CHAPTER 355. REIMBURSEMENT RATES
SUBCHAPTER F. REIMBURSEMENT
METHODOLOGY FOR PROGRAMS SERVING
PERSONS WITH MENTAL ILLNESS OR
INTELLECTUAL OR DEVELOPMENTAL
DISABILITY

1 TAC §355.727
The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §355.727, concerning Add-on Payment Methodology for Home and Community-Based Services Supervised Living and Residential Support Services.

BACKGROUND AND PURPOSE
The purpose of the proposal is to extend the period in which add-on payments for Home and Community-based Services Waiver (HCS) Supervised Living and Residential Support Services (SL/RSS) are effective.

The proposal is necessary to comply with 2022-23 General Appropriations Act, Senate Bill (S.B.) 1, 87th Legislature, Regular Session, 2021 (Article II, HHSC, Rider 30), which requires HHSC to maintain rate increases authorized by the 2020-21 General Appropriations Act, House Bill 1, 86th Legislature, Regular Session, 2019 (Article II, HHSC, Rider 44).

SECTION-BY-SECTION SUMMARY
The proposed amendment to §355.727(b) revises the last date in which HHSC will pay an add-on to the direct care portion of the SL/RSS rates from August 31, 2021, to August 31, 2023.

The proposed amendment to §355.727(c)(1) revises the period in which providers may be required to submit cost reports in addition to other reporting requirements. This proposed amendment corresponds with the date revision in the proposed change to subsection (b). The proposed amendment to §355.727(c)(1) also revises the name of HHSC Rate Analysis to reflect the new name of the department, which is the HHSC Provider Finance Department.

FISCAL NOTE
Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rule will be in effect, there will be an estimated additional cost to state government as a result of enforcing and administering the rule as proposed.

The effect on state government for each year of the first five years the proposed rule is in effect is an estimated cost of $5,983,315 in General Revenue (GR) ($16,149,299 in All Funds (AF)) in state fiscal year (SFY) 2022, $6,330,525 in GR ($16,149,299 in AF) in SFY 2023, $6,330,525 in GR ($16,149,299 in AF) in SFY 2024, $6,330,525 in GR ($16,149,299 in AF) in SFY 2025, and $6,330,525 in GR ($16,149,299 in AF) in SFY 2026.

Enforcing or administering the rule does not have foreseeable implications relating to costs or revenues of local government.

GOVERNMENT GROWTH IMPACT STATEMENT
HHSC has determined that during the first five years that the rule will be in effect:

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

(2) implementation of the proposed rule will not affect the number of HHSC employee positions;

(3) implementation of the proposed rule will result in no assumed change in future legislative appropriations;

(4) the proposed rule will not affect fees paid to HHSC;

(5) the proposed rule will not create a new rule;

(6) the proposed rule will not expand, limit, or repeal existing rules;

(7) the proposed rule will not change the number of individuals subject to the rule; and

(8) HHSC has insufficient information to determine the proposed rule's effect on 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. The rules do not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rules.

LOCAL EMPLOYMENT IMPACT
The proposed rule will not affect a local economy.

COSTS TO REGULATED 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.
PUBLISHER BENEFIT AND COSTS

Victoria Grady, Director of Provider Finance, has determined that for each year of the first five years the rule is in effect, the public benefit will be additional funds for HCS providers of SL/RSS, which will enable HCS providers to maintain access to care in group home settings.

Trey Wood has also determined that for the first five years the rule is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rule as it implements an extension to add-on payments for HCS providers of SL/RSS and, therefore, all costs to implement the proposal will be absorbed by HHSC.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to their 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 HHSC Provider Finance Department, Mail Code H-400, P.O. Box 149030, Austin, Texas 78714-9030, or by email to PFD-LTSS@hhhs.texas.gov.

To be considered, comments must be submitted no later than 21 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 Rules 21R147" 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 by the health and human services system; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance (Medicaid) payments under Texas Human Resources Code Chapter 32.


§355.727. Add-on Payment Methodology for Home and Community-Based Services Supervised Living and Residential Support Services.

(a) (No change.)

(b) Direct Care Staffing Add-on Payment Methodology. Effective January 1, 2020, through August 31, 2023 [August 31, 2024], HHSC will pay an add-on to the direct care portion of the Supervised Living and Residential Support Services rates.

(1) The add-on for each level of need (LON) is as follows:

(A) $4.06 per unit for LON 1;

(B) $4.53 per unit for LON 5;

(C) $5.22 per unit for LON 8;

(D) $6.04 per unit for LON 6; and

(E) $8.45 per unit for LON 9.

(2) The add-on is to be used only for attendant compensation as defined in §355.103(b)(1) of this chapter (relating to Specifications for Allowable and Unallowable Costs).

(c) Reporting requirements.

(1) All Home and Community-based Services (HCS) providers who deliver Supervised Living or Residential Support Services during the time period the add-on is in effect must comply with reporting requirements as described in §355.105(b) of this chapter (relating to General Reporting and Documentation Requirements, Methods, and Procedures) for each reporting period during the time period the add-on is in effect. Providers may be required to submit cost reports in addition to other reporting requirements to include those days in which the add-on was in effect and [calendar years 2020 and 2021] not otherwise included in another report in which accountability has been determined. This report must be submitted for each component code if the provider requested participation individually or if the provider requested participation as a group. This report will be used as the basis for determining any recoupment amounts as described in subsection (f) of this section for the direct care staffing add-on reporting period. Participating providers failing to submit an acceptable Direct Care Staffing Compensation Report within 60 days of the date of the HHSC request for the report will be placed on vendor hold until such time as an acceptable report is received and processed by the HHSC Provider Finance Department [Rate Analysis].

(2) Providers who do not participate in attendant compensation rate enhancement and deliver no Supervised Living or Residential Support Services during the time period the add-on is in effect may be excused from submitting an accountability report for the years in which an HCS cost report is not required.

(d) - (g) (No change.)

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 July 30, 2021.

TRD-202102968

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: September 12, 2021

For further information, please call: (512) 424-6637

SUBCHAPTER I. REPORTING

1 TAC §355.7201

BACKGROUND AND PURPOSE

The proposal is necessary to comply with the 2022-23 General Appropriations Act, Senate Bill (S.B.) 1, 87th Legislature, Regular Session, 2021 (Article II, HHSC, Rider 143) and S.B. 809, 87th Legislature, Regular Session, 2021.

