] and regardless of whether there is a charge for the food.

(C) Food establishment does not include:

(i) an establishment that offers only prepackaged foods that are not TCS foods;

(ii) a produce stand that only offers whole, uncut fresh fruit and vegetables;

(iii) a food processing plant, including one that is located on the premises of a food establishment;

(iv) a cottage food production operation; [a kitchen in a private home if only food that is not TCS food is prepared for sale or service at a function such as a religious or charitable organization’s bake sale if allowed by law—]
(vi) a bed and breakfast limited as defined in §228.223 of this title (relating to Bed and Breakfast); or [an area where food that is prepared as specified in clause (vi) of this subparagraph is sold or offered for human consumption.]

(vii) a private home that receives catered or home-delivered food, [a Bed and Breakfast Limited establishment as defined in §228.3 of this title (relating to Definitions) concerning food establishments;]

(f) Cottage food production operations (may be referred to in the law as "a cottage food production operation")

(10) Herbs--The leafy green parts of a plant (either fresh or dried) used for culinary purposes and not for medicinal uses.

(11) Home--A primary residence that contains a kitchen and appliances designed for common residential usage.

(12) Process authority--A person who has expert knowledge acquired through appropriate training and experience in the pickling, fermenting, or acidification and processing of pickled, fermented, or acidified foods.

(13) Time and temperature control for safety food (TCS food)--A food that requires time and temperature control for safety to limit pathogen growth or toxin production. The term includes a food that must be held under proper temperature controls, such as refrigeration, to prevent the growth of bacteria that may cause human illness. A TCS food may include a food that contains protein and moisture and is neutral or slightly acidic, such as meat, poultry, fish, and shellfish products, pasteurized and unpasteurized milk and dairy products, raw seed sprouts, baked goods that require refrigeration, including cream or custard pies or cakes, and ice products. The term does not include a food that uses TCS food as ingredients if the final food product does not require time or temperature control for safety to limit pathogen growth or toxin production.

(c) Complaints. The department shall maintain a record of a complaint made by a person against an operator.

(d) Packaging and labeling requirements for cottage food production operations. All foods prepared by an operator shall be packaged and labeled in a manner that prevents product contamination.

(1) The label information shall include:

(A) the name and physical address of the cottage food production operation;

(B) the common or usual name of the product;

(C) disclosure of any major food allergens, such as eggs, nuts, soy, peanuts, milk, wheat, fish, or shellfish used in the product; and

(D) the following statement: "This food is made in a home kitchen and is not inspected by the Texas Department of State Health Services or a local health department."

(2) Labels must be legible.

(3) A food item is not required to be packaged if it is too large or bulky for conventional packaging. For these food items, the information required under paragraph (1) of this subsection shall be provided to the consumer on an invoice or receipt.

(4) A label for frozen raw and uncut fruit or vegetables must include the following statement in at least 12-point font when sold: "SAFE HANDLING INSTRUCTIONS: To prevent illness from bacteria, keep this food frozen until preparing for consumption" on the label or on an invoice or receipt provided with the frozen fruit or vegetables.

(e) Certain sales by cottage food production operations prohibited or restricted.

(1) An operator may not sell any of the foods described in this section at wholesale.

(2) An operator may sell a food described in this section in this state through the internet or by mail-order only if:

(A) the consumer purchases the food through the internet or by mail-order from the operator and the operator personally delivers the food to the consumer; and

(B) subject to paragraph (3) of this subsection, before the operator accepts payment for the food, the operator provides all labeling information required by subsection (d) of this section to the consumer by:

(i) posting a legible statement on the cottage food production operation's internet website;

(ii) publishing the information in a catalog; or

(iii) otherwise communicating the information to the consumer.

(3) The operator that sells a food described by subsection (b)(3)(A) of this section in this state in the manner described by paragraph (2) of this subsection:

(A) is not required to include the address of the cottage food production operation in the labeling information required under subsection (d)(1)(A) of this section before the operator accepts payment for the food; and

(B) shall provide the address of the cottage food production operation on the label of the food in the manner required by subsection (d)(1)(A) of this section after the operator accepts payment for the food.

(f) Requirements for sale of certain cottage food products.

(1) An operator that sells to consumers pickled fruit or vegetables, fermented vegetable products, or plant-based acidified canned goods shall:

(A) use a recipe that:

(i) is from a source approved by the department under paragraph (4) of this subsection;

(ii) has been tested by an appropriately certified laboratory that confirmed the finished fruit or vegetable product[s] or plant-based acidified canned good has an equilibrium pH value of 4.6 or less; or

(iii) is approved by a qualified process authority; or

(B) if the operation does not use a recipe described by subparagraph (A) of this paragraph, test each batch of the recipe with a calibrated pH meter to confirm the finished fruit or vegetable product[s] or plant-based acidified canned good has an equilibrium pH value of 4.6 or less.

(2) An operator may not sell to consumers pickled fruit or vegetables, fermented vegetable products, or plant-based acidified
canned goods before the operator complies with paragraph (1) of this subsection.

(3) For each batch of pickled fruit or vegetables, fermented vegetable products, or plant-based acidified canned goods, an operator must:

(A) label the batch with a unique number; and
(B) for a period of at least 12 months, keep a record that includes:

(i) the batch number;
(ii) the recipe used by the producer;
(iii) the source of the recipe or testing results as applicable; and
(iv) the date the batch was prepared.

(4) The department shall:

(A) approve sources for recipes that an operator may use to produce pickled fruit or vegetables, fermented vegetable products, or plant-based acidified canned goods; and
(B) semianually post on the department's internet website a list of the approved sources for recipes, appropriately certified laboratories, and qualified process authorities.

(5) This subsection does not apply to a pickled cucumber preserved in vinegar, brine, or similar solution.

(g) Requirements for the sale of frozen raw and uncut fruit or vegetables. An operator that sells to consumers frozen raw and uncut fruit or vegetables shall:

(1) store and deliver the frozen raw and uncut fruit or vegetables at an air temperature of not more than 32 degrees Fahrenheit; and
(2) label the frozen raw and uncut fruit or vegetables in accordance with subsection (d)(4) of this section.

(h) A cottage food production operation is not exempt from meeting the application of Texas Health and Safety Code, §431.045, Emergency Order; §431.0495, Recall Orders; and §431.247, Delegation of Powers or Duties. The department or local health authority may act to prevent an immediate and serious threat to human life or health.

(i) Prohibition for Cottage Food Production Operations. A cottage food production operation may not sell TCS foods to customers.

(1) Production of Cottage Food Products - Basic Food Safety Education or Training Requirements.

(1) An individual who operates a cottage food production operation must have successfully completed a basic food safety education or training program for food handlers accredited under Texas Health and Safety Code, Chapter 438, Subchapter D.

(2) An individual may not process, prepare, package, or handle cottage food products unless the individual:

(A) meets the requirements of paragraph (1) of this subsection;
(B) is directly supervised by an individual described by paragraph (1) of this subsection; or
(C) is a member of the household in which the cottage food products are produced.

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

Filed with the Office of the Secretary of State on May 23, 2022.
TRD-202202002
Cynthia Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 231-5653

SUBCHAPTER FF. FARMERS' MARKETS
25 TAC §§229.702 - 229.704

STATUTORY AUTHORITY
The proposed amendments are authorized by Texas Government Code, §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the efficient enforcement of Texas Health and Safety Code, Chapter 437; and Texas Health and Safety Code, §1001.075, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001.

The proposed amendments implement Texas Government Code, Chapter 531 and Texas Health and Safety Code, Chapters 437 and 1001.

229.702. Definitions.

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

(1) Department--The Texas Department of State Health Services.

(2) Farmer--A person or entity that produces agricultural products by practice of the agricultural arts upon land that the person or entity controls.

(3) [(2)] Farmers' market--A designated location used for a recurring event at which a majority of the vendors are farmers or other food producers who sell food directly to consumers. A farmers' market must include vendors who meet the definition of "farmer" as defined in paragraph (2) of this section and may include vendors who meet the definition of "food producer" as defined in paragraph (6) of this section. [A designated location used primarily for the distribution and sale directly to consumers of food by farmers and other producers.]

(4) [(3)] Fish--As defined in the U.S. Food and Drug Administration Food Code 2017 (Food Code) §1-201.10(B) [§228.2 of this title (relating to Definitions)].

(5) [(4)] Food--An agricultural, apicultural, horticultural, silvicultural, viticultural, or vegetable product for human consumption, in either its natural or processed state, that has been produced or processed or otherwise has had value added to the product in this state. The term includes:

(A) fish or other aquatic species;
(B) livestock, a livestock product, or livestock by-product;
(C) planting seed;

47 TexReg 3420  June 10, 2022  Texas Register
(D) poultry, a poultry product, or a poultry by-product;
(E) wildlife processed for food or by-products;
(F) a product made from a product described in this paragraph by a farmer or other producer who grew or processed the product; or
(G) produce.

(6) Food producer--A person who grew, raised, processed, prepared, manufactured, or otherwise added value to the food product the person is selling. The term does not include a person who only packaged or repackaged a food product.

(7) [(§4)] Potable water--Drinking water.

(8) [(6)] Poultry--A live or dead domesticated bird.

(9) [(7)] Produce--Fresh fruit [fruits] or vegetables.

(10) [(9)] Sample--A bite-sized portion of food or foods offered free of charge to demonstrate its characteristics and does not include a whole meal, an individual portion, or a whole sandwich.

(11) [(10)] Time and temperature control for safety food (TCS food) [Time/Temperature Control for Safety (TCS) food]--Formerly Potentially Hazardous Food--As defined in the Food Code §1-201.10(B) [§228.2 of this title].

§229.703. Permits.

The department or the local health department may issue a permit to a farmer or food producer [person] who sells food [potentially hazardous food (time/temperature control for safety food)] at a farmers’ market. Regardless of what the permit is called, the following parameters from Texas Health and Safety Code §437.006(c) apply. The permit:

1. must be valid for a term of not less than one year;

2. may impose an annual fee in an amount not to exceed $100.00 for issuance or renewal; and

3. must cover sales at all farmers' markets, farm stands, and farms within the jurisdiction of the permitting authority.

§229.704. Temperature Requirements.

(a) TCS food [Potentially hazardous food (time/temperature control for safety food)] sold, distributed, or prepared on-site at a farmers’ market, and TCS food [potentially hazardous food (time/temperature control for safety food)] transported to or from a farmers’ market shall meet the requirements of this section.

(b) Frozen food. Stored frozen foods shall be maintained frozen.

(c) Hot and cold holding. TCS food [All potentially hazardous food] sold at, prepared on site at, or transported to or from a farm or farmers’ market [at all times] shall be maintained at:

1. 5 degrees Celsius (41 degrees Fahrenheit) or below; or

2. 54 degrees Celsius (135 degrees Fahrenheit) or above.

(d) Cooking of raw animal foods. Raw animal foods shall be cooked to heat all parts of the food to the following applicable temperatures:

1. poultry, ground poultry, stuffing with poultry, meat, and fish to 74 degrees Celsius (165 degrees Fahrenheit) for <1 second (instantaneous) [45 seconds];

2. ground meat, ground pork, ground fish, and injected meats to 68 degrees Celsius (155 degrees Fahrenheit) for 17 [48] seconds;

3. beef, pork, meat, fish, and raw shell eggs for immediate service to 63 degrees Celsius (145 degrees Fahrenheit) for 15 seconds;

4. prepackaged TCS food [Potentially hazardous food (time/temperature control for safety food)] that has been commercially processed to 57 degrees Celsius (135 degrees Fahrenheit);

5. a raw or undercooked whole-muscle, intact beef steak may be served if:

   A. the steak is labeled to indicate that it meets the definition of "whole-muscle, intact beef" as defined in the Food Code §1-201.10(B) [§228.2 of this title (relating to Definitions)]; and [or]

   B. the steak is cooked on both the top and bottom to a surface temperature of 63 degrees Celsius (145 degrees Fahrenheit) or above and a cooked color change is achieved on all external surfaces; and [·]

   6. raw animal foods cooked in a microwave oven shall be:

   A. rotated or stirred throughout or midway during cooking to compensate for uneven distribution of heat;

   B. covered to retain surface moisture;

   C. heated to a temperature of at least 74 degrees Celsius (165 degrees Fahrenheit) in all parts of the food; and

   D. allowed to stand covered for 2 minutes after cooking to obtain temperature equilibrium.

(e) Cooking fruit [fruits] and vegetables. Fruit [Fruits] and vegetables that are cooked shall be heated to a temperature of 57 degrees Celsius (135 degrees Fahrenheit).

(f) Eggs. A farmer or egg producer that sells eggs directly to the consumer at a farm or farmers’ market shall maintain the eggs at an ambient air temperature of 7 degrees Celsius (45 degrees Fahrenheit) as specified in the Food Code §3-501.16(B) [§228.63 of this title (relating to Specifications for Receiving)].

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

Filed with the Office of the Secretary of State on May 23, 2022.
TRD-20220203
Cynthia Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 231-5653

TITLE 26. HEALTH AND HUMAN SERVICES
PART 1. HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 306. BEHAVIORAL HEALTH DELIVERY SYSTEM
SUBCHAPTER C. TEXAS CERTIFIED
COMMUNITY BEHAVIORAL HEALTH CLINICS


The Texas Health and Human Services Commission (HHSC) proposes new §306.101, concerning Purpose; §306.103, concerning Application; §306.105, concerning Definitions; §306.107, concerning Certification Eligibility; §306.109, concerning Application Process; and §306.111, concerning Certification Standards.

BACKGROUND AND PURPOSE

The purpose of the proposal is to adopt existing certification, recertification, and certification maintenance requirements for Texas Certified Community Behavioral Health Clinics (T-CCBHCs). The proposal outlines requirements for T-CCBHCs serving persons with mental illness, severe emotional disturbances, and substance use disorders.

Certification requirements for Community Behavioral Health Clinics were mandated by a Substance Abuse and Mental Health Services Administration (SAMHSA) grant awarded to Texas in 2015. HHSC also recognized the CCBHC model as an emerging best practice and committed to increasing the number of CCBHCs to 19 as a goal in fiscal year 2020 in the Texas Health and Human Services Business Plan: Blueprint for a Healthy Texas. To date, the state has exceeded the goal and intends to certify all interested and qualified local mental health authorities and local behavioral health authorities as CCBHCs in addition to other interested qualified providers. As of November 2021, 250 counties are served by a T-CCBHC.

SECTION-BY-SECTION SUMMARY

Proposed new §306.101 describes the purpose of the subchapter.

Proposed new §306.103 establishes rule applicability to T-CCBHCs.

Proposed new §306.105 provides definitions for terminology used in the subchapter.

Proposed new §306.107 establishes Texas applicant certification eligibility criteria regarding staffing requirements, availability and accessibility of services, care coordination, scope of service, reporting, and organizational authority.

Proposed new §306.109 describes the T-CCBHC application process regarding application submittal, application denial criteria, documentation, and timeframe for submittal of requested supplemental information.

Proposed new §306.111 establishes Texas applicant certification standards including maintaining all required licenses and other parameters for T-CCBHC certification and recertification.