The proposed new rule will outline definitions, reporting requirements, guidelines and procedures for health care institutions, as defined by Civil Practice and Remedies Code §74.001, including certain hospitals and nursing facilities, to report received federal COVID-19 funding. The COVID funding includes federal money received under the Coronavirus Aid, Relief, and Economic Security Act (15 U.S.C. §9001 et seq.), the Consolidated Appropriations Act, 2021 (Pub. L. No. 116-260), and the American Rescue Plan Act of 2021 (Pub. L. No. 117-2).

The proposed new rule outlines penalties for providers who fail to submit the required reports, in alignment with the provisions of S.B. 809 and Rider 143.

HHSC will compile and analyze the data and submit required legislative reports. S.B. 809 requires quarterly reports and Rider 143 requires HHSC to submit reports on December 1st and June 1st of each fiscal year. Appropriations in Strategy A.2.4, Nursing Facility Payments, for fiscal year 2023 are contingent on the submission of the reports due December 1, 2021 and June 1, 2022.

The required reporting for both the providers and HHSC is anticipated to terminate by September 1, 2023.

SECTION-BY-SECTION SUMMARY

Proposed new §355.7201(a) provides an introduction to the section and explains the requirement to collect and compile legislatively required reports pertaining to the COVID-19 federal funding.

Proposed new §355.7201(b) provides the applicable terms used in the section which includes "HHSC" and "health care institutions."

Proposed new §355.7201(c) lists the institutions that are required to submit the monthly reports to HHSC. This includes all institutions that are defined as a health care institution by Civil Practice and Remedies Code §74.001.


Proposed new §355.7201(e) outlines the frequency of reporting for the health care institutions. This includes monthly reports with the initial report due by October 1, 2021. The language further provides that HHSC may grant providers an extension, upon their request.

Proposed new §355.7201(f) outlines when HHSC will submit HHSC's legislatively-mandated reports based on the compiled monthly reports submitted by the institutions.

Proposed new §355.7201(g) details the potential penalties for providers who fail to submit the required reports.

Proposed new §355.7201(h) details the duration of the reporting requirements, which ends on September 1, 2023, or as specified by HHSC.

FISCAL NOTE

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

Local governments that own or operate any of the facilities required to report federal COVID-19 funds could incur costs to report under the proposed rule. However, some providers may have already been required to submit this information to the federal government, which would reduce the overall cost they would incur to provide information already gathered to the state based on this proposal. HHSC will evaluate available federal reporting information and format to minimize duplication where possible. HHSC is unable to provide an estimate of the cost local governments would incur to provide required reports to HHSC.

GOVERNMENT GROWTH IMPACT STATEMENT

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

(1) the proposed rule will not create or eliminate a government program;
(2) implementation of the proposed rule will not affect the number of HHSC employee positions;
(3) implementation of the proposed rule will result in no assumed change in future legislative appropriations;
(4) the proposed rule will not affect fees paid to HHSC;
(5) the proposed rule will create a new rule;
(6) the proposed rule will not expand existing rules;
(7) the proposed rule will not change the number of individuals subject to the rule; and
(8) HHSC has insufficient information to determine the proposed rule's effect on the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that the proposal could have an adverse economic effect on small businesses, micro-businesses, and rural communities due to cost to comply pertaining to the monthly report submissions. However, some providers may have already been required to submit this information to the federal government, which would reduce the overall cost providers would incur to provide information they have already gathered to the state based on this proposal.

HHSC is unable to determine the number of small businesses, micro-businesses, and/or rural communities that are subject to the rule.

The proposed rule implements legislation that provides no alternatives to the rule proposed, and therefore the agency has no regulatory flexibility available or alternative methods of achieving the purpose of the proposed rule.

LOCAL EMPLOYMENT IMPACT

The proposed rule 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 implement legislation that does not specifically state that §2001.0045 applies to the rule.
PUBLIC BENEFIT AND COSTS

Victoria Grady, Director of Provider Finance, has determined that for each year of the first five years the rule is in effect, the public benefit will be a better understanding of the type and amount of federal funds that have flowed to health care institutions during the COVID-19 public health emergency.

Trey Wood has also determined that for the first five years the rules are in effect, there could be anticipated economic costs to persons who are required to comply with the proposed rule. The proposed new rule will require health care institutions, as defined by Civil Practice and Remedies Code §74.001, to report on a monthly basis federal COVID-19 funds received. Providers may incur a cost to comply pertaining to the monthly report submission; however, HHSC anticipates it is likely that some providers may have already been required to submit this information to the federal government, which would reduce the overall cost providers would incur to provide information they have already gathered to the state based on this proposal.

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 HHSC Provider Finance Department, Mail Code H-400, P.O. Box 149030, Austin, Texas 78714-9030, or by email to PFD-LTSS@hhhs.texas.gov.

To be considered, comments must be submitted no later than 21 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 21R146" in the subject line.

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC’s duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code Chapter 32; 2022-23 General Appropriations Act, S.B. 1, 87th Legislature, Regular Session, 2021 (Article II, HHSC, Rider 143); and S.B. 809, 87th Legislature, Regular Session, 2021 (to be codified as new Chapter 81A in Texas Health and Safety Code, Subtitle D, Title 2), which requires HHSC to establish procedures for health care institutions to report required information.

The new section affects Texas Government Code Chapter 531; Texas Human Resources Code Chapter 32; 2022-23 General Appropriations Act, S.B. 1, 87th Legislature, Regular Session, 2021 (Article II, HHSC, Rider 143); and S.B. 809, 87th Legislature, Regular Session, 2021 (to be codified as new Chapter 81A in Texas Health and Safety Code, Subtitle D, Title 2).


(a) Introduction. The Texas Health and Human Services Commission (HHSC) collects monthly reports from health care institutions to compile legislatively-mandated reports. This section outlines the reporting requirements related to novel coronavirus (COVID-19) federal fund reporting. This section also describes the circumstances in which penalties and recoupments will be necessary for certain provider types for failure to submit required monthly reports.

(b) Definitions. Unless the context clearly indicates otherwise, the following words and terms when used in this section are defined as follows:

(1) Health care institution--As defined by Civil Practice and Remedies Code §74.001.

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

(c) Institutions required to complete monthly reports. Health care institutions that are required to submit monthly reports include:

(1) an ambulatory surgical center;

(2) an assisted living facility licensed under Texas Health and Safety Code Chapter 247;

(3) an emergency medical services provider;

(4) a health services district created under Texas Health and Safety Code Chapter 287;

(5) a home and community support services agency;

(6) a hospice;

(7) a hospital;

(8) a hospital system;

(9) an intermediate care facility for the mentally retarded or a home and community-based services waiver program for persons with mental retardation adopted in accordance with the Social Security Act §1915(c) (42 U.S.C. §1396n), as amended;

(10) a nursing home; and

(11) an end stage renal disease facility licensed under Texas Health and Safety Code §251.011.

(d) Reporting requirements. A health care institution is required to report on moneys received under the Coronavirus Aid, Relief, and Economic Security Act (15 U.S.C. §9001 et seq.), the Consolidated Appropriations Act, 2021 (Pub. L. No. 116-260), and the American Rescue Plan Act of 2021 (Pub. L. No. 117-2). HHSC may also request additional information related to direct or indirect costs associated with COVID that have impacted the provider's business operation and any other information HHSC deems necessary to appropriately contextualize the moneys received as described in this subsection. HHSC will collect information and the requested data may vary by provider type based on legislative direction.

(e) Frequency of reporting.

(1) Submission of data will be required on a monthly basis.

(2) Initial reporting will begin on September 1, 2021, and is due by October 1, 2021. The initial reporting period will be for January 31, 2020, through August 31, 2021. HHSC may choose to grant the
provider an extension of up to 15 calendar days if the provider notifies HHSC that additional time is required to submit the initial report prior to the due date.

(3) Subsequent monthly reports will be due by the first day of each month and will cover the time-period two months prior. For example, the report due November 1, 2021, will cover September 1, 2021 through September 30, 2021. HHSC may grant the provider an extension of no more than 15 calendar days if the provider notifies HHSC that more time is needed prior to the due date.

(f) HHSC legislatively-mandated reports. HHSC will compile reports based on submitted data and submit the reports on a quarterly basis to the Governor, Legislative Budget Board, and any appropriate standing committee in the Legislature. Quarterly reports will be submitted beginning December 1, 2021, and continue March 1, June 1, and September 1 thereafter. Upon conclusion of the PHE, the submission frequency may be reduced to semi-annually on December 1 and June 1 of each fiscal year.

(g) Penalties for failure to report. Specified providers are required to report information as requested on a monthly basis to HHSC.

(1) A facility that does not report requested information will be identified by name and a unique identifying number, such as National Provider Identification number, in HHSC’s legislatively-mandated reports.

(2) Failure to report 2 or more times in a 12-month period will result in notification to the appropriate licensing authority who may take disciplinary action against a health care institution that violates this chapter as if the institution violated an applicable licensing law.

(3) Failure to report will result in the issuance of a vendor hold on future payments to the identified provider after 30 days following the due date of the required report. The vendor hold will be released after the provider has submitted all delinquent reports to HHSC.

(4) Appropriations in 2022-23 General Appropriations Act, Senate Bill (S.B.) 1, 87th Legislature, Regular Session, 2021 (Article II, HHSC) Strategy A.2.4, Nursing Facility Payments, for fiscal year 2023 are contingent on the submission of the reports due December 1, 2021, and June 1, 2022. If HHSC is unable to utilize appropriations for nursing facilities from Strategy A.2.4, HHSC will suspend all payments to providers until such a time as HHSC is authorized to continue making expenditures under Strategy A.2.4.

(h) Duration. This reporting requirement ends on August 31, 2023 or as specified by HHSC.

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 July 30, 2021.

TRD-202102982
Karen Ray
Chief Counsel
Texas Health and Human Services Commission

Earliest possible date of adoption: September 12, 2021

For further information, please call: (512) 424-6637

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 4. MEDICAID HOSPITAL SERVICES

1 TAC §355.8061

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §355.8061, concerning Outpatient Hospital Reimbursement.

BACKGROUND AND PURPOSE

The purpose of the amendment is to comply with Senate Bill (S.B.) 1, Article II, HHSC, Rider 8(f), 87th Legislature, Regular Session 2021, and to make other amendments to enhance clarity, consistency, and specificity. HHSC is required by S.B. 1 to allocate certain funds appropriated to provide an increase to outpatient reimbursement rates for rural hospitals. HHSC proposes an increase to outpatient services reimbursement by removing the cap that was established September 1, 2013, and applying a percentage increase to the cost to charge ratios for rural hospitals.

The proposed amendment will also eliminate the cost settlement of payments to maintain the level of payment directed by the rider. Rider 8 states that reimbursement for outpatient emergency department services which do not qualify as emergency visits may not exceed 65 percent of cost. Therefore, HHSC proposes a decrease in the allowable charges to 55 percent for these services to accommodate the increase in cost to charge ratios and retain the payments below 65 percent of cost.

Pursuant to S.B. 170, 86th Legislature, Regular Session, 2019 and S.B. 1621, 86th Legislature, Regular Session, 2019, HHSC’s managed care contracts require managed care organizations to reimburse rural hospitals using a minimum fee schedule for services delivered through the Medicaid managed care program. The proposed amendment adds subsection (e), requiring a Medicaid minimum fee schedule for all rural hospitals, to conform to the current law as well.

In addition, HHSC proposes to explain the cost to charge ratio (CCR) rate setting process by including a section specific to rural hospitals.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §355.8061(a) adds two clarifying edits.

The proposed amendment to §355.8061(b)(2) adds "non-rural" to be specific about the outpatient interim rate determination for non-rural hospitals and the "default" interim rate.

Proposed new paragraph §355.8061(b)(3) specifies the outpatient interim rate determination and claim reimbursement for rural hospitals. New subparagraph (D) eliminates cost settlement of outpatient services for rural hospitals.

Proposed new subsection §355.8061 creates new subsection (e) to clarify the minimum fee schedule requirement for Managed Care Organizations.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rule will be in effect, there will be a fiscal impact to the state of a cost of $12,001,619 General Revenue (GR) ($32,393,035 All Funds (AF) for State Fiscal Year (SFY) 2022, and $13,002,823 GR ($33,170,468 AF) each year for SFY 2023 through SFY 2026.
For each year of the first five years that the rule will be in effect, enforcing or administering the rule has implications relating to revenues of local governments. The effect is projected to be a net increase to revenues of local governments of approximately $5,087,125 GR ($13,730,432 AF) for SFY 2022, and $5,382,330 GR, ($13,730,433 AF) each year for SFY 2023 - SFY 2026.

GOVERNMENT GROWTH IMPACT STATEMENT

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

(1) the proposed rule will not create or eliminate a government program;
(2) implementation of the proposed rule will not affect the number of HHSC employee positions;
(3) implementation of the proposed rule will not require an increase in future legislative appropriations;
(4) the proposed rule will not affect fees paid to HHSC;
(5) the proposed rule will not create a new rule;
(6) the proposed rule will not expand, limit, or repeal an existing rule;
(7) the proposed rule will not change the number of individuals subject to the rule; and
(8) the proposed rule 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 or micro-businesses. This rule amendment increases funding for rural hospitals and there are no hospitals in Texas receiving Medicaid that are small businesses or micro-businesses.