FISCAL NOTE

Trey Wood, HHSC Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

(1) the proposed rules will not create or eliminate a government program;

(2) implementation of the proposed rules will not affect the number of HHSC employee positions;

(3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;

(4) the proposed rules will not affect fees paid to HHSC;

(5) the proposed rules will create new rules;

(6) the proposed rules will not expand, limit, or repeal existing rules;

(7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the proposed rules will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities because current T-CCBHCs are already functioning in compliance with the proposed rules so there is no required change to current business practices.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Sonja Gaines, Deputy Executive Commissioner, Intellectual and Developmental Disability and Behavioral Health Services, has determined that for each year of the first five years the rule is in effect, the public benefit will be improved understanding of existing T-CCBHC requirements currently contained in publicly available CCBHC program manuals and on the HHS website. In addition, while Texas no longer receives the SAMHSA grant award, HHSC continues to use the CCBHC framework as a model and SAMHSA may require grantees to be certified by the state as CCBHCs to receive certain federal awards.

Trey Wood has also determined that for the first five years the rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules because the proposed rules codify existing CCBHC certification processes and do not impose any additional fees or costs on those required to comply.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 701 W. 51st Street,
Austin, Texas 78751; or emailed to HHSRulesCoordinationOffice@hhs.texas.gov.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate “Comments on Proposed Rule “21R109” in the subject line.

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, Health and Safety Code Section 531.001(e), which requires HHSC to assist the local agencies and organizations providing mental health services by coordinating the implementation of a statewide system of mental health services, and Government Code §531.002(b)(2) which provides HHSC is the state agency with primary responsibility for ensuring the delivery of state health and human services in a manner that maximizes the use of federal, state, and local funds.

The new sections affect Texas Government Code §531.0055, Health and Safety Code Section 531.001(e), and §531.002(b)(2).

§306.101. Purpose.
The purpose of this subchapter is to describe the requirements for an applicant to be certified by the Texas Health and Human Services Commission as a Texas Certified Community Behavioral Health Clinic.

§306.103. Application.
The provisions of this subchapter apply to applicants defined in §306.105 of this subchapter (relating to Definitions).

§306.105. Definitions.
The following words and terms, when used in this subchapter, have the following meaning, unless the context clearly indicates otherwise:

(1) Applicant—An entity applying or reapplying for certification as a Texas Certified Community Behavioral Health Clinic (T-CCBHC).

(2) Application—A Texas Health and Human Services Commission form submitted by an applicant for T-CCBHC certification and recertification.

(3) Community needs assessment—A systematic approach to identifying community needs and determining program capacity to address the needs of the population being served. The needs assessment is objective and includes input from people receiving services, program staff, and other key community stakeholders.

(4) Crisis stabilization—Services to address a mental health or substance use crisis, including suicide crisis response and services capable of addressing crises related to substance use.

(5) Family-centered—Developmentally appropriate and youth guided care that recognizes active participation between families and caregivers and professionals as a cornerstone to the planning, delivery, and evaluation of services.

(6) Governmental entity—A state agency or a political subdivision of the state, such as a city, county, hospital district, hospital authority, or state entity.

(7) HHSC—The Texas Health and Human Services Commission or its designee.

(8) LBHA—Local behavioral health authority. An entity designated as the local behavioral health authority by HHSC in accordance with Health and Safety Code, §533.035(a).

(9) LMHA—Local mental health authority. An entity designated as the local mental health authority by HHSC in accordance with Health and Safety Code, §533.035(a).

(10) Person—An individual receiving services under this subchapter.

(11) Person-centered—Care that is strengths-based, trauma informed, and focuses on individual capacities, preferences, and goals that give the person the opportunity to optimize their self-defined quality of life, choice, control, and self-determination through meaningful exploration and discovery of unique preferences, needs, and wants while ensuring medical and non-medical needs are met via means that are exclusively for the benefit of the person and supports them to reach their full potential.

(12) T-CCBHC—Texas Certified Community Behavioral Health Clinic. An entity certified in accordance with this subchapter.

§306.107. Certification Eligibility.
An applicant must meet the criteria in this section for certification.

(1) Staffing requirements.

(A) Staffing plans must reflect findings of the community needs assessment.

(B) Staff members must have, and be currently active with, all necessary state-required licenses and accreditations to deliver required services.

(C) Staff members must be trained to serve the needs of the clinic's patient population as identified through the community needs assessment and in compliance with Section 223(a)(2)(A) of the Protecting Access to Medicare Act of 2014.

(D) Staff must be trained in a person-centered and family-centered approach.

(2) Availability and accessibility of services. The applicant cannot deny or limit services based on a person's inability to pay.

(3) Care coordination.

(A) The applicant must coordinate care across settings and providers to ensure seamless transitions for the person across the full spectrum of health services including acute, chronic, and behavioral health.

(B) The T-CCBHC must have a health information technology system that includes an electronic health record and must have a plan in place focusing on ways to improve care coordination using health information technology.

(4) Scope of services.

(A) The applicant must provide, or, with HHSC approval, arrange for the provision of the following services:

(i) crisis mental health services, including 24-hour mobile crisis services, crisis intervention services, and safety monitoring.
(ii) screening, assessment, and diagnosis, including risk assessment;

(iii) person-centered treatment planning or similar processes, including risk assessment and crisis planning;

(iv) outpatient mental health and substance use services;

(v) outpatient clinic primary care screening and monitoring of key health indicators and health risk;

(vi) targeted case management as defined in 1 TAC, §353.1403;

(vii) psychiatric rehabilitation services;

(viii) peer specialist services and family partner supports; and

(ix) intensive, community-based mental health care for members of the armed forces and veterans.

(B) Crisis mental health services must be provided regardless of a person’s place of residence, homelessness, or lack of a permanent address.

(5) Quality and other reporting.

(A) A T-CCBHC must report encounter data, clinical outcomes data, quality data, and other data HHSC requests.

(B) A T-CCBHC must have health information technology systems that allow reporting on data and quality measures.

(6) Organizational authority.

(A) The applicant must be a non-profit or governmental entity; or an entity operated under the authority of the Indian Health Service, an Indian tribe or tribal organization pursuant to a contract, grant, cooperative agreement, or compact with the Indian Health Service pursuant to the Indian Self-Determination Act (25 U.S.C. 450 et seq.), or an urban Indian organization pursuant to a grant or contract with the Indian Health Service under title V of the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.).

(B) The applicant must be operational as an entity listed under subparagraph (A) of this paragraph for a minimum of two years in Texas before applying for T-CCBHC certification.

(C) The applicant’s T-CCBHC must have a governing board. The governing board must:

(i) be comprised of at least 51 percent families, consumers, and people in recovery from behavioral health conditions; or

(ii) establish an advisory committee that meets the requirements of clause (i) of this subparagraph and provides meaningful input to the governing board about the T-CCBHC’s polices, processes, and services.


(a) An applicant must submit a completed HHSC application to be considered for certification or recertification using application information and instructions provided on the HHSC website.

(b) HHSC prioritizes review and approval of LMHA and LBHA T-CCBHC applications as appropriate.

(c) HHSC reviews an application in accordance with the T-CCBHC eligibility requirements in §306.107 of this subchapter (relating to Certification Eligibility) and may deny an application for certification for good cause, including:

(1) the application is incomplete in any aspect;

(2) the application is not submitted in accordance with HHSC’s application instructions or published notice;

(3) the application contains false information;

(4) HHSC, any other agency in Texas or in another state, or federal agency has terminated the applicant’s contract, licensure, or certification for cause at any point in the three years preceding the application submission date;

(5) the applicant is excluded or debarred from contracting with the State of Texas or the federal government;

(6) the applicant has an outstanding Medicaid program audit exception or other unresolved financial liability owed to the State of Texas;

(7) the applicant is ineligible to enroll as a Medicaid provider for reasons relating to criminal history records as set forth in state rules; or

(8) the applicant terminated a provider agreement in a federal health care program, as defined in 42 U.S.C. §1302a-7(b)(I), while an adverse action or sanction was in effect.

(d) An applicant must submit supporting documentation and participate in HHSC conducted interviews to confirm the applicant meets each criterion in §306.107 of this subchapter.

(e) Applicants must submit appropriate documentation in response to no more than two requests from HHSC for supplemental information within a timeframe agreed upon by the applicant and HHSC not to exceed 60 calendar days from the date of HHSC’s first request.

§306.111. Certification Standards.

(a) In order to maintain certification, T-CCBHCs must coordinate with other T-CCBHCs that deliver services in the same geographic service area to ensure services are not duplicated for persons receiving services from more than one T-CCBHC.

(b) T-CCBHC certification does not replace Texas regulations regarding provision of services or contract requirements. T-CCBHCs must maintain all required licenses throughout the certification period. Any regulatory license revocations, of either facility or professional licenses, that result in a T-CCBHC being unable to operate within the State of Texas will preclude the T-CCBHC from continuing as certified.

(c) T-CCBHC certification is approved for three years, subject to parameters outlined in §306.109(c) of this subchapter (relating to Application Process).

(d) T-CCBHCs may reapply for certification if eligible in accordance with §306.109 of this subchapter.

(e) To ensure prevention of a lapse in certification, T-CCBHCs must submit an application, as defined in §306.105(2) of this subchapter (relating to Definitions), to be considered for recertification. Applications must be submitted no earlier than 180 calendar days before the expiration of certification, but not later than 60 calendar days before the expiration of certification.

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

Filed with the Office of the Secretary of State on May 24, 2022.
TRD-202202010
The amendments are proposed under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2 (State Taxation).

The amendments implement Tax Code, §151.3182 (Certain Property Used in Research and Development Activities; Reporting of Estimates and Evaluation).

§3.340. Qualified Research.

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

(1) Business component--A business component is any product, process, computer software, technique, formula, or invention, which is to be held for sale, lease, or license, or used by the taxpayer in a trade or business of the taxpayer.

(2) Combined group--Taxable entities that are part of an affiliated group engaged in a unitary business and that are required to file a combined group report under Tax Code, §171.1014 (Combined Reporting; Affiliated Group Engaged in Unitary Business). For more information about combined groups, see §3.590 of this title (relating to Margin: Combined Reporting).

(3) Directly used in qualified research--Having an immediate use in qualified research activity, without an intervening or ancillary use.

(4) Four-Part Test--The test described in IRC, §41(d) (Qualified research defined) that determines whether research activities are qualified research. The four parts of the test are the Section 174 Test, the Discovering Technological Information Test, the Business Component Test, and the Process of Experimentation Test.

(5) Franchise tax research and development activities credit--A credit against franchise tax for qualified research activities that is allowed under Tax Code, Chapter 171, Subchapter M (Tax Credit for Certain Research and Development Activities).

(6) Internal Revenue Code (IRC)--The Internal Revenue Code of 1986 in effect on December 31, 2011, excluding any changes made by federal law after that date, but including any regulations adopted under the code applicable to the tax year to which the provisions of the code in effect on that date applied. A regulation adopted after December 31, 2011 is only included in this term to the extent that [the regulation requires] a taxpayer could have applied [to apply] the regulation to the 2011 federal income tax year. Examples of treasury regulations included in this definition are:

(A) Treasury Regulation, §1.174-2 (Definition of research and experimental expenditures) as contained in 26 CFR part I (revised as of July 21, 2014);

(B) Treasury Regulation, §1.41-4 (Qualified research for expenditures paid or incurred in taxable years ending on or after December 31, 2003) as contained in 26 CFR part 1 (revised as of November 3, 2016), except for paragraph (c)(6) (Internal use software). For paragraph (c)(6), as provided in the last sentence of Treasury Regulation, §1.41-4(e) (Effective/applicability dates), taxpayers may elect to follow either of the following versions of paragraph (c)(6):

(i) Treasury Regulation, §1.41-4(c)(6) (Internal-use computer software) as contained in 26 CFR part 1 (revised as of April 1, 2003) and IRB 2001-5; or
(ii) Proposed Treasury Regulation, §1.41-4(c)(6) (Internal use software for taxable years beginning on or after the December 31, 1985) as contained in IRB 2002-4.

(7) Qualified research--This term has the meaning given in IRC, §41(d), except that the research must be conducted in Texas. Qualified research activities must satisfy each part of the Four-Part Test.

(8) Registrant--A taxpayer who holds a Texas Qualified Research Registration Number issued by the comptroller.

(9) Registration number--The Texas Qualified Research Registration Number issued by the comptroller to a taxpayer who submits the Texas Registration for Qualified Research and Development Sales Tax Exemption form.

(10) Taxable entity--This term has the meaning given by Tax Code, §171.0002 (Definition of Taxable Entity).

(b) Depreciable tangible personal property used in qualified research.

(1) Subject to paragraph (2) of this subsection, the sale, storage, or use of tangible personal property is exempt from Texas sales and use tax if the property:

(A) has a useful life that exceeds one year;
(B) is subject to depreciation under:
   (i) generally accepted accounting principles; or
   (ii) IRC, §167 (Depreciation) or §168 (Accelerated cost recovery system); and
(C) is sold, leased, rented to, stored, or used by a taxpayer engaged in qualified research; and
(D) is directly used in qualified research. Depreciable tangible personal property is directly used in qualified research if it is used in the actual performance of activities that are part of the qualified research. For example, machinery, equipment, computers, software, tools, laboratory furniture such as desks, laboratory tables, stools, benches, and storage cabinets, and other tangible personal property used by personnel in the process of experimentation are directly used in qualified research. Tangible personal property is not directly used in qualified research if it is used in ancillary or support activities such as administration, maintenance, marketing, distribution, or transportation activities, or if it is used in activities excluded from qualified research. For example, machinery and equipment used by administrative, accounting, or clerical personnel are not directly used in qualified research.

(2) A taxpayer may not claim the exemption if that taxpayer will, as a taxable entity or as a member of a combined group, claim a franchise tax research and development activities credit on a franchise tax report based on the accounting period during which the depreciable tangible personal property used in qualified research would first be subject to Texas sales or use tax.

(3) A claim for a carryforward of an unused franchise tax research and development activities credit under Tax Code, §171.659 (Carryforward) does not affect a taxpayer's ability, as a taxable entity or as a member of a combined group, to claim the sales and use tax exemption provided by paragraph (1) of this subsection.

(4) Property satisfies paragraph (1)(B) of this subsection if it is subject to depreciation under generally accepted accounting principles, IRC, §167, or IRC, §168 even if the taxpayer does not actually depreciate that property.

(5) Property satisfies paragraph (1) of this subsection only if it is tangible personal property subject to depreciation at the time a taxpayer purchases it. For example, assume a taxpayer purchases tangible personal property that is not subject to depreciation. The taxpayer later incorporates that property into real property that is subject to depreciation. Although the real property with the incorporated tangible personal property is subject to depreciation, the tangible personal property, on its own, was never subject to depreciation. The tangible personal property does not satisfy paragraph (1) of this subsection because it was never subject to depreciation as tangible personal property.

(6) A taxpayer has the burden of establishing its entitlement to the exemption by clear and convincing evidence, including proof that the research activities meet the definition of qualified research and applying the shrink-back rule described in subsection (c)(3) of this section. All qualified research activities must be supported by contemporaneous business records.

(7) An Internal Revenue Service audit determination of eligibility for the federal research and development credit under IRC, §41 (Credit for increasing research activities), whether that determination is that the taxpayer qualifies or does not qualify for the federal research and development credit, is not binding on the comptroller's determination of eligibility for the exemption.

(c) Application of the Four-Part Test. Research activities must satisfy each part of the Four-Part Test, as described in paragraph (1) of this subsection, to be qualified research.

(1) Four-Part Test.

(A) Section 174 Test. Expenditures related to the research must be eligible to be treated as expenses under IRC, §174 (Research and experimental expenditures).