LOCAL EMPLOYMENT IMPACT

The proposed rule will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule does not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Victoria Grady, Director of Provider Finance, has determined that for each year of the first five years the rule is in effect, the public benefit will be an increase to outpatient rates for rural hospitals, therefore paying the hospitals more closely to the cost of providing Medicaid outpatient services. An additional benefit includes clarification of language specific to the outpatient interim rate determination for non-rural and rural hospitals.

Trey Wood, Chief Financial Officer, has also determined that for the first five years the rule is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rule. There is no requirement to alter current business practices and no new fees or costs imposed 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 HEARING

A public hearing to receive comments on the proposal will be held by HHSC through a webinar. The meeting date and time will be posted on the HHSC Communications and Events website at: https://hhs.texas.gov/about-hhs/communications-events and the HHSC Provider Finance Hospitals website at: https://pfh.hhs.texas.gov/provider-finance-communications.

Please contact Valerie Lesak at PFD_Hospitals@hhsc.state.tx.us if you have questions.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Valerie Lesak in the HHSC Provider Finance for Hospitals department at PFD_Hospitals@hhsc.state.tx.us.

Written comments on the proposal may be submitted to the HHSC Provider Finance Department, North Austin Complex, 4601 Guadalupe St, Austin, Texas 78751 (Mail Code H-400); P.O. Box 149030, Austin, Texas 78714-9030 (Mail Code H-400); by fax to (512)-730-7475; or by email to PFD_Hospitals@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 21 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) faxed or 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 21R141” in the subject line.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC’s duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code, Chapter 32; and Texas Government Code §531.02194, which requires adoption of a prospective reimbursement methodology for the payment of rural hospitals.

The amendment affects Texas Government Code Chapter 531, and Texas Human Resources Code Chapter 32.

§355.8061. Outpatient Hospital Reimbursement.

(a) Introduction. The Texas Health and Human Services Commission (HHSC), or its designee, reimburses outpatient hospital services under the reimbursement methodology described in this section. Except as described in subsections (c) and (d) of this section, HHSC will reimburse for outpatient hospital services based on a percentage of allowable charges and an outpatient interim rate.

(b) Interim reimbursement.

(1) HHSC will determine a percentage of allowable charges, which are charges for covered Medicaid services determined through claims adjudication.
(A) For high volume providers that received Medicaid outpatient payments equaling at least $200,000 during calendar year 2004.

(i) For children's hospitals and state-owned hospitals as defined in §355.8052 of this division (relating to Inpatient Hospital Reimbursement), the percentage of allowable charges is 76.03 percent, except as described in subparagraph (C) of this paragraph.

(ii) For rural hospitals as defined in §355.8052 of this division, the percentage of allowable charges is 100 percent.

(iii) For all other providers, the percentage of allowable charges is 72.00 percent.

(B) For all providers not considered high volume providers as determined in paragraph (1)(A) of this subsection.

(i) For children's hospitals and state-owned hospitals as defined in §355.8052 of this division, the percentage of allowable charges is 72.27 percent, except as described in subparagraph (C) of this paragraph.

(ii) For rural hospitals as defined in §355.8052 of this division, the percentage of allowable charges is 100 percent.

(iii) For all other providers, the percentage of allowable charges is 68.44 percent.

(C) For children's hospitals:

(i) The percentage of allowable charges described in subparagraphs (A)(i) and (B)(i) of this paragraph are subject to the prior written approval of the Legislative Budget Board and the Governor, as required by the 2014-2015 General Appropriations Act (Article II, Health and Human Services Comm., S.B. 1, 83rd Leg., Regular Session, 2013, Rider 83 and Special Provisions Relating to All Health and Human Services Agencies, Section 44, Rate Limitations and Reporting Requirements).

(ii) If the percentages of allowable charges described in subparagraphs (A)(i) and (B)(i) of this paragraph are not approved as described in clause (i) of this subparagraph, the percentages of allowable charges described in subparagraphs (A)(iii) and (B)(iii) of this paragraph apply.

(D) For outpatient emergency department (ED) services that do not qualify as emergency visits, which are listed in the Texas Medicaid Provider Procedures Manual and other updates on the claims administrator's website, HHSC will reimburse:

(i) rural hospitals, as defined in §355.8052 of this division, an amount not to exceed 65 percent of allowable charges after application of the methodology in paragraph (2)(C) of this subsection, which will result in a payment that does not exceed 65 percent of allowable cost; and

(ii) all other hospitals, a flat fee set at a percentage of the Medicaid acute care physician office visit amount for adults.

(2) HHSC will determine an outpatient interim rate for each non-rural hospital, which is the ratio of Medicaid allowable outpatient costs to Medicaid allowable outpatient charges derived from the hospital's Medicaid cost report.

(A) For a non-rural hospital with at least one tentative cost report settlement completed prior to September 1, 2013, the interim rate is the rate in effect on August 31, 2013, except the hospital will be assigned the interim rate calculated upon completion of any future cost report settlement if that interim rate is lower.

(B) For a non-rural new hospital that does not have at least one tentative cost report settlement completed prior to September 1, 2013, the default interim rate is 50 percent until the interim rate is adjusted as follows:

(i) If the non-rural hospital files a short-period cost report for its first cost report, the hospital will be assigned the interim rate calculated upon completion of the hospital's first tentative cost report settlement.

(ii) The hospital will be assigned the interim rate calculated upon completion of the hospital's first full-year tentative cost report settlement.

(iii) The hospital will retain the interim rate calculated as described in clause (ii) of this subparagraph, except it will be assigned the interim rate calculated upon completion of any future cost report settlement if that interim rate is lower.

(C) Interim claim reimbursement for non-rural hospitals is determined by multiplying the amount of a hospital's outpatient allowable charges after applying any reductions to allowable charges made under paragraph (1) of this subsection by the outpatient interim rate in effect on the date of service.

(D) Cost settlement. Interim claim reimbursement determined in subparagraph (C) of this paragraph will be cost-settled at both tentative and final audit of a non-rural hospital's cost report. The calculation of allowable costs will be determined based on the amount of allowable charges after applying any reductions to allowable charges made under paragraph (1) of this subsection.

(i) Interim payments for claims with a date of service prior to September 1, 2013, will be cost settled.

(ii) Interim payments for claims with a date of service on or after September 1, 2013, will be included in the cost report interim rate calculation, but will not be adjusted due to cost settlement unless the settlement calculation indicates an overpayment.

(iii) HHSC will calculate an interim rate at tentative and final cost settlement for the purposes described in subparagraph (B) of this paragraph.

(iv) If a hospital's interim claim reimbursement for all outpatient services, excluding imaging, clinical lab and outpatient emergency department services that do not qualify as emergency visits, for the hospital's fiscal year exceeded the allowable costs for those services, HHSC will recoup the amount paid to the hospital in excess of allowable costs.

(v) If a hospital's interim claim reimbursement for all outpatient services, excluding imaging, clinical lab and outpatient emergency department services that do not qualify as emergency visits, for the hospital's fiscal year was less than the allowable costs for those services, HHSC will not make additional payments through cost settlement to the hospital for service dates on or after September 1, 2013.

(3) HHSC will determine an outpatient interim rate for each rural hospital, which is the ratio of Medicaid allowable outpatient costs to Medicaid allowable outpatient charges derived from the hospital's Medicaid cost report.

(A) For a rural hospital with at least one tentative cost report settlement completed prior to September 1, 2021, the interim rate effective on September 1, 2021, is the rate calculated in the latest initial cost report with an additional percentage increase, not to exceed an interim rate of 100 percent. After September 1, 2021, a rural hospital will be assigned the interim rate calculated upon completion of each
initial or amended initial cost report, with an additional percentage increase, not to exceed an interim rate of 100 percent.

(B) For a new rural hospital that does not have at least one initial cost report completed prior to September 1, 2021, the default interim rate is 50 percent until the interim rate is adjusted as follows.

(i) If the rural hospital files a short-period cost report for their first cost report, the hospital will continue to receive the default rate until completion of the first full-year initial cost report.

(ii) The rural hospital will be assigned the interim rate calculated upon completion of a review of the hospital's first full-year initial or amended initial cost report, with an additional percentage increase, not to exceed an interim rate of 100 percent.

(C) Interim claim reimbursement for a rural hospital is determined by multiplying the amount of a hospital's outpatient allowable charges after applying any reductions to allowable charges made under paragraph (1) of this subsection by the outpatient interim rate in effect on the date of service as described in subparagraph (A) of this paragraph.

(D) Interim claim reimbursement determined in subparagraph (C) of this paragraph will not be cost-settled for services rendered on or after September 1, 2021.

(c) Outpatient hospital surgery. Outpatient hospital non-emergency surgery is reimbursed in accordance with the methodology for ambulatory surgical centers as described in §355.8121 of this subchapter (relating to Reimbursement).

(d) Outpatient hospital imaging.

(1) For all hospitals except rural hospitals, as defined in §355.8052 of this division, outpatient hospital imaging services are not reimbursed under the outpatient reimbursement methodology described in subsection (b) of this section. Outpatient hospital imaging services are reimbursed according to an outpatient hospital imaging service fee schedule that is based on a percentage of the Medicare Outpatient Prospective Payment System fee schedule for similar services. If a resulting fee for a service provided to any Medicaid beneficiary is greater than 125 percent of the Medicaid adult acute care fee for a similar service, the fee is reduced to 125 percent of the Medicaid adult acute care fee.

(2) For rural hospitals, outpatient hospital imaging services are reimbursed based on a percentage of the Medicare Outpatient Prospective Payment System fee schedule for similar services.

(e) Minimum Fee Schedule. Effective March 1, 2021, Managed Care Organizations are required to reimburse rural hospitals based on a minimum fee schedule. The minimum fee schedules are the rates specific to rural hospitals, as described in subsections (b) through (d).

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 July 30, 2021.

TRD-202102979
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 730-7401

46 TexReg 4934 August 13, 2021 Texas Register
COSTS TO REGULATED PERSONS. The proposed new section does not impose a cost on regulated persons, including another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. Mr. Wolfe has also determined that there will be no impact on rural communities, small businesses, or microbusinesses as a result of implementing these amendments and therefore no regulatory flexibility analysis, as specified in Texas Government Code §2006.002, is required.

GOVERNMENT GROWTH IMPACT STATEMENT. In accordance with Texas Government Code, §2006.0221, the Commission makes the following determinations. During the first five years that the amendments would be in effect, the proposed amendments: will not create or eliminate a government program; will not result in the addition or reduction of employees; will not require an increase or decrease in future legislative appropriations; will not lead to an increase or decrease in fees paid to a state agency; will not create a new regulation; will not repeal an existing regulation; and will not result in an increase or decrease in the number of individuals subject to the rule. During the first five years that the amendments would be in effect, the proposed amendments will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. The Commission has determined that no private real property interests are affected by this proposal and 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.

REQUEST FOR PUBLIC COMMENT. Comments on the proposed amendments may be submitted to Mark Wolfe, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the Texas Register.

STATUTORY AUTHORITY. These amendments are proposed under the authority of Texas Government Code §442.005(q), which provides the Commission with the authority to promulgate rules to reasonably affect the purposes of the Commission and the Texas Tax Code §171.909, which requires the Commission to adopt rules for the implementation of the rehabilitation tax credit program.

CROSS REFERENCE TO STATUTE. These amendments are proposed under the authority of Texas Tax Code §171.009, which requires the Commission to adopt rules for the implementation of the Tax Credit for Certified Rehabilitation of Certified Historic Structures. The proposed amendment implements Subchapter S of the Texas Tax Code. No other statutes, articles, or codes are affected by these amendments.


The following words and terms when used in these rules shall have the following meanings unless the context clearly indicates otherwise:

1. Applicant--The entity that has submitted an application for a building or structure it owns or for which it has a contract to purchase.

2. Application--A fully completed Texas Historic Preservation Tax Credit Application form submitted to the Commission, which includes three parts:

   (A) Part A - Evaluation of Significance, to be used by the Commission to make a determination whether the building is a certified historic structure;

   (B) Part B - Description of Rehabilitation, to be used by the Commission to review proposed projects for compliance with the Standards for Rehabilitation; and

   (C) Part C - Request for Certification of Completed Work, to be used by the Commission to review completed projects for compliance with the work approved under Part B.

3. Application fee--The fee charged by the Commission and paid by the applicant for the review of Part B and Part C of the application as follows:

   Figure: 13 TAC §13.1(3) (No change.)

4. Audited cost report--Such documentation as defined by the Comptroller in 34 TAC Chapter 3, Tax Administration.

5. Building--Any edifice enclosing a space within its walls, and usually covered by a roof, the purpose of which is principally to shelter any form of human activity, such as shelter or housing, or to provide working, office, parking, display, or sales space. The term includes among other examples, banks, office buildings, factories, warehouses, barns, railway or bus stations, and stores and may also be used to refer to a historically and functionally related unit, such as a courthouse and jail or a house and barn. Functional constructions made usually for purposes other than creating human shelter or activity such as bridges, windmills, and towers are not considered buildings under this definition and are not eligible to be certified historic structures.