(i) Expenditures are eligible to be treated as expenses under IRC, §174, if the expenditures are incurred in connection with the taxpayer's trade or business and represent a research and development cost in the experimental or laboratory sense. Expenditures represent research and development costs in the experimental or laboratory sense if they are for activities intended to discover information that would eliminate uncertainty concerning the development or improvement of a product. Uncertainty exists if the information available to the taxpayer does not establish the capability or method for developing or improving the product or the appropriate design of the product.

(ii) For the purposes of this test, the term "product" includes any pilot model, process, formula, invention, technique, patent, or similar property, and includes products to be used by the taxpayer in its trade or business as well as products to be sold for sale, lease, or license.

(iii) Expenditures for the following are not eligible to be treated as expenses under IRC, §174:

(I) land;
(II) depreciable property;
(III) the ordinary testing or inspection of materials or products for quality control;
(IV) efficiency surveys;
(V) management studies;
(VI) consumer surveys;
(VII) advertising or promotions;
(VIII) the acquisition of another's patent, model, production, or process; or

(IX) research in connection with literary, historical, or similar projects.

(iv) Although expenditures for depreciable property are not eligible to be treated as expenditures under IRC, §174, those expenditures qualify for the purposes of the sales tax research and development exemption, provided that the research activities otherwise satisfy the Four-Part Test and are not excluded under subsection (d) of this section.

(B) Discovering Technological Information Test. The research must be undertaken for the purpose of discovering information that is technological in nature.

(i) Research is undertaken for the purpose of discovering technological information if it is intended to eliminate uncertainty concerning the development or improvement of a business component. Uncertainty exists if the information available to the taxpayer does not establish the capability or method for developing or improving the business component, or the appropriate design of the business component.

(ii) In order to satisfy the requirement that the research is technological in nature, the process of experimentation used to discover information must fundamentally rely on principles of the physical or biological sciences, engineering, or computer science. A taxpayer may employ existing technologies and may rely on existing principles of the physical or biological sciences, engineering, or computer science to satisfy this requirement.

(iii) A determination that research is undertaken for the purpose of discovering information that is technological in nature does not require that the taxpayer:

(I) seek to obtain information that exceeds, expands, or refines the common knowledge of skilled professionals in the particular field of science or engineering in which the taxpayer is performing the research; or

(II) succeed in developing a new or improved business component.

(C) Business Component Test. The application of the technological information for which the research is undertaken must be intended to be useful in the development of a new or improved business component of the taxpayer, which may include any product, process, computer software, technique, formula, or invention that is to be held for sale, lease, or license, or used by the taxpayer in a trade or business of the taxpayer.

(i) If a taxpayer provides a service to a customer, the service provided to that customer is not a business component because a service is not a product, process, computer software, technique, formula, or invention. However, a product, process, computer software, technique, formula, or invention used by a taxpayer to provide services to its customers may be a business component.

(ii) A design is not a business component because a design is not a product, process, computer software, technique, formula, or invention. While uncertainty as to the appropriate design of a business component is a qualifying uncertainty for the Section 174 Test and the Discovering Technological information test, the design itself is not a business component. For example, the design of a structure is not a business component, although the structure itself may be a business component. Similarly, a blueprint or other plan used to construct a structure that embodies a design is not a business component.

(D) Process of Experimentation Test. Substantially all of the research activities must constitute elements of a process of experimentation for a qualified purpose. A process of experimentation is undertaken for a qualified purpose if it relates to a new or improved function, performance, reliability, or quality of a business component. Any research relating to style, taste, cosmetic, or seasonal design factors does not satisfy the Process of Experimentation Test.

(i) A process of experimentation is a process designed to evaluate one or more alternatives to achieve a result where the capability or the method of achieving that result, or the appropriate design of that result, is uncertain as of the beginning of the taxpayer's research activities.

(ii) A process of experimentation must:

(I) be an evaluative process and generally should be capable of evaluating more than one alternative; and

(II) fundamentally rely on the principles of the physical or biological sciences, engineering, or computer science and involve:

(-a-) the identification of uncertainty concerning the development or improvement of a business component;

(-b-) the identification of one or more alternatives intended to eliminate that uncertainty; and

(-c-) the identification and the conduct of a process of evaluating the alternatives through, for example, modeling, simulation, or a systematic trial and error methodology.

(iii) A taxpayer may undertake a process of experimentation if there is no uncertainty concerning the taxpayer's capability or method of achieving the desired result so long as the appropriate design of the desired result is uncertain as of the beginning of the taxpayer's research activities. Uncertainty concerning the development or improvement of the business component (e.g., its appropriate design) does not establish that all activities undertaken to achieve that new or improved business component constitute a process of experimentation.

(iv) The substantially all requirement of this subparagraph is satisfied only if 80% or more of a taxpayer's research activities, measured on a cost or other consistently applied reasonable basis constitute elements of a process of experimentation that relates to a new or improved function, performance, reliability, or quality. The substantially all requirement is satisfied even if the remainder of a taxpayer's research activities with respect to the business component do not constitute elements of a process of experimentation that relates to a new or improved function, performance, reliability, or quality.

(v) Non-experimental methods, such as simple trial and error, brainstorming, or reverse engineering, are not considered a process of experimentation.

(vi) The following are factors that may be considered in determining whether a trial and error methodology is experimental systematic trial and error or non-experimental simple trial and error. Evidence provided to determine the type of trial and error is not limited to these factors, nor is evidence of each factor required. These factors only apply to determining whether a process of experimentation is systematic trial and error. Systematic trial and error is not the only qualifying process of experimentation. These factors are:

(I) whether the person conducting the trial and error methodology stops testing alternatives once a single acceptable result is found or continues to find multiple acceptable results for comparison;

(II) whether all the results of the trial and error methodology are recorded for evaluation;
(III) whether there is a written procedure for conducting the trial and error methodology; and

(IV) whether there is a written procedure for evaluating the results of the trial and error methodology.

(vii) Examples.

(I) Example 1. A taxpayer is engaged in the business of developing and manufacturing widgets. The taxpayer wants to change the color of its blue widget to green. The taxpayer obtains several different shades of green paint from various suppliers. The taxpayer paints several sample widgets, and surveys its customers to determine which shade of green its customers prefer. The taxpayer's activities to change the color of its blue widget to green do not satisfy the Process of Experimentation Test because its activities are not undertaken for a qualified purpose. All of the taxpayer's research activities are related to style, taste, cosmetic, or seasonal design factors.

(II) Example 2. The taxpayer in Example 1 chooses one of the green paints. The taxpayer obtains samples of the green paint from a supplier and determines that it must modify its painting process to accommodate the green paint because the green paint has different characteristics from other paints it has used. The taxpayer obtains detailed data on the green paint from its paint supplier. The taxpayer also consults with the manufacturer of its paint spraying machines. The manufacturer informs the taxpayer that it must acquire new nozzles that operate with the green paint it wants to use because the current nozzles do not work with the green paint. The taxpayer tests the new nozzles, using the green paint, to ensure that they work as specified by the manufacturer of the paint spraying machines. The taxpayer's activities to modify its painting process are not qualified research. The taxpayer did not conduct a process of evaluating alternatives in order to eliminate uncertainty regarding the modification of its painting process. Rather, the manufacturer of the paint machines eliminated the taxpayer's uncertainty regarding the modification of its painting process. The taxpayer's activities to test the nozzles to determine if the nozzles work as specified by the manufacturer of the paint spraying machines are in the nature of routine or ordinary testing or inspection for quality control.

(III) Example 3. A taxpayer is engaged in the business of manufacturing food products and currently manufactures a large-shred version of a product. The taxpayer seeks to modify its current production line to permit it to manufacture both a large-shred version and a fine-shred version of one of its food products. A smaller, thinner shredding blade capable of producing a fine-shred version of the product is not commercially available. Thus, the taxpayer must develop a new shredding blade that can be fitted onto its current production line. The taxpayer is uncertain concerning the design of the new shredding blade because the material used in its existing blade breaks when machined into smaller, thinner blades. The taxpayer engages in a systematic trial and error process of analyzing various blade designs and materials to determine whether the new shredding blade must be constructed of a different material from that of its existing shredding blade and, if so, what material will best meet its functional requirements. The taxpayer's activities to modify its current production line by developing the new shredding blade satisfy the Process of Experimentation Test. Substantially all of the taxpayer's activities constitute elements of a process of experimentation because it evaluated alternatives to achieve a result where the method of achieving that result, and the appropriate design of that result, were uncertain as of the beginning of the taxpayer's research activities. The taxpayer identified uncertainties related to the development of a business component, and identified alternatives intended to eliminate these uncertainties. Furthermore, the taxpayer's process of evaluating identified alternatives was technological in nature and was undertaken to eliminate the uncertainties.

(IV) Example 4. A taxpayer is in the business of designing, developing and manufacturing automobiles. In response to government-mandated fuel economy requirements, the taxpayer seeks to update its current model vehicle and undertakes to improve aerodynamics by lowering the hood of its current model vehicle. The taxpayer determines, however, that lowering the hood changes the air flow under the hood, which changes the rate at which air enters the engine through the air intake system, which reduces the functionality of the cooling system. The taxpayer's engineers are uncertain how to design a lower hood to obtain the increased fuel economy, while maintaining the necessary air flow under the hood. The taxpayer designs, models, simulates, tests, refines, and re-tests several alternative designs for the hood and associated proposed modifications to both the air intake system and cooling system. This process enables the taxpayer to eliminate the uncertainties related to the integrated design of the hood, air intake system, and cooling system. Such activities constitute 85% of its total activities to update its current model vehicle. The taxpayer then engages in additional activities that do not involve a process of evaluating alternatives in order to eliminate uncertainties. The additional activities constitute only 15% of the taxpayer's total activities to update its current model vehicle. In this case substantially all of the taxpayer's activities constitute elements of a process of experimentation because it evaluated alternatives to achieve a result where the method of achieving that result, and the appropriate design of that result, were uncertain as of the beginning of its research activities. The taxpayer identified uncertainties related to the improvement of a business component and identified alternatives intended to eliminate these uncertainties. Furthermore, the taxpayer's process of evaluating the identified alternatives was technological in nature and was undertaken to eliminate the uncertainties. Because 85% of the taxpayer's activities to update its current model vehicle constitute elements of a process of experimentation that relates to a new or improved function, performance, reliability, or quality, all of its activities satisfy the Process of Experimentation Test.

(V) Example 5. A taxpayer is in the business of providing building and construction services, including the construction of warehouses, strip malls, office buildings, and other commercial structures. The taxpayer is engaged to construct a structure in a part of Texas where foundation problems are common. The taxpayer's engineers were uncertain how to design the structure to ensure stability of the structure's foundation because the taxpayer had never designed a structure in a similar location. The taxpayer's engineers used their professional experience and various building codes to determine how to design the foundation based on the conditions at the construction site. The engineers chose to use piles in the foundation. The taxpayer constructed a test pile on site to confirm whether this would work in the conditions present on the construction site. This test pile would become part of the foundation of the structure regardless of whether the engineers had to redesign the additional piles required for the foundation. The taxpayer's activities in using professional experience and business codes to design the foundation did not meet the Process of Experimentation Test because the activities did not resolve technological uncertainties through an experimental process. Constructing the test pile also did not meet the Process of Experimentation Test because it was not an evaluative process.

(VI) Example 6. A taxpayer is in the business of providing building and construction services, including the construction of warehouses, strip malls, office buildings, and other commercial structures. For one of its projects to construct an office building, the taxpayer was uncertain how to design the layout of the electrical systems. The taxpayer's employees held on-site meetings to discuss different options, such as running the wire under the floor or through the ceiling, but did not actually experiment by installing wire in different locations. The taxpayer used computer-aided simulation and modeling
to produce the final electrical system layout. While in some cases computer-aided simulation and modeling may be an experimental process, in this case, it was not an experimental process because the taxpayer did not use the computer-aided simulation and modeling to evaluate different alternatives in a scientific manner. The taxpayer's activities did not satisfy the Process of Experimentation Test because it did not conduct an experimental process of evaluating alternatives to eliminate a technological uncertainty.

(II) Example 7. A taxpayer is an oil and gas operator that recently acquired rights to drill in an area in which it had not previously operated. The taxpayer decided to use horizontal drilling in this area, but it had never drilled a horizontal well and was uncertain how to successfully execute the horizontal drilling. At the time the taxpayer began horizontal drilling, the technology to drill horizontal wells was established. The taxpayer selected technology from existing commercially available options to use in its horizontal drilling program. The taxpayer's activities did not satisfy the Process of Experimentation Test because evaluating commercially available options does not constitute a process of experimentation.

(III) Example 8. A taxpayer is an oil and gas operator that recently acquired rights to drill in an area in which it had not previously operated. The taxpayer decided to use horizontal drilling in this area. The taxpayer had drilled a horizontal well before in a different formation and at different depths. However, it had never drilled a horizontal well in this formation or at the required depths and was uncertain how to successfully execute the horizontal drilling. The taxpayer utilized its existing technology to perform its horizontal drilling operations in this area and the existing technology was successful. The taxpayer's activities did not satisfy the Process of Experimentation Test because the taxpayer merely used its existing technology and did not perform any experimentation to evaluate alternative any drilling methods.

(IV) Example 9. A taxpayer sought to discover cancer immunotherapies. The taxpayer was uncertain as to the appropriate design of the proteins to be used as a drug candidate. The taxpayer identified several alternative protein constructs and used a process to test them. The taxpayer's process involved testing the constructs using in vitro functional assays and binding assays, and either modifying the designs or discarding them and repeating the previous steps. The taxpayer took the resulting products from the in vitro testing and tested the drug candidate in living organisms. This process evaluated the various alternatives identified by the taxpayer. The taxpayer's activities satisfied the Process of Experimentation Test.

(2) Application of the Four-Part Test to business components. The Four-Part Test is applied separately to each business component of the taxpayer. Any plant process, machinery, or technique for commercial production of a business component is treated as a separate business component from the business component being produced.

(3) Shrink-back rule. The Four-Part Test is first applied at the level of the discrete business component used by the taxpayer in a trade or business of the taxpayer. If the requirements of the Four-Part Test are not met at that level, then they are applied at the next most significant subset of elements of the business component. This shrinking back of the product continues until either a subset of elements of the product that satisfies the requirements of the Four-Part Test is reached, or the most basic element of the product is reached and such element fails to satisfy any part of the Four-Part Test.

(4) Software development as qualified research. In determining if software development activities constitute qualified research, the comptroller shall consider the facts and circumstances of each activity.

(A) Application of Four-Part Test to software development activities.

(i) A taxpayer must prove that a software development activity is qualified research and meets all the requirements of the Four-Part Test under paragraph (1) of this subsection, even if the activity is likely to qualify as described in subparagraph (B) of this paragraph.

(ii) A taxpayer may prove that a software development activity described as unlikely to qualify in subparagraph (C) of this paragraph, is qualified research by providing evidence that the activity meets all the requirements of the Four-Part Test under paragraph (1) of this subsection.

(B) Software development activities likely to qualify. Types of activities likely to qualify include, but are not limited to:

(i) developing the initial release of an application software product that includes new constructs, such as new architectures, new algorithms, or new database management techniques;

(ii) developing system software, such as operating systems and compilers;

(iii) developing specialized technologies, such as image processing, artificial intelligence, or speech recognition; and

(iv) developing software as part of a hardware product where the software interacts directly with that hardware in order to make the hardware/software package function as a unit.