6. Certificate of Eligibility--A document issued by the Commission to the owner, following review and approval of a Part C application, that confirms the property to which the eligible costs and expenses relate is a certified historic structure and the rehabilitations qualifies as a certified rehabilitation; and specifies the date the certified historic structure was first placed in service after the rehabilitation.

7. Certified historic structure--A building or buildings located on a property in Texas that is certified by the Commission as:

   (A) listed individually in the National Register of Historic Places;

   (B) designated as a Recorded Texas Historic Landmark under §442.006, Texas Government Code, or as a State Antiquities Landmark under Chapter 191, Texas Natural Resources Code; §21.6 and §26.3(63) - (64) of this title; or

   (C) certified by the Commission as contributing to the historic significance of:

      (i) a historic district listed in the National Register of Historic Places; or

      (ii) a certified local district as per 36 CFR §67.9.

8. Certified local district--A local historic district certified by the United States Department of the Interior in accordance with 36 C.F.R §67.9.

9. Certified rehabilitation--The rehabilitation of a certified historic structure that the Commission has certified as meeting the Standards for Rehabilitation. If the project is submitted for the federal rehabilitation tax credit it must be reviewed by the National Park Service prior to a determination that it meets the requirements for a certified
rehabilitation under this rule. In the absence of a determination for the federal rehabilitation tax credit, the Commission shall have the sole responsibility for certifying the project.

(10) Commission--The Texas Historical Commission. [For the purpose of notification or filing of any applications or correspondence, delivery shall be made via postal mail to: Texas Historic Preservation Tax Credit Program, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711-2276; or by overnight delivery at: Texas Historic Preservation Tax Credit Program, Texas Historical Commission, 1700 North Congress Avenue, Suite B-65, Austin, Texas 78701.]

(11) Comptroller--The Texas Comptroller of Public Accounts.

(12) Contributing--A building in a historic district considered to be historically, culturally, or architecturally significant according to the criteria established by state or federal government, including those formally promulgated by the National Park Service and the United States Department of the Interior at 36 C.F.R. Part 60 and applicable national Register bulletins.

(13) Credit--The tax credit for the certified rehabilitation of historic structures available pursuant to Chapter 171, Subchapter S of the Texas Tax Code.

(14) District--A geographically definable area, urban, or rural, possessing a significant concentration, linkage, or continuity of sites, building, structures, or objects united by past events geographically but linked by association or history.

(15) Eligible costs and expenses--The qualified rehabilitation expenditures as defined by §47(c)(2), Internal Revenue Code, including rehabilitation expenses as set out in 26 C.F.R. §1.48-12(c), incurred during the project, except as otherwise specified in Chapter 171, Subchapter S of the Texas Tax Code. [The depreciation and tax-exempt use provisions of §47(c)(2) do not apply to the costs and expenses incurred by an entity exempt from the tax imposed by §171.003 of the Tax Code or by authorized investment of public funds, governed by Chapter 2356 by an institution of higher education or university system as defined by §61.003, Education Code if the other provisions of §47(c)(2) are met.]

(16) Federal rehabilitation tax credit--A federal tax credit for 20% of qualified rehabilitation expenditures with respect to a certified historic structure, as defined in §47, Internal Revenue Code; 26 C.F.R. §1.48-12; and 36 C.F.R. Part 67.

(17) National Park Service--The agency of the United States Department of the Interior that is responsible for certifying projects to receive the federal rehabilitation tax credit.

(18) Owner--A person, partnership, company, corporation, whether for profit or not, governmental body, an institution of higher education or university system or any other entity holding a legal or equitable interest in a Property or Structure, which can include a full or partial ownership interest. A long-term lessee of a property may be considered an owner if their current lease term is at a minimum 27.5 years for residential rental property or 39 years for nonresidential real property, as referenced by §47(c)(2), Internal Revenue Code.

(19) Phased development--A rehabilitation project which may reasonably be expected to be completed in two or more distinct states of development, as defined by United States Treasury Regulation 26 C.F.R. §1.48-12(b)(2)(v). Each phase of a phased development can independently support an Application for a credit as though [thought] it was a stand-alone rehabilitation, as long as each phase meets the definition of a Project. If any completed phase of the rehabilitation project does not meet the requirements of a certified rehabilitation, future applications by the same owner for the same certified historic structure will not be considered.

(20) Placed in Service--A status obtained upon completion of the rehabilitation project as described in the Part B application, and any subsequent amendments, and documented in the Part C application [when the building is ready to be reoccupied and any permits and licenses needed to occupy the building have been issued]. Evidence of the date a property is placed in service includes a certificate of occupancy issued by the local building official and/or an architect's certificate of substantial completion. Other documents will suffice when certificates of occupancy and/or substantial completion are not available for a specific project, including final contractor invoices or other verifiable statements of completion. Alternate documents should be approved by the Commission before submission. Placed in Service documentation must indicate the date that work was completed.

(21) Project--A specified scope of work, as described in a rehabilitation plan submitted with a Part B application and subsequent amendments, comprised of work items that will be fully completed and Placed in Service. Examples of a project may include, but are not limited to, a whole building rehabilitation, rehabilitation of individual floors or spaces within a building, repair of building features, or replacement of building systems (such as mechanical, electrical, and plumbing systems). Partial or incomplete scopes of work, such as project planning and design, demolition, or partial completion of spaces, features, or building systems are not included in this definition as projects. Per §13.6(d)(5) of this title, the Commission's review encompasses the entire building and site even if other work items are not included in a submitted project.

(22) [213] Property--A parcel of real property containing one or more buildings or structures that is the subject of an application for a credit.

(23) [222] Rehabilitation--The process of returning a building or buildings to a state of utility, through repair or alteration, which makes possible an efficient use while retaining those portions and features of the building and its site and environment which are significant.

(24) [224] Rehabilitation plan--Descriptions, drawings, construction plans, and specifications for the proposed rehabilitation of a certified historic structure in sufficient detail to enable the Commission to evaluate compliance with the Standards for Rehabilitation.

(25) [244] Standards for Rehabilitation--The United States Secretary of the Interior's Standards for Rehabilitation as defined in §67.7.

(26) [253] Structure--A building; see also certified historic structure.

(27) [263] Tax Credit--A credit earned against either the state franchise tax or the insurance premium tax per §171 of the Texas Tax Code and any limitations provided therein.

§13.5. Request for Certification of Completed Work.

(a) Application Part C - Request for Certification of Completed Work. Part C of the application requires information to allow the Commission to certify the completed work follows the Standards for Rehabilitation and the rehabilitation plan as approved by the Commission in the Part B review. Part C may be submitted when the project is placed in service.