(C) Software development activities unlikely to qualify. Types of activities unlikely to qualify include, but are not limited to:

(i) maintaining existing software applications or products;

(ii) configuring purchased software applications;

(iii) reverse engineering of existing applications;

(iv) performing studies, or similar activities, to select vendor products;

(v) detecting flaws and bugs directed toward the verification and validation that the software was programmed as intended and works correctly;

(vi) modifying an existing software business component to make use of new or existing standards or devices, or to be compliant with another vendor's product or platform;

(vii) developing a business component that is substantially similar in technology, functionality, and features to the capabilities already in existence at other companies;

(viii) upgrading to newer versions of hardware or software or installing vendor-fix releases;

(ix) re-hosting or porting an application to a new hardware such as from mainframe to PC, or software platform, such as Windows to UNIX, or rewriting an existing application in a new language, such as rewriting a COBOL mainframe application in C++;

(x) writing hardware device drivers to support new hardware, such as disks, scanners, printers, or modems;

(xi) performing data quality, data cleansing, and data consistency activities, such as designing and implementing software to validate data fields, clean data fields, or make the data fields consistent across databases and applications;
(xii) bundling existing individual software products into product suites, such as combining existing word processor, spreadsheet, and slide presentation software applications into a single suite;

(xiii) expanding product lines by purchasing other products;

(xiv) developing interfaces between different software applications;

(xvi) developing vendor product extensions;

(xvii) designing graphic user interfaces;

(xviii) developing functional enhancements to existing software applications/products;

(xix) developing software as an embedded application, such as in cell phones, automobiles, and airplanes;

(xx) developing software utility programs, such as debuggers, backup systems, performance analyzers, and data recovery;

(xxi) changing from a product based on one technology to a product based on a different or newer technology; and

(xxii) adapting and commercializing technology developed by a consortium or open software group.

(d) Excluded research activities. Qualified research does not include the activities described in this subsection.

(1) Research after commercial production. Any research conducted after the beginning of commercial production of the business component.

(A) Activities are conducted after the beginning of commercial production of a business component if such activities are conducted after the component is developed to the point where it is ready for commercial sale or use or meets the basic functional and economic requirements of the taxpayer for the component's sale or use.

(B) The following activities are deemed to occur after the beginning of commercial production of a business component:

(i) preproduction planning for a finished business component;

(ii) tooling-up for production;

(iii) trial production runs;

(iv) troubleshooting involving detecting faults in production equipment or processes;

(v) accumulating data relating to production processes;

(vi) debugging flaws in a business component; and

(vii) any activities that involve the use of an item for which the taxpayer claimed the manufacturing exemption under Tax Code, §151.318.

(C) In cases involving development of both a product and a manufacturing or other commercial production process for the product, the research after commercial production exclusion applies separately for the activities relating to the development of the product and the activities relating to the development of the process. For example, even after a product meets the taxpayer's basic functional and economic requirements, activities relating to the development of the manufacturing process may still constitute qualified research, provided that the development of the process itself separately satisfies the requirements of this section, and the activities are conducted before the process meets the taxpayer's basic functional and economic requirements or is ready for commercial use.

(D) Clinical testing of a pharmaceutical product prior to its commercial production in the United States is not treated as occurring after the beginning of commercial production even if the product is commercially available in other countries. Additional clinical testing of a pharmaceutical product after a product has been approved for a specific therapeutic use by the Food and Drug Administration and is ready for commercial production and sale is not treated as occurring after the beginning of commercial production if such clinical testing is undertaken to establish new functional uses, characteristics, indications, combinations, dosages, or delivery forms for the product. A functional use, characteristic, indication, combination, dosage, or delivery form shall be considered new only if such functional use, characteristic, indication, combination, dosage, or delivery form must be approved by the Food and Drug Administration.

(E) Examples.

(i) Example 1. A taxpayer is a tire manufacturer and develops a new material to use in its tires. The taxpayer conducts research to determine the changes that will be necessary for it to modify its existing manufacturing processes to manufacture the new tire. The taxpayer determines that the new tire material retains heat for a longer period of time than the materials it currently uses for tires, and as a result, the new tire material adheres to the manufacturing equipment during tread cooling. The taxpayer evaluates several alternatives for processing the treads at cooler temperatures to address this problem, including a new type of belt for its manufacturing equipment to be used in tread cooling. Such a belt is not commercially available. Because the taxpayer is uncertain of the belt design, it develops and conducts sophisticated engineering tests on several alternative designs for a new type of belt to be used in tread cooling until it successfully achieves a design that meets its requirements. The taxpayer then manufactures a set of belts for its production equipment, installs the belts, and tests the belts to make sure they were manufactured correctly. The taxpayer's research with respect to the design of the new belts to be used in its manufacturing of the new tire may be qualified research under the Four-Part Test. However, the taxpayer's expenses to implement the new belts, including the costs to manufacture, install, and test the belts were incurred after the belts met the taxpayer's functional and economic requirements and are excluded as research after commercial production.

(ii) Example 2. For several years, a taxpayer has manufactured and sold a particular kind of widget. The taxpayer initiates a new research project to develop a new or improved widget. The taxpayer's activities to develop a new or improved widget are not excluded from the definition of qualified research under this paragraph. The taxpayer's activities relating to the development of a new or improved widget constitute a new research project to develop a new business component and are not considered activities conducted after the beginning of commercial production.

(iii) Example 3. For the purposes of this example, assume that the taxpayer's development of its products and manufacturing processes satisfies the Four-Part Test described by subsection (c) of this section and is not otherwise excluded under this subsection. A taxpayer is a manufacturer of integrated circuits for use in specific applications. The taxpayer develops various integrated circuit devices and associated manufacturing processes. The taxable entity assembles various product configurations for testing. After an internal process of testing, the taxpayer delivers a sample quantity of the integrated circuit to a potential customer for further testing. At the time when the samples are delivered to the taxpayer's potential customer, the potential customer has not agreed to purchase any integrated circuits from the
taxpayer. This process of testing by both the taxpayer and its poten-
tial customer continues until an acceptable product and manufacturing
process to produce the product is achieved. At that point, the taxpayer
and the potential customer enter an agreement for the delivery of an
order of the integrated circuits. In some cases, no acceptable pro-
duct or manufacturing process is achieved, and no agreement is reached
with the potential customer. Research activities occurring prior to an
agreement are not considered activities conducted after the beginning
of commercial production because the integrated circuits were not yet
ready for commercial use. Any research that occurs after an agreement
is reached are excluded as activities conducted after the beginning of
commercial production because the integrated circuits were ready for
commercial use once the product and associated manufacturing process
was accepted by the potential customer.

(2) Adaptation of existing business components. Activi-
ties relating to adapting an existing business component to a particular
customer's requirement or need. This exclusion does not apply merely
because a business component is intended for a specific customer. For
example:

(A) Example 1. A taxpayer is a computer software de-
development firm and owns a general ledger accounting software core
program that it markets and licenses to customers. The taxpayer incurs
expenditures in adapting the core software program to the requirements
of one of its customers. Because the taxpayer's activities represent ac-
tivities to adapt an existing software program to a particular customer's
requirement or need, its activities are excluded from the definition of
qualified research under this paragraph.

(B) Example 2. Assume that the customer from Exam-
ple 1 pays the taxpayer to adapt the core software program to the cus-
tomer's requirements. Because the taxpayer's activities are excluded
from the definition of qualified research, the customer's payments to
the taxpayer do not for qualified research and are not considered to be
contract research expenses.

(C) Example 3. Assume that the customer from Exam-
ple 1 uses its own employees to adapt the core software program to
its requirements. Because the customer's employees' activities to adapt
the core software program to its requirements are excluded from the
definition of qualified research, the wages the customer paid to its em-
ployees do not constitute in-house research expenses.

(D) Example 4. A taxpayer manufactures and sells rail
cars. Because rail cars have numerous specifications related to perfor-
manence, reliability and quality, rail car designs are subject to extensive,
complex testing in the scientific or laboratory sense. A customer or-
ders passenger rail cars from the taxpayer. The customer's rail car re-
quirements differ from those of the taxpayer's other existing customers
only in that the customer wants fewer seats in its passenger cars and a
higher quality seating material and carpet that are commercially avail-
able. The taxpayer manufactures rail cars meeting the customer's re-
quirements. The rail car sold to the customer was not a new business
component, but merely an adaptation of an existing business compo-
nent that did not require a process of experimentation. Thus, the tax-
payer's activities to manufacture rail cars for the customer are excluded
from the definition of qualified research because the taxpayer's activi-
ties represent activities to adapt an existing business component to
a particular customer's requirement or need.

(E) Example 5. A taxpayer is a manufacturer and un-
dertakes to create a manufacturing process for a new valve design.
The taxpayer determines that it requires a specialized type of robotic
equipment to use in the manufacturing process for its new valves. Such
robotic equipment is not commercially available. Therefore, the tax-
payer purchases existing robotic equipment for the purpose of modify-
ing it to meet its needs. The taxpayer's engineers identify uncertainty
that is technological in nature concerning how to modify the existing
robotic equipment to meet its needs. The taxpayer's engineers develop
several alternative designs, conduct experiments using modeling and
simulation in modifying the robotic equipment, and conduct extensive
scientific and laboratory testing of design alternatives. As a result of
this process, the taxpayer's engineers develop a design for the robotic
equipment that meets its needs. The taxpayer constructs and installs
the modified robotic equipment on its manufacturing process. The
taxpayer's research activities to determine how to modify the robotic
equipment it purchased for its manufacturing process are not consid-
ered an adaptation of an existing business component.

(F) Example 6. A taxpayer is an oil and gas operator
and has been engaged in horizontal drilling for the past ten years. Re-
cently, the taxpayer was hired by a customer to drill in a formation. The
drilling objectives included targeting an interval within that formation
for horizontal drilling. The taxpayer was uncertain about the success-
ful execution of the horizontal drilling because it had not previously
drilled a horizontal well in that formation. The taxpayer was also un-
certain about the economic results from the targeted interval. The tax-
payer drilled several horizontal wells before its customer was satisfied
with the economic results. The taxpayer modified its existing horizon-
tal drilling program based on these results. The taxpayer's activities to
identify a horizontal drilling process are excluded from the definition
of qualified research because the activities consisted of adapting an ex-
isting business component, its existing horizontal drilling process, and
did not involve creating a new or improved business component.

(G) Example 7. For the purposes of this example, as-
sume that the taxpayer's development of its products satisfies the Four-
Part Test described by subsection (c) of this section and is not other-
wise excluded under this subsection. A taxpayer is a manufacturer of
rigid plastic containers. The taxpayer contracts with major food and
beverage manufacturers to provide suitable bottle and packaging des-
igns. The products designed by the taxpayer may be for repeat cus-
tomers and the sizes and types of bottle may be similar to previous
products. The development of each new product, and the production
process necessary to produce the products at sufficient production vol-
ume, starts from new concept drawings developed by engineers. The
taxpayer uses a qualifying process of experimentation to evaluate alter-
native concepts for the product and production processes. The tax-
payer's activities related to both the product and the production process
are not excluded from the definition of qualified research as an adapta-
tion of an existing business component.

(3) Duplication of existing business component. Any re-
search related to the reproduction of an existing business component,
in whole or in part, from a physical examination of the business compo-
nent itself or from plans, blueprints, detailed specifications, or publicly
available information with respect to such business component. This
exclusion does not apply merely because the taxpayer examines an ex-
isting business component in the course of developing its own business
component.

(4) Surveys, studies, etc. Any efficiency survey; activity
relating to management function or technique; market research, test-
ing or development (including advertising or promotions); routine data
collection; or routine or ordinary testing or inspection for quality con-
trol.

(5) Computer software. Any research activities with re-
spect to internal use software.

(A) For the purposes of this paragraph, internal use soft-
ware is computer software developed by, or for the benefit of, the tax-
payer primarily for internal use by the taxpayer.
ware internally if the software was developed for use in the operation of the business. Computer software that is developed to be commercially sold, leased, licensed, or otherwise marketed for separately stated consideration to unrelated third parties is not internal use software.] 

[(B) Software developed by a taxpayer primarily for internal use by an entity that is part of an affiliated group to which the taxpayer also belongs shall be considered internal use software for purposes of this paragraph.] 

[(G) This exclusion does not apply to software used in:

(i) an activity that constitutes qualified research, or
(ii) a production process that meets the requirements of the Four-Part Test.

[(D) The determination as to whether software is internal use software depends on the facts and circumstances existing at the beginning of the development of the software.] 

(6) Social sciences, etc. Any research in the social sciences, arts, or humanities.

(7) Funded research. Any research funded by any grant, contract, or otherwise by another person or governmental entity.

(A) Research is considered funded if:

(i) the taxpayer performing the research for another person retains no substantial rights to the results of the research; or
(ii) the payments to the researcher are not contingent upon the success of the research.

(B) For the purposes of determining whether a taxpayer retains substantial rights to the results of the research:

(i) Incidental benefits to the researcher from the performance of the research do not constitute substantial rights. For example, increased experience in a field of research is not considered substantial rights.

(ii) A taxpayer does not retain substantial rights in the research it performs if the taxpayer must pay for the right to use the results of the research.

(C) If a taxpayer performing research does not retain substantial rights to the results of the research, the research is considered funded regardless of whether the payments to the researcher are contingent upon the success of the research. In this case, all research activities are considered funded even if the researcher has expenses that exceed the amount received by the researcher for the research.

(D) If a taxpayer performing research does retain substantial rights to the results of the research and the research is considered funded under subparagraph (A)(ii) of this paragraph, the research is only funded to the extent of the payments and fair market value of any property that the taxpayer becomes entitled to by performing the research. If the expenses related to the research exceed the amount the researcher is entitled to receive, the research is not considered funded with respect to the excess expenses. For example, a taxpayer performs research for another person. Based on the contract, the research activities are considered funded under subparagraph (A)(ii) of this paragraph because payments to the researcher are not contingent on the success of the research. The taxpayer retains substantial rights to the results of the research. The taxpayer is entitled to $100,000 under the contract but spent $120,000 on the research activities. In this case, the research is considered funded with respect to $100,000 and is not considered funded with respect to $20,000.

(E) A taxpayer performing research for another person must identify any other person paying for the research activities and any person with substantial rights to the results of the research.

(F) All agreements, not only research contracts, entered into between the taxpayer performing the research and the party funding the research shall be considered in determining the extent to which the research is funded.

(G) The provisions of this paragraph shall be applied separately to each research project undertaken by the taxpayer.

(e) Texas Qualified Research and Development Exemption Registration. In order to claim an exemption under this section, a taxpayer must first register with the comptroller and obtain a registration number.

(1) Registration procedure. To obtain a registration number, a taxpayer must complete Form AP-234, Texas Registration for Qualified Research and Development Sales Tax Exemption, its electronic equivalent, or any form promulgated by the comptroller that succeeds such form.

(A) The taxpayer requesting the registration number must certify that it will not, as a taxable entity or as a member of a combined group, claim a franchise tax research and development activities credit on a franchise tax report based on an accounting period during which it claims an exemption under subsection (b) of this section.

(B) The taxpayer requesting the registration number must provide all data and information required by the comptroller to administer the exemption and comply with Tax Code, §151.3182(c) (Certain Property Used in Research and Development Activities; Reporting of Estimates and Evaluation).

(2) Retroactive registration. A taxpayer may request that a registration number be given retroactive effect.

(A) A taxpayer may request that a registration number have retroactive effect by following the procedures required under paragraph (1) of this subsection and by completing an annual information report, described in paragraph (3) of this subsection, for each prior year for which the registration number is to be effective.

(B) The registration number may be made retroactive to the later of January 1, 2014, or a date requested by a registrant that is no more than four years prior to the date the registration is received, if the date requested is not within an accounting period during which the registrant, as a taxable entity or as a member of a combined group, claimed the franchise tax research and development activities credit.

(C) A registrant who is issued a retroactive registration number may file a claim for refund of Texas sales and use tax paid on purchases made on or after the later of January 1, 2014, or the effective date of the registration number, that qualify for exemption under subsection (b) of this section, in accordance with the requirements of §3.325 of this title (relating to Refunds and Payments Under Protest).

(D) A claim for a carryforward of an unused franchise tax research and development activities credit under Tax Code, §171.659 does not affect a taxpayer's ability, as a taxable entity or as a member of a combined group, to request a retroactive registration.

(3) Annual information report. A registrant must submit an annual information report for each calendar year its registration number is effective, irrespective of the date on which the original registration occurred.
(A) The registrant must provide all data and information required by the comptroller to administer the exemption and comply with Tax Code, §151.3182(c).

(B) The annual information report must be submitted electronically unless the comptroller issues a waiver. A registrant who cannot comply with this requirement due to hardship, impracticality, or other valid reason must submit a written request to the comptroller for a waiver of the requirement.

(C) The due date for the annual information report for the preceding calendar year is March 31. If March 31 falls on a Saturday, Sunday, or a legal holiday, the due date is the next business day.

(i) An annual information report filed electronically must be completed and submitted by 11:59 p.m. central time on the due date to be considered timely.

(ii) Reports submitted on paper must be postmarked on or before the due date to be considered timely.

(D) A registrant who fails to timely file an annual information report for its registration number will be given written notice of the failure to file. If an annual information report is not submitted within 60 days of the date of the notice of failure to file, the registration number will be cancelled by the comptroller in accordance with paragraph (5) of this subsection.

(4) Direct payment permit holders. A direct payment permit holder must obtain a registration number as required by paragraph (1) of this subsection in order to claim an exemption under this section. A direct payment permit holder with a registration number must file an annual information report for each year the number is effective as required by paragraph (3) of this subsection.

(5) Cancellation of registration number by the comptroller. The comptroller will cancel the registration number of a registrant who fails to comply with the provisions of this section. For example, the comptroller may cancel the registration number of a registrant who fails to file an annual information report or who claims the franchise tax research and development activities credit without first cancelling its registration number, as required by paragraph (8) of this subsection. The comptroller shall give written notice of the cancellation to the registrant. The notice may be personally served on the registrant or sent by regular mail to the registrant’s address as shown in the comptroller’s records. The former registrant may not claim an exemption under this section during the period when the registration number is cancelled. A former registrant that purchases an item under a cancelled registration number may be subject to a criminal penalty under Tax Code, §151.707 (Resale or Exemption Certificate; Criminal Penalty) and §3.287(d)(3) of this title (relating to Exemption Certificates).

(6) Effective date of cancellation. A registrant whose registration number is cancelled by the comptroller is responsible for remitting Texas sales and use tax, and penalty and interest from the date of purchase, on any items purchased tax-free pursuant to Tax Code, §151.3182 on or after the effective date of cancellation. In the case of a registrant whose registration number is cancelled because of a failure to file an annual information report, the effective date of the cancellation is December 31 of the last year for which the registrant filed an annual information report. In the case of a registrant whose registration number is cancelled because the registrant, as a taxable entity or as a member of a combined group, claimed the franchise tax research and development activities credit, the effective date of cancellation is the beginning date of the accounting period covered by the franchise tax report on which the credit was claimed.

(7) Reinstatement following cancellation. A former registrant who has had its registration number cancelled by the comptroller may submit a request in writing to have the registration number reinstated.

(A) A former registrant whose registration number has been cancelled may request reinstatement of the number be given retroactive effect. The registrant must file an annual information report for each prior year for which the registration number is to be effective.

(B) A registration number will not be reinstated for periods during which the former registrant is not eligible for the exemption under this section.

(C) Before the comptroller will reinstate a registration number, the former registrant must remit any Texas sales and use taxes, as well as applicable penalties and interest from the date of purchase, on all purchases made tax-free under this section during periods when the registrant was not eligible for the exemption under this section.

(8) Cancellation of registration number by registrant. A registrant who has received a registration number and subsequently chooses to claim the franchise tax research and development activities credit must cancel the registration number. The registrant is responsible for remitting Texas sales and use tax, and penalty and interest from the date of purchase, on any items purchased tax-free under this section during any accounting periods covered by a franchise tax report on which the credit is claimed.

(f) Texas Qualified Research Sales and Use Tax Exemption Certificate. Beginning January 1, 2014, a retailer may accept a valid and complete Form 01-931, Texas Qualified Research Sales and Use Tax Exemption Certificate or any form promulgated by the comptroller or that succeeds such form, in lieu of Texas sales and use tax on the sale of depreciable tangible personal property that qualifies for exemption under subsection (b) of this section. To be valid and complete, a Texas Qualified Research Sales and Use Tax Exemption Certificate must bear the registration number issued to the registrant by the comptroller and must be signed by the registrant or the registrant’s authorized agent. Texas Qualified Research Sales and Use Tax Exemption Certificates are subject to the requirements of §3.287(d) of this title. A retailer must maintain a copy of the Texas Qualified Research Sales and Use Tax Exemption Certificate accepted in lieu of tax on a sale and all records supporting that transaction. Refer to §3.281 of this title (relating to Records Required; Information Required).

(g) Divergent use. When a registrant uses an item purchased under a valid Texas Qualified Research Sales and Use Tax Exemption Certificate in a taxable manner, the registrant is liable for payment of Texas sales and use tax, plus penalty and interest as applicable, based on the fair market rental value of the tangible personal property for the period of time used in the taxable manner. This subsection applies to an item that is used for any purpose other than for use in qualified research, whether that use occurs before, during, or after the time when the item is used in qualified research. Refer to Tax Code, §151.155 (Exemption Certificate).

(h) Refund of Texas sales and use tax paid on depreciable tangible personal property used in qualified research. A registrant with a valid registration number may file a claim for refund of Texas sales and use tax paid on purchases made on or after the later of January 1, 2014, or the effective date of the registration number, that qualify for exemption under subsection (b) of this section in accordance with the requirements of §3.325 of this title.

(i) Effective dates.

(1) The provisions of this section apply to the sale, storage, or use of tangible personal property occurring on or after January 1, 2014.
(2) The sales and use tax exemption for depreciable tangible personal property used in qualified research expires on December 31, 2026.

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

Filed with the Office of the Secretary of State on May 24, 2022.

TRD-202202019
Jennifer Burleson
Director, Tax Policy
Comptroller of Public Accounts
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 475-2220

SUBCHAPTER V. FRANCHISE TAX

34 TAC §3.599

The Comptroller of Public Accounts proposes amendments to §3.599, concerning margin: research and development activities credit. The comptroller amends this section to provide guidance regarding the franchise tax research and development activities credit.

The comptroller proposes to amend the definition of Internal Revenue Code (IRC) in subsection (b)(5) to explain which federal Treasury Regulations are applicable to the 2011 federal income tax year. The comptroller has reconsidered comments received during the 2021 rulemaking process and agrees that the adopted definition is too restrictive. The amended definition includes any Treasury Regulation that a taxable entity could have applied to the 2011 federal income tax year. The amended definition also includes specific examples of Treasury Regulations applicable to the 2011 federal income tax year.

The comptroller proposes to amend subsection (d)(5) to remove items that are inconsistent with the changes made to the definition of IRC. The comptroller reletters subparagraph (C) accordingly.

The comptroller reorganizes subsection (i)(1) and (2) for readability and amends the language moved from paragraph (2) to paragraph (1) to explain that the combined group is the taxable entity for the purposes of calculating and reporting the credit.

The comptroller revises paragraph (3) to remove the current text restricting credit carryforwards and describes how to determine the credit carryforward when the membership of a combined group changes.

The comptroller proposes to amend subsection (m) by explaining that the conveyance, assignment, or transfer of an ownership interest in the taxable entity is not a conveyance, assignment, or transfer of the credit by the taxable entity.

Brad Reynolds, Chief Revenue Estimator, has determined that during the first five years that the proposed amended rule is in effect, the rule: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rule's applicability; and will not positively or adversely affect this state's economy.

Mr. Reynolds also has determined that the proposed amended rule would benefit the public by improving the clarity and implementation of the section. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses or rural communities. The proposed amendments would have no significant fiscal impact on the state government, units of local government, or individuals. There would be no significant anticipated economic cost to the public.

You may submit comments on the proposal to Jenny Burleson, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711 or to the email address: tp.rule.comments@cpa.texas.gov. The comptroller must receive your comments no later than 30 days from the date of publication of the proposal in the Texas Register.

The amendments are proposed under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2 (State Taxation).

The amendments implement Tax Code, Chapter 171, Subchapter M (Tax Credit for Certain Research and Development Activities).

§3.599. Margin: Research and Development Activities Credit.

(a) Effective dates.

(1) The provisions of this section apply to franchise tax reports originally due on or after January 1, 2014.

(2) These provisions expire on December 31, 2026. The credits allowed under this section cannot be established on a report originally due after December 31, 2026. The expiration does not affect the carryforward of a credit authorized under these provisions as provided in subsection (l) of this section and established on a report originally due prior to the expiration date of these provisions.

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

(1) Business component—A business component is any product, process, computer software, technique, formula, or invention, which is to be held for sale, lease, or license, or used by the taxable entity in a trade or business of the taxable entity.

(2) Combined group—Taxable entities that are part of an affiliated group engaged in a unitary business and that are required to file a combined group report under Tax Code, §171.1014 (Combined Reporting; Affiliated Group Engaged in Unitary Business).

(3) Controlling interest--

(A) For a corporation, either more than 50%, owned directly or indirectly, of the total combined voting power of all classes of stock of the corporation, or more than 50%, owned directly or indirectly, of the beneficial ownership interest in the voting stock of the corporation.

(B) For a partnership, association, trust, or other entity other than a limited liability company, more than 50%, owned directly or indirectly, of the capital, profits, or beneficial interest in the partnership, association, trust, or other entity.

(C) For a limited liability company, either more than 50%, owned directly or indirectly, of the total membership interest of the limited liability company or more than 50%, owned directly or indirectly, of the beneficial ownership interest in the membership interest of the limited liability company.
(4) Four-Part Test--The test described in IRC, §41(d) (Qualified research defined) that determines whether research activities are qualified research. The four parts of the test are the Section 174 Test, the Discovering Technological Information Test, the Business Component Test, and the Process of Experimentation Test.

(5) Internal Revenue Code (IRC)--The Internal Revenue Code of 1986 in effect on December 31, 2011, excluding any changes made by federal law after that date, but including any regulations that are later adopted under that code applicable to the tax year to which the provisions of the code in effect on that date applied. A regulation adopted after December 31, 2011 is only included in this term to the extent that the regulation requires a taxable entity could have applied to apply the regulation to the 2011 federal income tax year. Examples of treasury regulations included in this definition are:

   (A) Treasury Regulation, §1.174-2 (Definition of research and experimental expenditures) as contained in 26 CFR part 1 (revised as of July 21, 2014);

   (B) Treasury Regulation, §1.41-4 (Qualified research for expenditures paid or incurred in taxable years ending on or after December 31, 2003) as contained in 26 CFR part 1 (revised as of November 3, 2016), except for paragraph (c)(6) (Internal use software). For paragraph (c)(6), as provided in the last sentence of Treasury Regulation, §1.41-4(e) (Effective/applicability dates), taxable entities may elect to follow either of the following versions of paragraph (c)(6):

      (i) Treasury Regulation, §1.41-4(c)(6) (Internal-use computer software) as contained in 26 CFR part 1 (revised as of April 1, 2003) and IRB 2001-5; or

      (ii) Proposed Treasury Regulation, §1.41-4(c)(6) (Internal use software for taxable years beginning on or after the December 31, 1985) as contained in IRB 2002-4.

(6) Public or private institution of higher education--

   (A) an institution of higher education, as defined by Education Code, §61.003 (Definitions); or

   (B) a private or independent institution of higher education, as defined by Education Code, §61.003.

(7) Qualified research--This term has the meaning given in IRC, §41(d), except that the research must be conducted in Texas. Qualified research activities must satisfy each part of the Four-Part Test.

(8) Qualified research expense--This term has the meaning given in IRC, §41(b) (Qualified research expenses), except that the expense must be qualified research conducted in Texas. IRC, §41(b) defines qualified research expenses as the sum of in-house research expenses and contract research expenses.

   (A) In-house research expenses include any wages paid or incurred for qualified services performed by an employee; any amount paid or incurred for supplies used in the conduct of qualified research; and any amount paid or incurred to another person for the right to use computers in the conduct of qualified research.

   (i) Qualified services include an employee either engaging in qualified research or engaging in the direct supervision or direct support of qualified research.

   (I) For the purposes of this clause, the term "engaging in qualified research" means the actual conduct of qualified research. For example, a scientist conducting laboratory experiments could be engaging in qualified research.

   (II) For the purposes of this clause, the term "direct supervision" means the immediate supervision (first-line management) of qualified research. For example, a research scientist who directly supervises laboratory experiments, but who may not actually perform experiments, could be directly supervising qualified research. "Direct supervision" does not include supervision by a higher-level manager to whom first-line managers report, even if that manager is a qualified research scientist.

   (III) For the purposes of this clause, the term "direct support" means services in the direct support of either: Persons engaging in actual conduct of qualified research, or persons who are directly supervising persons engaging in the actual conduct of qualified research.

   (a) Direct support of research includes, but is not limited to, the services of: a secretary for typing reports describing laboratory results derived from qualified research; a laboratory worker for cleaning equipment used in qualified research; a clerk for compiling research data; and a machinist for machining a part of an experimental model used in qualified research.

   (b) Direct support of research activities does not include general administrative services, or other services only indirectly of benefit to research activities. For example, services of: payroll personnel in preparing salary checks of laboratory scientists; an accountant for accounting for research expenses; and an janitor for general cleaning of a research laboratory; or officers engaged in supervising financial or personnel matters do not qualify as direct support of research. This is true whether general administrative personnel are part of the research department or in a separate department.

   (c) Direct support does not include supervision. Supervisory services constitute "qualified services" only to the extent provided in subclause (II) of this clause.

   (ii) Supplies are any tangible property other than land, improvements to land, or property of a character subject to the allowance for depreciation.

   (iii) If a taxable entity claimed a sales or use tax exemption under Tax Code, Chapter 151 (Limited Sales, Excise, and Use Tax) when it purchased a taxable item, and that exemption is for the use other than use in qualified research, the item is excluded from being an in-house research expense, even if it otherwise meets the definition of supplies in clause (ii) of this paragraph. Exclusions or exclusions that are not based on the use of an item do not result in an exclusion from being an in-house research expense under this clause.

   (I) For example:

      (a) An item for which a taxable entity claimed the manufacturing exemption under Tax Code, §151.318 (Property Used in Manufacturing) or the sale for resale exemption under Tax Code, §151.302 (Sales for Resale) is excluded from being an in-house research expense under this clause.