(b) Application requirements. Information to be submitted in the Part C includes:
The commission also requests comment from interested persons on the following questions:

1. Should the maximum rate for provider of last resort service that is charged by a large service provider to a residential customer in proposed §25.43(m)(2)(A)(iii) and small and medium non-residential customers in proposed §25.43(m)(2)(B)(iv) include a safety threshold to prevent the energy charge from increasing by more than a certain percentage on a year-to-year basis? If so, what is an appropriate safety threshold?

2. Do the acknowledgement of risk requirements in proposed §25.475(c)(3)(G) and §25.475(j) provide adequate customer protections for residential and small commercial customers that enroll in indexed retail electric products and retail electric products that allow for the pass-through of ancillary service charges? If not, should these products be prohibited for residential and small commercial customers?

Comments responding to these questions should be filed in accordance with the instructions below under the heading "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 create a new regulation to implement PURA §39.110 as enacted by the 87th Texas Legislature;
6. the proposed rule will not expand, limit, or repeal an existing regulation;
7. the proposed rule will change the number of individuals subject to the rule's applicability by applying certain minor provisions of §25.475 to brokers and transmission and distribution utilities; 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).

Takeings 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

Cliff Crouch, Customer Protection Division, has determined that for the first five-year period the proposed rule is 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 sections.

Public Benefits

Mr. Crouch has also determined that for each year of the first five years the proposed rules and amendments are in effect, the anticipated public benefits expected as a result of the adoption of the proposed rules and amendments will be increased customer awareness of potential impacts to their electric bills, increased customer protections for the products they are enrolling in, and increased knowledge of availability of critical care and critical load designations. Mr. Crouch does not believe there will be any major economic costs to persons required to comply with the rule under Texas Government Code §2001.024(a)(5).

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 September 14, 2021, at 9:30 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 September 7, 2021. 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 August 27, 2021. Reply comments must be filed by September 7, 2021. 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. Commission staff strongly encourages commenters to include a bulleted executive summary to assist Commission Staff in reviewing the filed comments in a timely fashion. All comments should refer to Project Number 51830.

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §25.43

Statutory Authority

These new rules are proposed under the following provision 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 commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §17.003, which requires electric utilities and retail electric providers to provide clear and uniform information about rates, terms, services, involuntary load shed procedures, critical designations, and procedures for applying for critical designations; §17.102, which directs the commission to adopt and enforce rules requiring that charges on an electric service provider’s bill be clearly and easily identified, §39.101, which requires the commission to ensure that retail customer protections are established that entitle a customer to safe, reliable, and reasonably priced electricity, and other protections; §39.106, which requires that the commission designate providers of last resort; §39.107(g), which prohibits metered electric service being sold to residential customers on a prepaid basis at a price that is higher than the price charged by the POLR, §39.110, which prohibits the offering of wholesale indexed products to residential or small commercial customers and placed conditions on the enrollment of other customers in wholesale indexed products; §39.112, which requires a REP to provide certain information to a residential customer who has a fixed rate product.


§25.43. Provider of Last Resort (POLR).

(a) Purpose. This section establishes the requirements for Provider of Last Resort (POLR) service and ensures that it is available to any requesting retail customer and any retail customer who is transferred to another retail electric provider (REP) by the Electric Reliability Council of Texas (ERCOT) because the customer's REP failed to provide service to the customer or failed to meet its obligations to the independent organization.

(b) Application. The provisions of this section relating to the selection of REPs providing POLR service apply to all REPs that are serving retail customers in transmission and distribution utility (TDU) service areas. This section does not apply when an electric cooperative or a municipally owned utility (MOU) designates a POLR provider for its certificated service area. However, this section is applicable when an electric cooperative delegates its authority to the commission in accordance with subsection (r) of this section to select a POLR provider for the electric cooperative's service area. All filings made with the commission pursuant to this section, including filings subject to a claim of confidentiality, must be filed with the commission's Filing Clerk in accordance with the commission's Procedural Rules, Chapter 22, Subchapter E, of this title (relating to Pleadings and other Documents).

(c) Definitions. The following terms when used in this section have the following meanings, unless the context indicates otherwise:

(1) Affiliate -- As defined in §25.107 of this title (relating to Certification of Retail Electric Providers (REPs)).

(2) Basic firm service -- Electric service that is not subject to interruption for economic reasons and that does not include value-added options offered in the competitive market. Basic firm ser-
service excludes, among other competitively offered options, emergency or back-up service, and stand-by service. For purposes of this definition, the phrase "interruption for economic reasons" does not mean disconnection for non-payment.

(3) Billing cycle -- A period bounded by a start date and stop date that REPs and TDUs use to determine when a customer used electric service.

(4) Billing month -- Generally a calendar accounting period (approximately 30 days) for recording revenue, which may or may not coincide with the period a customer's consumption is recorded through the customer's meter.

(5) Business day -- As defined by the ERCOT Protocols.

(6) Large non-residential customer -- A non-residential customer who had a peak demand in the previous 12-month period at or above one megawatt (MW).

(7) Large service provider (LSP) -- A REP that is designated to provide POLR service pursuant to subsection (j) of this section.

(8) Market-based product--A month-to-month product that is either offered to or matches the rate of a product offered to non-POLR customers of the REP for the same TDU territory and customer class. A month-to-month contract may not contain a termination fee or penalty. For purposes of this section, a rate for residential customers that is derived by applying a positive or negative multiplier to the rate described in subsection (m)(2) of this section is not a market-based product.

(9) Mass transition -- The transfer of customers as represented by ESI IDs from a REP to one or more POLR providers pursuant to a transaction initiated by the independent organization that carries the mass transition (TS) code or other code designated by the independent organization.

(10) Medium non-residential customer -- A non-residential retail customer who had a peak demand in the previous 12-month period of 50 kilowatt (kW) or greater, but less than 1,000 kW.

(11) POLR area -- The service area of a TDU in an area where customer choice is in effect.

(12) POLR provider -- A volunteer retail electric provider (VREP) or LSP that may be required to provide POLR service pursuant to this section.

(13) Residential customer -- A retail customer classified as residential by the applicable TDU tariff or, in the absence of classification under a tariff, a retail customer who purchases electricity for personal, family, or household purposes.

(14) Transitioned customer -- A customer as represented by ESI IDs that is served by a POLR provider as a result of a mass transition under this section.

(15) Small non-residential customer -- A non-residential retail customer who had a peak demand in the previous 12-month period of less than 50 kW.

(16) Voluntary retail electric provider (VREP) -- A REP that has volunteered to provide POLR service pursuant to subsection (i) of this section.