      (b) Water, sulphur, and items for which a taxable entity paid sales or use tax to another state are not subject to sales or use tax under Tax Code, §151.315 (Water), Tax Code, §151.3171 (Sulphur), and Tax Code, §151.303 (Previously Taxed Items: Use Tax Exemption or Credit), but are not excluded from being an in-house research expense under this clause.

   (II) If an item is excluded from being an in-house research expense under this clause, and the taxable entity used that item in qualified research activities rather than the use for which the sales or use tax exemption was granted, the taxable entity may pay any sales or use tax, and any applicable penalty or interest, related to the purchase or use of the item. Once the applicable sales or use tax, penalty, and interest is paid, the taxable entity may include the cost of that item as an in-house research expense.

PROPOSED RULES  June 10, 2022  47 TexReg 3435
(iv) The term "wages" has the meaning given such term by IRC, §3401(a) (Wages). In the case of an employee within the meaning of IRC, §401(e)(1) (Self-employed individual treated as employee) the term wages includes the earned income as defined in IRC, §401(e)(2) (Earned income) of such employee. The term wages does not include any amount taken into account in determining the work opportunity credit under IRC, §51(a) (Determination of amount).

(v) If an employee performed both qualified services and nonqualified services, only wages for qualified services constitute an in-house research expense. Unless the taxable entity can demonstrate another method is more appropriate, the amount of wages that are in-house research expenses shall be determined by multiplying the total amount of wages paid to or incurred for the employee during the report year by the ratio of the total time actually spent by the employee in the performance of qualified services for the taxable entity to the total time spent by the employee in the performance of all services for the taxable entity during the report year.

(vi) Notwithstanding clause (v) of this subparagraph, if the ratio of the total time actually spent by an employee in the performance of qualified services for the taxable entity to the total time spent by the employee in the performance of all services for the taxable entity during the report year is greater than 80%, all services performed by that employee are considered qualified services.

(B) Contract research expenses are 65% of any amount paid or incurred by the taxable entity to any person, other than an employee of the taxable entity, for qualified research. If a taxable entity satisfies the requirements of IRC, §41(b)(3)(C) (Amounts paid to certain research consortia) or IRC, §41(b)(3)(D) (Amounts paid to eligible small businesses, universities, and Federal laboratories) the percentage of allowable contract research expenses is increased as provided by those subparagraphs.

(i) An expense is paid or incurred for qualified research only to the extent that it is paid or incurred pursuant to an agreement that:

(I) is entered into prior to the performance of the qualified research;

(II) provides that research be performed on behalf of the taxable entity; and

(III) requires the taxable entity to bear the expense even if the research is not successful.

(ii) If an expense is paid or incurred by the taxable entity pursuant to an agreement under which payment is contingent on the success of the research, then the expense is not a contract research expense because the expense is considered paid for the product or result of the research rather than the performance of the research. This clause only applies to that portion of a payment that is contingent on the success of the research.

(iii) Qualified research is performed on behalf of the taxable entity if the taxable entity has a right to the research results, even if that right is not exclusive.

(iv) If any contract research expenses are paid or incurred during one report year for qualified research that is conducted in a subsequent report year, the expenses shall be treated as paid or incurred during the report year in which the qualified research is conducted.

(v) See IRC, §41(b) for special circumstances that change the percentage that applies to contract research expenses.
not establish the capability or method for developing or improving the business component, or the appropriate design of the business component.

(ii) In order to satisfy the requirement that the research is technological in nature, the process of experimentation used to discover information must fundamentally rely on principles of the physical or biological sciences, engineering, or computer science. A taxable entity may employ existing technologies and may rely on existing principles of the physical or biological sciences, engineering, or computer science to satisfy this requirement.

(iii) A determination that research is undertaken for the purpose of discovering information that is technological in nature does not require that the taxable entity:

(I) seek to obtain information that exceeds, expands, or refines the common knowledge of skilled professionals in the particular field of science or engineering in which the taxable entity is performing the research; or

(II) succeed in developing a new or improved business component.

(C) Business Component Test. The application of the technological information for which the research is undertaken must be intended to be useful in the development of a new or improved business component of the taxable entity, which may include any product, process, computer software, technique, formula, or invention that is to be held for sale, lease, or license, or used by the taxable entity in a trade or business of the taxable entity.

(i) If a taxable entity provides a service to a customer, the service provided to that customer is not a business component because a service is not a product, process, computer software, technique, formula, or invention. However, a product, process, computer software, technique, formula, or invention used by a taxable entity to provide services to its customers may be a business component.

(ii) A design is not a business component because a design is not a product, process, computer software, technique, formula, or invention. While uncertainty as to the appropriate design of a business component is a qualifying uncertainty for the Section 174 Test and the Discovering Technological information test, the design itself is not a business component. For example, the design of a structure is not a business component, although the structure itself may be a business component. Similarly, a blueprint or other plan used to construct a structure that embodies a design is not a business component.

(D) Process of Experimentation Test. Substantially all of the research activities must constitute elements of a process of experimentation for a qualified purpose. A process of experimentation is undertaken for a qualified purpose if it relates to a new or improved function, performance, reliability, or quality of a business component. Any research relating to style, taste, cosmetic, or seasonal design factors does not satisfy the Process of Experimentation Test.

(i) A process of experimentation is a process designed to evaluate one or more alternatives to achieve a result where the capability or the method of achieving that result, or the appropriate design of that result, is uncertain as of the beginning of the taxable entity's research activities.

(ii) A process of experimentation must:

(I) be an evaluative process and generally should be capable of evaluating more than one alternative; and

(II) fundamentally rely on the principles of the physical or biological sciences, engineering, or computer science and involve:

(-a-) the identification of uncertainty concerning the development or improvement of a business component;

(-b-) the identification of one or more alternatives intended to eliminate that uncertainty; and

(-c-) the identification and the conduct of a process of evaluating the alternatives through, for example, modeling, simulation, or a systematic trial and error methodology.

(iii) A taxable entity may undertake a process of experimentation if there is no uncertainty concerning the taxable entity's capability or method of achieving the desired result so long as the appropriate design of the desired result is uncertain as of the beginning of the taxable entity's research activities. Uncertainty concerning the development or improvement of the business component (e.g., its appropriate design) does not establish that all activities undertaken to achieve that new or improved business component constitute a process of experimentation.

(iv) The substantially all requirement of this subparagraph is satisfied only if 80% or more of a taxable entity's research activities, measured on a cost or other consistently applied reasonable basis constitute elements of a process of experimentation that relates to a new or improved function, performance, reliability, or quality. The substantially all requirement is satisfied even if the remainder of a taxable entity's research activities with respect to the business component do not constitute elements of a process of experimentation that relates to a new or improved function, performance, reliability, or quality.

(v) Non-experimental methods, such as simple trial and error, brainstorming, or reverse engineering, are not considered a process of experimentation.

(vi) The following are factors that may be considered in determining whether a trial and error methodology is experimental systematic trial and error or non-experimental simple trial and error. Evidence provided to determine the type of trial and error is not limited to these factors, nor is evidence of each factor required. These factors only apply to determining whether a process of experimentation is systematic trial and error. Systematic trial and error is not the only qualifying process of experimentation. These factors are:

(I) whether the person conducting the trial and error methodology stops testing alternatives once a single acceptable result is found or continues to find multiple acceptable results for comparison;

(II) whether all the results of the trial and error methodology are recorded for evaluation;

(III) whether there is a written procedure for conducting the trial and error methodology; and

(IV) whether there is a written procedure for evaluating the results of the trial and error methodology.

(vii) Examples.

(I) Example 1. A taxable entity is engaged in the business of developing and manufacturing widgets. The taxable entity wants to change the color of its blue widget to green. The taxable entity obtains several different shades of green paint from various suppliers. The taxable entity paints several sample widgets, and surveys its customers to determine which shade of green its customers prefer. The taxable entity's activities to change the color of its blue widget to green do not satisfy the Process of Experimentation Test because its activities
are not undertaken for a qualified purpose. All of the taxable entity's research activities are related to style, taste, cosmetic, or seasonal design factors.

(II) Example 2. The taxable entity in Example 1 chooses one of the green paints. The taxable entity obtains samples of the green paint from a supplier and determines that it must modify its painting process to accommodate the green paint because the green paint has different characteristics from other paints it has used. The taxable entity obtains detailed data on the green paint from its paint supplier. The taxable entity also consults with the manufacturer of its paint spraying machines. The manufacturer informs the taxable entity that it must acquire new nozzles that operate with the green paint it wants to use because the current nozzles do not work with the green paint. The taxable entity tests the new nozzles, using the green paint, to ensure that they work as specified by the manufacturer of the paint spraying machines. The taxable entity's activities to modify its painting process are not qualified research. The taxable entity did not conduct a process of evaluating alternatives in order to eliminate uncertainty regarding the modification of its painting process. Rather, the manufacturer of the paint machines eliminated the taxable entity's uncertainty regarding the modification of its painting process. The taxable entity's activities to test the nozzles to determine if the nozzles work as specified by the manufacturer of the paint spraying machines are in the nature of routine or ordinary testing or inspection for quality control.

(III) Example 3. A taxable entity is engaged in the business of manufacturing food products and currently manufactures a large-shred version of a product. The taxable entity seeks to modify its current production line to permit it to manufacture both a large-shred version and a fine-shred version of one of its food products. A smaller, thinner shredding blade capable of producing a fine-shred version of the food product is not commercially available. Thus, the taxable entity must develop a new shredding blade that can be fitted onto its current production line. The taxable entity is uncertain concerning the design of the new shredding blade because the material used in its existing blade breaks when machined into smaller, thinner blades. The taxable entity engages in a systematic trial and error process of analyzing various blade designs and materials to determine whether the new shredding blade must be constructed of a different material from that of its existing shredding blade and, if so, what material will best meet its functional requirements. The taxable entity's activities to modify its current production line by developing the new shredding blade satisfy the Process of Experimentation Test. Substantially all of the taxable entity's activities constitute elements of a process of experimentation because it evaluated alternatives to achieve a result where the method of achieving that result, and the appropriate design of that result, were uncertain as of the beginning of the taxable entity's research activities. The taxable entity identified uncertainties related to the development of a business component, and identified alternatives intended to eliminate these uncertainties. Furthermore, the taxable entity's process of evaluating identified alternatives was technological in nature and was undertaken to eliminate the uncertainties.

(IV) Example 4. A taxable entity is in the business of designing, developing and manufacturing automobiles. In response to government-mandated fuel economy requirements, the taxable entity seeks to update its current model vehicle and undertakes to improve aerodynamics by lowering the hood of its current model vehicle. The taxable entity determines, however, that lowering the hood changes the air flow underneath the hood, which changes the rate at which air enters the engine through the air intake system, which reduces the functionality of the cooling system. The taxable entity's engineers are uncertain how to design a lower hood to obtain the increased fuel economy, while maintaining the necessary air flow under the hood. The taxable entity designs, models, simulates, tests, refines, and re-tests several alternative designs for the hood and associated proposed modifications to both the air intake system and cooling system. This process enables the taxable entity to eliminate the uncertainties related to the integrated design of the hood, air intake system, and cooling system. Such activities constitute 85% of its total activities to update its current model vehicle. The taxable entity then engages in additional activities that do not involve a process of evaluating alternatives in order to eliminate uncertainties. The additional activities constitute only 15% of the taxable entity's total activities to update its current model vehicle. In this case substantially all of the taxable entity's activities constitute elements of a process of experimentation because it evaluated alternatives to achieve a result where the method of achieving that result, and the appropriate design of that result, were uncertain as of the beginning of its research activities. The taxable entity identified uncertainties related to the improvement of a business component and identified alternatives intended to eliminate these uncertainties. Furthermore, the taxable entity's process of evaluating the identified alternatives was technological in nature and was undertaken to eliminate the uncertainties. Because 85% of the taxable entity's activities to update its current model vehicle constitute elements of a process of experimentation that relates to a new or improved function, performance, reliability, or quality, all of its activities satisfy the Process of Experimentation Test.

(V) Example 5. A taxable entity is in the business of providing building and construction services, including the construction of warehouses, strip malls, office buildings, and other commercial structures. The taxable entity is engaged to construct a structure in a part of Texas where foundation problems are common. The taxable entity's engineers were uncertain how to design the structure to ensure stability of the structure's foundation because the taxable entity had never designed a structure in a similar location. The taxable entity's engineers used their professional experience and various building codes to determine how to design the foundation based on the conditions at the construction site. The engineers chose to use piles in the foundation. The taxable entity constructed a test pile on site to confirm whether this would work in the conditions present on the construction site. This test pile would become part of the foundation of the structure regardless of whether the engineers had to redesign the additional piles required for the foundation. The taxable entity's activities in using professional experience and building codes to design the foundation did not meet the Process of Experimentation Test because the activities did not resolve technological uncertainties through an experimental process. Constructing the test pile also did not meet the Process of Experimentation Test because it was not an evaluative process.

(VI) Example 6. A taxable entity is in the business of providing building and construction services, including the construction of warehouses, strip malls, office buildings, and other commercial structures. For one of its projects to construct an office building, the taxable entity was uncertain how to design the layout of the electrical systems. The taxable entity's employees held on-site meetings to discuss different options, such as running the wire under the floor or through the ceiling, but did not actually experiment by installing wire in different locations. The taxable entity used computer-aided simulation and modeling to produce the final electrical system layout. While in some cases computer-aided simulation and modeling may be an experimental process, in this case, it was not an experimental process because the taxable entity did not use the computer-aided simulation and modeling to evaluate different alternatives in a scientific manner. The taxable entity's activities did not satisfy the Process of Experimentation Test because it did not conduct an experimental process of evaluating alternatives to eliminate a technological uncertainty.

(VII) Example 7. A taxable entity is an oil and gas operator that recently acquired rights to drill in an area in which it had not previously operated. The taxable entity decided to use hori-
horizontal drilling in this area, but it had never drilled a horizontal well and was uncertain how to successfully execute the horizontal drilling. At the time the taxable entity began horizontal drilling, the technology to drill horizontal wells was established. The taxable entity selected technology from existing commercially available options to use in its horizontal drilling program. The taxable entity's activities did not satisfy the Process of Experimentation Test because evaluating commercially available options does not constitute a process of experimentation.

(VIII) Example 8. A taxable entity is an oil and gas operator that recently acquired rights to drill in an area in which it had not previously operated. The taxable entity decided to use horizontal drilling in this area. The taxable entity had drilled a horizontal well before in a different formation and at different depths. However, it had never drilled a horizontal well in this formation or at the required depths and was uncertain how to successfully execute the horizontal drilling. The taxable entity utilized its existing technology to perform its horizontal drilling operations in this area and the existing technology was successful. The taxable entity's activities did not satisfy the Process of Experimentation Test because the taxable entity merely used its existing technology and did not perform any experimentation to evaluate any alternative drilling methods.

(IX) Example 9. A taxable entity sought to discover cancer immunotherapies. The taxable entity was uncertain as to the appropriate design of the proteins to be used as a drug candidate. The taxable entity identified several alternative protein constructs and used a process to test them. The taxable entity's process involved testing the constructs using in vitro functional assays and binding assays, and either modifying the designs or discarding them and repeating the previous steps. The taxable entity took the resulting products from the in vitro testing and tested the drug candidate in living organisms. This process evaluated the various alternatives identified by the taxable entity. The taxable entity's activities satisfied the Process of Experimentation Test.

(2) Application of the Four-Part Test to business components. The Four-Part Test is applied separately to each business component of the taxable entity. Any plant process, machinery, or technique for commercial production of a business component is treated as a separate business component from the business component being produced.

(3) Shrink-back rule. The Four-Part Test is first applied at the level of the discrete business component used by the taxable entity in a trade or business of the taxable entity. If the requirements of the Four-Part Test are not met at that level, then they are applied at the next most significant subset of elements of the business component. This shrinking back of the product continues until either a subset of elements of the product that satisfies the requirements of the Four-Part Test is reached, or the most basic element of the product is reached, and such element fails to satisfy any part of the Four-Part Test.

(4) Software development as qualified research. In determining if software development activities constitute qualified research, the comptroller will consider the facts and circumstances of each activity.

(A) Application of Four-Part Test to software development activities.

(i) A taxable entity must prove that a software development activity is qualified research and meets all the requirements of the Four-Part Test under paragraph (1) of this subsection, even if the activity is likely to qualify as described in subparagraph (B) of this paragraph.
(xvi) designing graphic user interfaces;
(xvii) developing functional enhancements to existing software applications/products;
(xviii) developing software as an embedded application, such as in cell phones, automobiles, and airplanes;
(xix) developing software utility programs, such as debuggers, backup systems, performance analyzers, and data recovery;
(xx) changing from a product based on one technology to a product based on a different or newer technology; and
(xxi) adapting and commercializing technology developed by a consortium or open software group.

(d) Excluded research activities. Qualified research does not include the activities described in this subsection.

(1) Research after commercial production. Any research conducted after the beginning of commercial production of the business component.

(A) Activities are conducted after the beginning of commercial production of a business component if such activities are conducted after the component is developed to the point where it is ready for commercial sale or use meets the basic functional and economic requirements of the taxable entity for the component's sale or use.

(B) The following activities are deemed to occur after the beginning of commercial production of a business component:

(i) preproduction planning for a finished business component;
(ii) tooling-up for production;
(iii) trial production runs;
(iv) troubleshooting involving detecting faults in production equipment or processes;
(v) accumulating data relating to production processes;
(vi) debugging flaws in a business component; and
(vii) any activities that involve the use of an item for which the taxable entity claimed the manufacturing exemption under Tax Code, §151.318.

(C) In cases involving development of both a product and a manufacturing or other commercial production process for the product, the research after commercial production exclusion applies separately for the activities relating to the development of the product and the activities relating to the development of the process. For example, even after a product meets the taxable entity's basic functional and economic requirements, activities relating to the development of the manufacturing process may still constitute qualified research, provided that the development of the process itself separately satisfies the requirements of this section, and the activities are conducted before the process meets the taxable entity's basic functional and economic requirements or is ready for commercial use.

(D) Clinical testing of a pharmaceutical product prior to its commercial production in the United States is not treated as occurring after the beginning of commercial production even if the product is commercially available in other countries. Additional clinical testing of a pharmaceutical product after a product has been approved for a specific therapeutic use by the Food and Drug Administration and is ready for commercial production and sale is not treated as occurring after the beginning of commercial production if such clinical testing is undertaken to establish new functional uses, characteristics, indications, combinations, dosages, or delivery forms for the product. A functional use, characteristic, indication, combination, dosage, or delivery form shall be considered new only if such functional use, characteristic, indication, combination, dosage, or delivery form must be approved by the Food and Drug Administration.

(E) Examples.

(i) Example 1. A taxable entity is a tire manufacturer and develops a new material to use in its tires. The taxable entity conducts research to determine the changes that will be necessary for it to modify its existing manufacturing processes to manufacture the new tire. The taxable entity determines that the new tire material retains heat for a longer period of time than the materials it currently uses for tires, and, as a result, the new tire material adheres to the manufacturing equipment during tread cooling. The taxable entity evaluates several alternatives for processing the tread at cooler temperatures to address this problem, including a new type of belt for its manufacturing equipment to be used in tread cooling. Such a belt is not commercially available. Because the taxable entity is uncertain of the belt design, it develops and conducts sophisticated engineering tests on several alternative designs for a new type of belt to be used in tread cooling until it successfully achieves a design that meets its requirements. The taxable entity then manufactures a set of belts for its production equipment, installs the belts, and tests the belts to make sure they were manufactured correctly. The taxable entity's research with respect to the design of the new belts to be used in its manufacturing of the new tire may be qualified research under the Four-Part Test. However, the taxable entity's expenses to implement the new belts, including the costs to manufacture, install, and test the belts were incurred after the belts met the taxable entity's functional and economic requirements and are excluded as research after commercial production.

(ii) Example 2. For several years, a taxable entity has manufactured and sold a particular kind of widget. The taxable entity initiates a new research project to develop a new or improved widget. The taxable entity's activities to develop a new or improved widget are not excluded from the definition of qualified research under this paragraph. The taxable entity's activities relating to the development of a new or improved widget constitute a new research project to develop a new business component and are not considered activities conducted after the beginning of commercial production.

(iii) Example 3. For the purposes of this example, assume that the taxable entity's development of its products and manufacturing processes satisfies the Four-Part Test described by subsection (c) of this section and is not otherwise excluded under this subsection. A taxable entity is a manufacturer of integrated circuits for use in specific applications. The taxable entity develops various integrated circuit devices and associated manufacturing processes. The taxable entity assembles various product configurations for testing. After an internal process of testing, the taxable entity delivers a sample quantity of the integrated circuit to a potential customer for further testing. At the time when the samples are delivered to the taxable entity's potential customer, the potential customer has not agreed to purchase any integrated circuits from the taxable entity. This process of testing by both the taxable entity and its potential customer continues until an acceptable product and manufacturing process to produce the product is achieved. At that point, the taxable entity and the potential customer enter into an agreement for the delivery of an order of the integrated circuits. In some cases, no acceptable product or manufacturing process is achieved, and no agreement is reached with the potential customer. Research activities occurring prior to an agreement are not considered activities conducted after the beginning of commercial production be-
cause the integrated circuits were not yet ready for commercial use. Any research that occurs after an agreement is reached are excluded as activities conducted after the beginning of commercial production because the integrated circuits were ready for commercial use once the product and associated manufacturing process was accepted by the potential customer.  

(2) Adaptation of existing business components. Activities relating to adapting an existing business component to a particular customer's requirement or need. This exclusion does not apply merely because a business component is intended for a specific customer. For example:

(A) Example 1. A taxable entity is a computer software development firm and owns a general ledger accounting software core program that it markets and licenses to customers. The taxable entity incurs expenditures in adapting the core software program to the requirements of one of its customers. Because the taxable entity's activities represent activities to adapt an existing software program to a particular customer's requirement or need, its activities are excluded from the definition of qualified research under this paragraph.

(B) Example 2. Assume that the customer from Example 1 pays the taxable entity to adapt the core software program to the customer's requirements. Because the taxable entity's activities are excluded from the definition of qualified research, the customer's payments to the taxable entity are not for qualified research and are not considered to be contract research expenses.

(C) Example 3. Assume that the customer from Example 1 uses its own employees to adapt the core software program to its requirements. Because the customer's employees' activities to adapt the core software program to its requirements are excluded from the definition of qualified research, the wages the customer paid to its employees do not constitute in-house research expenses.

(D) Example 4. A taxable entity manufactures and sells rail cars. Because rail cars have numerous specifications related to performance, reliability and quality, rail car designs are subject to extensive, complex testing in the scientific or laboratory sense. A customer orders passenger rail cars from the taxable entity. The customer's rail car requirements differ from those of the taxable entity's other existing customers only in that the customer wants fewer seats in its passenger cars and a higher quality seating material and carpet that are commercially available. The taxable entity manufactures rail cars meeting the customer's requirements. The rail car sold to the customer was not a new business component, but merely an adaptation of an existing business component that did not require a process of experimentation. Thus, the taxable entity's activities to manufacture rail cars for the customer are excluded from the definition of qualified research because the taxable entity's activities represent activities to adapt an existing business component to a particular customer's requirement or need.

(E) Example 5. A taxable entity is a manufacturer and undertakes to create a manufacturing process for a new valve design. The taxable entity determines that it requires a specialized type of robotic equipment to use in the manufacturing process for its new valves. Such robotic equipment is not commercially available. Therefore, the taxable entity purchases existing robotic equipment for the purpose of modifying it to meet its needs. The taxable entity's engineers identify uncertainty that is technological in nature concerning how to modify the existing robotic equipment to meet its needs. The taxable entity's engineers develop several alternative designs, conduct experiments using modeling and simulation in modifying the robotic equipment, and conduct extensive scientific and laboratory testing of design alternatives. As a result of this process, the taxable entity's engineers develop a design for the robotic equipment that meets its needs. The taxable entity constructs and installs the modified robotic equipment on its manufacturing process. The taxable entity's research activities to determine how to modify the robotic equipment it purchased for its manufacturing process are not considered an adaptation of an existing business component.

(F) Example 6. A taxable entity is an oil and gas operator and has been engaged in horizontal drilling for the past ten years. Recently, the taxable entity was hired by a customer to drill in a formation. The drilling objectives included targeting an interval within that formation for horizontal drilling. The taxable entity was uncertain about the successful execution of the horizontal drilling because it had not previously drilled a horizontal well in that formation. The taxable entity was also uncertain about the economic results from the targeted interval. The taxable entity drilled several horizontal wells before its customer was satisfied with the economic results. The taxable entity modified its existing horizontal drilling program based on these results. The taxable entity's activities to identify a horizontal drilling process are excluded from the definition of qualified research because the activities consisted of adapting an existing business component, its existing horizontal drilling process, and did not involve creating a new or improved business component.

(G) Example 7. For the purposes of this example, assume that the taxable entity's development of its products satisfies the Four-Part Test described by subsection (c) of this section and is not otherwise excluded under this subsection. A taxable entity is a manufacturer of rigid plastic containers. The taxable entity contracts with major food and beverage manufacturers to provide suitable bottle and packaging designs. The products designed by the taxable entity may be for repeat customers and the sizes and types of bottle may be similar to previous products. The development of each new product, and the production process necessary to produce the products at sufficient production volume, starts from new concept drawings developed by engineers. The taxable entity uses a qualifying process of experimentation to evaluate alternative concepts for the product and production processes. The taxable entity's activities related to both the product and the production process are not excluded from the definition of qualified research as an adaptation of an existing business component.

(3) Duplication of existing business component. Any research related to the reproduction of an existing business component, in whole or in part, from a physical examination of the business component itself or from plans, blueprints, detailed specifications, or publicly available information with respect to such business component. This exclusion does not apply merely because the taxable entity examines an existing business component in the course of developing its own business component.

(4) Surveys, studies, etc. Any efficiency survey; activity relating to management function or technique; market research, testing or development (including advertising or promotions); routine data collection; or routine or ordinary testing or inspection for quality control.

(5) Computer software. Any research activities with respect to internal use software.

(A) For the purposes of this paragraph, internal use software is computer software developed by, or for the benefit of, the taxable entity primarily for internal use by the taxable entity. [A taxable entity uses software internally if the software was developed for use in the operation of the business. Computer software that is developed to be commercially sold, leased, licensed, or otherwise marketed for separately stated consideration to unrelated third parties is not internal use software.]
(B) Software developed by a taxable entity primarily for internal use by an entity that is part of an affiliated group to which the taxable entity also belongs shall be considered internal use software for purposes of this paragraph.

(C) This exclusion does not apply to software used in:

(i) an activity that constitutes qualified research, or

(ii) a production process that meets the requirements of the Four-Part Test.

(D) The determination as to whether software is internal use software depends on the facts and circumstances existing at the beginning of the development of the software.

(6) Social sciences, etc. Any research in the social sciences, arts, or humanities.

(7) Funded research. Any research funded by any grant, contract, or otherwise by another person or governmental entity.

(A) Research is considered funded if:

(i) the taxable entity performing the research for another person retains no substantial rights to the results of the research; or

(ii) the payments to the researcher are not contingent upon the success of the research.

(B) For the purposes of determining whether a taxable entity retains substantial rights to the results of the research:

(i) Incidental benefits to the researcher from the performance of the research do not constitute substantial rights.

(ii) A taxable entity does not retain substantial rights in the research if the taxable entity must pay for the right to use the results of the research.

(C) If a taxable entity performing research does not retain substantial rights to the results of the research, the research is considered funded regardless of whether the payments to the researcher are contingent upon the success of the research. In this case, all research activities are considered funded even if the researcher has expenses that exceed the amount received by the researcher for the research.

(D) If a taxable entity performing research does retain substantial rights to the results of the research and the research is considered funded under subparagraph (A)(ii) of this paragraph, the research is only funded to the extent of the payments and fair market value of any property that the taxable entity becomes entitled to by performing the research. If the expenses related to the research exceed the amount the researcher is entitled to receive, the research is not considered funded with respect to the excess expenses. For example, a taxable entity performs research for another person. Based on the contract, the research activities are considered funded under subparagraph (A)(ii) of this paragraph because payments to the researcher are not contingent on the success of the research. The taxable entity retains substantial rights to the results of the research. The taxable entity is entitled to $100,000 under the contract but spent $120,000 on the research activities. In this case, the research is considered funded with respect to $100,000 and is not considered funded with respect to $20,000.

(E) A taxable entity performing research for another person must identify any other person paying for the research activities and any person with substantial rights to the results of the research.

(F) All agreements, not only research contracts, entered into between the taxable entity performing the research and the party funding the research shall be considered in determining the extent to which the research is funded.

(G) The provisions of this paragraph shall be applied separately to each research project undertaken by the taxable entity.

(e) Eligibility for credit.

(1) A taxable entity is eligible to claim a credit for the periods in which the taxable entity is engaged in qualified research and incurs qualified research expenses. The credit may be claimed on a franchise tax report for qualified research expenses incurred during the period on which the report is based.

(2) A taxable entity has the burden of establishing its entitlement to, and the value of, the credit by clear and convincing evidence, including proof that the research activities meet the definition of qualified research, the amount of any qualified research expenses, and applying the shrink-back rule described in subsection (c)(3) of this section.

(A) All qualified research expenses must be paid or incurred in connection with research activities that are qualified research.

(B) All qualified research expenses must be supported by contemporaneous business records.

(i) Contemporaneous business records for wages are records that were created and maintained during the period in which the taxable entity paid the employee to engage in qualified services. This includes, but is not limited to, payroll records, employee job descriptions, performance evaluations, calendars, and appointment books.

(ii) Contemporaneous business records for supplies are records that were created and maintained during the period in which the supplies were purchased. This includes, but is not limited to, inventory records, invoices, purchase orders, and contracts.

(iii) Contemporaneous business records for contract research expenses are records that were created and maintained during the period in which the contract research expenses were paid or incurred. This includes, but is not limited to, contracts and invoices.

(3) An Internal Revenue Service audit determination of eligibility for the federal research and development credit under IRC, §41 (Credit for increasing research activities), whether that determination is that the taxable entity qualifies or does not qualify for the federal research and development credit, is not binding on the comptroller's determination of eligibility for the credit.

(f) Ineligibility for credit.

(1) A taxable entity is not eligible to claim a credit on a franchise tax report for qualified research expenses incurred during the period on which the report is based if the taxable entity, or a member of the combined group, if the taxable entity is a combined group, received an exemption from sales and use tax under Tax Code, §151.3182 (Certain Property Used in Research and Development Activities; Reporting of Estimates and Evaluation) during that period.

(2) A taxable entity that is not eligible to claim a credit under this subsection may carry forward an unused credit under subsection (l) of this section.

(g) Amount of credit.

(1) Qualified research expenses in Texas. Subject to subsection (h) of this section, and except as provided by paragraphs (2), (3), and (4) of this subsection, the credit allowed for any report equals 5.0% of the difference between:
(A) all qualified research expenses incurred during the period on which the report is based; and

(B) 50% of the average amount of all qualified research expenses incurred during the three tax periods preceding the period on which the report is based.

(2) Entities without qualified research expenses in each of the three preceding tax periods. Except as provided by paragraph (4) of this subsection, if the taxable entity has no qualified research expenses in one or more of the three tax periods preceding the period on which the report is based, the credit for the period on which the report is based equals 2.5% of the qualified research expenses incurred during that period.

(3) Qualified research expenses under a higher education contract. Subject to subsection (h) of this section, and except as provided by paragraph (4) of this subsection, if the taxable entity contracts with one or more public or private institutions of higher education for the performance of qualified research and the taxable entity incurs qualified research expenses in Texas under the contract during the period on which the report is based, then the credit for the report equals 6.25% of the difference between:

(A) all qualified research expenses incurred during the period on which the report is based; and

(B) 50% of the average amount of all qualified research expenses incurred during the three tax periods preceding the period on which the report is based.

(4) Entities with qualified research expenses under higher education contracts but without qualified research expenses in each of the three preceding tax periods. If the taxable entity incurs qualified research expenses in Texas under a contract with one or more public or private institutions of higher education for the performance of qualified research during the period on which the report is based, but the taxable entity has no qualified research expenses in one or more of the three tax periods preceding the period on which the report is based, then the credit for the period on which the report is based equals 3.125% of all qualified research expenses incurred during that period.

(5) Same method of computing qualified research expenses required. Notwithstanding whether the statute of limitations for claiming a credit under this section has expired for any tax period used in determining the average amount of qualified research expenses under paragraph (1)(B) or (3)(B) of this subsection, the determination of which research expenses are qualified research expenses for purposes of computing that average must be made in the same manner as that determination is made for purposes of paragraph (1)(A) or (3)(A) of this subsection. The comptroller may verify the qualified research expenses used to compute the prior year average, even if the statute of limitations for the prior year has expired. This verification will not result in an adjustment to tax, penalty, or interest for any report year for which the statute of limitations is closed.

(6) A taxable entity with any qualified research expenses under higher education contracts in a tax period may include all of its qualified research expenses in the calculations under paragraphs (3) and (4) of this subsection, even if not all of the qualified research expenses are related to higher education contracts. For taxable entities in a combined group, see subsection (i) of this section.

(h) Attribution of expenses following transfer of controlling interest.

(1) If a taxable entity acquires a controlling interest in another taxable entity, or in a separate unit of another taxable entity, during a tax period with respect to which the acquiring taxable entity claims a credit under this section, then the amount of the acquiring taxable entity's qualified research expenses equals the sum of:

(A) the amount of qualified research expenses incurred by the acquiring taxable entity during the period on which the report is based; and

(B) subject to paragraph (4) of this subsection, the amount of qualified research expenses incurred by the acquired taxable entity or unit during the portion of the period on which the report is based that precedes the date of the acquisition.

(2) A taxable entity that sells or otherwise transfers to another taxable entity a controlling interest in another taxable entity, or in a separate unit of a taxable entity, during a period on which a report is based may not claim a credit under this section for qualified research expenses incurred by the transferred taxable entity or unit during the period if:

(A) the taxable entity that makes the sale or transfer is ineligible for the credit under subsection (i) of this section; or

(B) the acquiring taxable entity claims a credit under this section for the corresponding period.

(3) If during any of the three tax periods following the period in which a sale or other transfer described by paragraph (2) of this subsection occurs, the taxable entity that sold or otherwise transferred the controlling interest reimburses the acquiring taxable entity for research activities conducted on behalf of the taxable entity that made the sale or other transfer, the amount of the reimbursement is:

(A) included as qualified research expenses incurred by the taxable entity that made the sale or other transfer for the tax period during which the reimbursement was paid, subject to paragraph (5) of this subsection; and

(B) excluded from the qualified research expenses incurred by the acquiring taxable entity for the tax period during which the reimbursement was paid.

(4) An acquiring taxable entity may not include on a report the amount of qualified research expenses otherwise authorized by paragraph (1)(B) of this subsection if the taxable entity that made the sale or other transfer described by paragraph (2) of this subsection received an exemption under Tax Code, §151.3182 during the portion of the period on which the acquiring taxable entity's report is based that precedes the date of the acquisition.

(5) A taxable entity that makes a sale or other transfer described by paragraph (2) of this subsection may not include on a report the amount of reimbursement otherwise authorized by paragraph (3)(A) of this subsection if the reimbursement is for research activities that occurred during a tax period in which the entity that makes a sale or other transfer received an exemption under Tax Code, §151.3182.

(i) Combined reporting.

(1) The combined group is the taxable entity for purposes of calculating and reporting this credit. [A credit under this section for qualified research expenses incurred by a member of a combined group must be claimed on the combined report for the group required by Tex Code, §171.1014.] [The combined group is the taxable entity for purposes of this section.]

(2) A credit under this section for qualified research expenses incurred by a member of a combined group must be claimed on the combined report for the group required by Tex Code, §171.1014. [The combined group is the taxable entity for purposes of this section.] The total qualified research expenses of each member of the combined group shall be added together to determine the total credit claimed on the combined report.
(3) When the membership of a combined group changes, the credit carryforward under subsection (i) of this section will be determined as follows:

(A) For the purposes of this paragraph, the carryforward attributable to a member of a combined group for each prior report year is determined by multiplying the total credit carryforward available for that report year by a fraction, the numerator of which is the qualified research expenses paid or incurred by the member during that report year, and the denominator of which is the total qualified research expenses paid or incurred by the combined group during that report year.

(B) If a combined group loses a member, the credit carryforward will be attributed to each member of the combined group that was included on the report for the report year to which the carryforward relates. Each member of the combined group that has a carryforward attributable to it under this subparagraph, including the member that leaves the combined group, may continue to use that carryforward on its future franchise tax reports.

(C) If a taxable entity that was not part of a combined group when it created a credit carryforward later joins a combined group, any credit carryforward it had previously established may be claimed on the combined group's future franchise tax reports.

(D) If a taxable entity, including a member of a combined group, is a non-surviving entity in a merger transaction, any credit carryforward established by the non-surviving entity may be claimed on the surviving entity's future franchise tax reports.

(E) If a taxable entity, including a member of a combined group, is terminated, dissolved, or otherwise loses its status as a legal entity, the credit carryforward attributable to that taxable entity may not be claimed on any future franchise tax report. This subparagraph does not apply if subparagraph (D) of this paragraph or subsection (m) of this section applies.

(F) If all of the assets of a member of a combined group are conveyed, assigned or transferred in a manner that qualifies under subsection (m) of this section, the carryforward attributable to that member may be conveyed, assigned, or transferred as part of that transaction.

(G) A combined group may only use a credit carryforward attributable to a member under subparagraphs (B), (C), or (D) of this paragraph if that member is part of the combined group on the last day of the accounting period on which that report is based.

[(A)] if there is a change in membership of the combined group, the resulting combined group is a new taxable entity and the resulting combined group is not entitled to the carryforward of the credit under subsection (i) of this section because it is no longer the same taxable entity as the taxable entity that established the credit carryforward. For the purposes of this section, there is no change in membership of the combined group if:

[(B)] the common owner or owners of the members of the combined group changes without any change in the members of the combined group;

[(C)] the common owner or owners change without any change in the members of the combined group other than the addition of a newly-formed entity that is the new common owner;

[(D)] two or more members of the combined group merge;

[(E)] one or more members of the combined group forms a new entity that is a member of the combined group; or

[(F)] one or more members of the combined group is terminated, dissolved, or otherwise loses its status as a legal entity.

(4) A combined group with any qualified research expenses under higher education contracts in a tax period may include all of its qualified research expenses in the calculations under subsection (g)(3) and (4) of this section, even if not all of the members of the combined group have qualified research expenses that are related to higher education contracts.

(j) Tiered partnership reporting.

(1) An upper tier entity and a lower tier entity may claim a credit under this section for qualified research expenses; however, an upper tier entity and a lower tier entity cannot claim a credit under this section for the same qualified research expense.

(2) An upper tier entity that includes the total revenue of a lower tier entity for purposes of computing its taxable margin as authorized by Tax Code, §171.1105 (Reporting for Certain Partnerships in Tiered Partnership Arrangement) may claim the credit under this section for qualified research expenses incurred by the lower tier entity to the extent of the upper tier entity's ownership interest in the lower tier entity.

(k) Limitation. The total credit claimed under this section for a report, including the amount of any carryforward credit under subsection (l) of this section, may not exceed 50% of the amount of franchise tax due for the report before any other applicable tax credits.

(l) Carryforward.

(1) If a taxable entity is eligible for a credit that exceeds the limitation under subsection (k) of this section, the taxable entity may carry the unused credit forward for not more than 20 consecutive reports.

(2) Research and development credits, including credit carryforwards, are considered to be used in the following order:

(A) a credit carryforward of unused research and development credits accrued under Tax Code, Chapter 171, Subchapter O (Tax Credit for Certain Research and Development Activities), before its repeal on January 1, 2008, and claimed as authorized by §3.593 of this title (relating to Margin: Franchise Tax Credits);

(B) a credit carryforward under this section; and

(C) a current year credit.

(3) If a taxable entity claims a carryforward on a report within the statute of limitations, the comptroller may verify that the credit that established the carryforward was based on qualified research activities, even if the statute of limitations for the year in which the credit was created has expired. This verification will not result in an adjustment to tax, penalty, or interest for any report year for which the statute of limitations has expired. The verification may result in an adjustment to the carryforward for all periods within the unexpired statute of limitations and for all future periods in which the taxable entity may claim the carryforward.

(4) For application of the carryforward to combined groups, see subsection (i)(3) of this section.

(m) Assignment prohibited. A taxable entity may not convey, assign, or transfer the credit allowed under this section to another en-
entity unless all of the assets of the taxable entity are conveyed, assigned, or transferred in the same transaction. The conveyance, assignment, or transfer of an ownership interest in the taxable entity is not a conveyance, assignment, or transfer of the credit by the taxable entity.

(n) Application for credit.

(1) A taxable entity applies for the credit by claiming the credit on or with the franchise tax report for the period for which the credit is claimed. A taxable entity must also complete Form 05-178, Texas Franchise Tax Research and Development Activities Credits Schedule, its electronic equivalent, or any form promulgated by the comptroller that succeeds such form.

(2) The comptroller may require a taxable entity that claims a credit under this section to provide all data and information required for the comptroller to evaluate the credit and to comply with Tax Code, §151.3182(c).

(o) Amending reports.

(1) If a report was originally due and filed after the effective date of this section and a credit allowed under this section was not claimed, a taxable entity may file an amended report within the statute of limitation to claim a credit, if the taxable entity or a member of its combined group does not have an active Registration Number for that period. See §3.584 of this title for information about filing an amended report.

(2) If a taxable entity or member of the combined group has or had a Registration Number for a period for which it intends to claim a credit allowed under this section, the taxable entity or member of the combined group must submit a written request to cancel the registration before claiming a credit. The written request must contain the following information:

(A) the tax period(s) covered by the report for which it intends to claim a credit allowed under this section; and

(B) a statement whether any tax-exempt purchases were made. If tax-exempt purchases were made, include an original or amended sales and use tax report with tax due, penalty, and interest for the sales tax periods that cover the tax-exempt purchases.

(3) If a report was filed claiming a credit allowed under this section and the taxable entity later decides to claim a sales and use tax exemption under Tax Code, §151.3182, the taxable entity must:

(A) file an amended franchise tax report that does not claim the credit under this section and pay any tax, penalty, and interest due;

(B) apply for a Registration Number; and

(C) file a request for a sales and use tax refund for taxes paid on purchases under Tax Code, §151.3182.

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

Filed with the Office of the Secretary of State on May 24, 2022.

TRD-202202020
Jennifer Burleson
Director, Tax Policy
Comptroller of Public Accounts

Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 475-2220

CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER H. TAX RECORD REQUIREMENTS

34 TAC §9.3061

The Comptroller of Public Accounts proposes new §9.3061, concerning installment payments of taxes on property not directly damaged in a disaster or emergency area.

This new section implements Senate Bill 742, Section 4, 87th Legislation, R.S. (2021). This section closely follows the language in Tax Code, §31.033 so as not to create an undue burden on the taxing units that adopt this installment payment option and to allow them flexibility to create their own policies that comply with the requirements in Tax Code, §31.033.

Subsection (a) provides definitions for terms used in the proposed new section.

Subsection (b) establishes the types of property and taxes to which the proposed new section applies.

Subsection (c) establishes that Tax Code, §31.032(b), (b-1), (c), and (d) apply to the payment of taxes to a taxing unit that has adopted an installment payment option for taxes owed on properly described in the proposed new section.

Brad Reynolds, Chief Revenue Estimator, has determined that during the first five years that the proposed new rule is in effect, the rule: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules’ applicability; and will not positively or adversely affect this state’s economy.

Mr. Reynolds also has determined that the proposed new rule would have no significant fiscal impact on the state government, units of local government, or individuals. The proposed new rule would benefit the public by conforming the rule to current statute and improving the clarity and implementation of the section. There would be no significant anticipated economic cost to the public. The proposed new rule would have no fiscal impact on small businesses or rural communities.

You may submit comments on the proposal to Shannon Murphy, Director, Property Tax Assistance Division, P.O. Box 13528, Austin, Texas 78711 or to the email address: ptad.rulescomments@cpa.texas.gov. The comptroller must receive your comments no later than 30 days from the date of publication of the proposal in the Texas Register.

This new section is authorized by Tax Code, §31.033 (d), which requires the comptroller to adopt rules to implement Tax Code, §31.033.

This new section implements Tax Code, §31.033, concerning Installment Payments of Taxes on Property in Disaster Area or Emergency Area That Has Not Been Damaged as a Result of Disaster or Emergency.

§9.3061. Installment Payments of Taxes on Property Not Directly Damaged in a Disaster or Emergency Area.

(a) In this section, "disaster", "disaster area", "emergency", and "emergency area" have the meanings assigned by Tax Code, §31.032(g).
(b) This section only applies to:

(1) Real property that is owned or leased by a business entity that is located in a disaster or emergency area, has not been damaged as a direct result of the disaster or emergency, and that had gross receipts in the entity's most recent federal income tax year or state franchise tax annual period that were not more than the amount calculated as provided by Tax Code, §31.032(h);

(2) tangible personal property that is owned or leased by a business entity described in paragraph (1) of this subsection; and

(3) taxes imposed by the taxing unit before the first anniversary of the disaster or emergency.

(c) For a taxing unit that has adopted an installment-payment plan under Tax Code, §§31.033, Tax Code, §31.032(b), (b-1), (c), and (d) apply to the payment by a person of that taxing unit's taxes imposed on property that the person owns.

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

Filed with the Office of the Secretary of State on May 27, 2022.
TRD-202202058
Victoria North
General Counsel for Fiscal and Agency Affairs
Comptroller of Public Accounts
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 475-2220

TRD-202202058
Victoria North
General Counsel for Fiscal and Agency Affairs
Comptroller of Public Accounts
Earliest possible date of adoption: July 10, 2022
For further information, please call: (512) 475-2220

TexReg 3446
June 10, 2022
Texas Register