(d) POLR service.

(1) There are two types of POLR providers: VREPs and LSPs.

(2) For the purpose of POLR service, there are four classes of customers: residential, small non-residential, medium non-residential, and large non-residential.

(3) A VREP or LSP may be designated to serve any or all of the four customer classes in a POLR area.

(4) A POLR provider must [shall] offer a basic, standard retail service package to customers it is designated to serve, which is [shall be] limited to:

(A) Basic firm service; and

(B) Call center facilities available for customer inquiries.

(5) A POLR provider must [shall], in accordance with §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges), fulfill billing and collection duties for REPs that have defaulted on payments to the servicer of transition bonds or to TDUs.

(6) Each LSP's customer billing for residential customers taking POLR service under a rate prescribed by subsection (m)(2) of this section must [shall] contain notice to the customer that other competitive products or services may be available from the LSP or another REP. The notice must [shall] include contact information for the LSP, and the Power to Choose website, and must [shall] include a notice from the commission in the form of a bill insert or a bill message with the header "An Important Message from the Public Utility Commission Regarding Your Electric Service" addressing why the customer has been transitioned to an LSP, a description of the purpose and nature of POLR service, and explaining that more information on competitive markets can be found at www.powertochoose.org, or toll-free at 1-866-PWR-4-TEX (1-866-797-4839).

(e) Standards of service.

(1) An LSP designated to serve a class in a given POLR area must [shall] serve any eligible customer requesting POLR service or assigned to the LSP pursuant to a mass transition in accordance with the Standard Terms of Service in subsection (f)(1) of this section for the provider customer's class. However, in lieu of providing terms of service to a transitioned customer under subsection (f) of this section and under a rate prescribed by subsection (m)(2) of this section an LSP may at its discretion serve the customer pursuant to a market-based month-to-month product, provided it serves all transitioned customers in the same class and POLR area pursuant to the product.

(2) A POLR provider must [shall] abide by the applicable customer protection rules as provided for under Subchapter R of this chapter (relating to Customer Protection Rules for Retail Electric Service), except that if there is an inconsistency or conflict between this section and Subchapter R of this chapter, the provisions of this section [shall] apply. However, for the medium non-residential customer class, the customer protection rules as provided for under Subchapter R of this chapter do not apply, except for §25.481 of this title (relating to Unauthorized Charges), §25.485(a)-(b) of this title (relating to Customer Access and Complaint Handling), and §25.495 of this title (relating to Unauthorized Change of Retail Electric Provider).

(3) An LSP that has received commission approval to designate one of its affiliates to provide POLR service on behalf of the LSP pursuant to subsection (k) of this section must [shall] retain responsibility for the provision of POLR service by the LSP affiliate and remains liable for violations of applicable laws and commission rules and all financial obligations of the LSP affiliate associated with the provisioning of POLR service on its behalf by the LSP affiliate.

(f) Customer information.
(1) The Standard Terms of Service prescribed in subparagraphs (A)-(D) of this paragraph apply to POLR service provided by an LSP under a rate prescribed by subsection (m)(2) of this section.

(A) Standard Terms of Service, POLR Provider Residential Service:
Figure: 16 TAC §25.43(f)(1)(A) (No change.)

(B) Standard Terms of Service, POLR Provider Small Non-Residential Service:
Figure: 16 TAC §25.43(f)(1)(B) (No change.)

(C) Standard Terms of Service, POLR Provider Medium Non-Residential Service:
Figure: 16 TAC §25.43(f)(1)(C) (No change.)

(D) Standard Terms of Service, POLR Provider Large Non-Residential Service:
Figure: 16 TAC §25.43(f)(1)(D) (No change.)

(2) An LSP providing service under a rate prescribed by subsection (m)(2) of this section must [shall] provide each new customer the applicable Standard Terms of Service. Such Standard Terms of Service must [shall] be updated as required under §25.475(f) of this title (relating to General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers).

(g) General description of POLR service provider selection process.

(1) Each REP [All REPs must shall] provide information to the commission in accordance with subsection (h)(1) of this section. Based on this information, the commission's designated representative will [shall] designate REPs that are eligible to serve as POLR providers in areas of the state in which customer choice is in effect, except that the commission will [shall] not designate POLR providers in the service areas of MOUs or electric cooperatives unless an electric cooperative has delegated to the commission its authority to designate the POLR provider, in accordance with subsection (r) of this section.

(2) POLR providers must [shall] serve two-year terms. The initial term for POLR service in areas of the state where retail choice is not in effect as of the effective date of the rule must [shall] be set at the time POLR providers are initially selected in such areas.

(h) REP eligibility to serve as a POLR provider. In each even-numbered year, the commission will [shall] determine the eligibility of certified REPs to serve as POLR providers for a term scheduled to commence in January of the next year.

(1) Each REP [All REPs shall] provide information to the commission necessary to establish its [their] eligibility to serve as a POLR provider for the next term. A REP must [REPs shall] file, by July 10th, [of each even-numbered year, by service area, information on the classes of customers it provides [they provide] service to, and for each customer class, the number of ESI IDs the REP serves and the retail sales in megawatt-hours for the annual period ending March 31 of the current year. As part of that filing, a REP may request that the commission designate one of its affiliates to provide POLR service on its behalf pursuant to subsection (k) of this section in the event that the REP is designated as an LSP. The independent organization must [shall] provide to the commission the total number of ESI ID and total MWh data for each class. Each REP must [All REPs shall] also provide information on its [their] technical capability and financial ability to provide service to additional customers in a mass transition. The commission's determination regarding eligibility of a REP to serve as POLR provider under the provisions of this section will [shall] not be considered confidential information.

(2) Eligibility to be designated as a POLR provider is specific to each POLR area and customer class. A REP is eligible to be designated a POLR provider for a particular customer class in a POLR area, unless:

(A) A proceeding to revoke or suspend the REP's certificate is pending at the commission, the REP's certificate has been suspended or revoked by the commission, or the REP's certificate is deemed suspended pursuant to §25.107 of this title (relating to Certification of Retail Electric Providers (REPs));

(B) The sum of the numeric portion of the REP's percentage of ESI IDs served and percentage of retail sales by MWhs in the POLR area, for the particular class, is less than 1.0;

(C) The commission does not reasonably expect the REP to be able to meet the criteria set forth in subparagraph (B) of this paragraph during the entirety of the term;

(D) On the date of the commencement of the term, the REP or its predecessor will not have served customers in Texas for at least 18 months;

(E) The REP does not serve the applicable customer class, or does not have an executed delivery service agreement with the service area TDU;

(F) The REP is certificated as an Option 2 REP under §25.107 of this title;

(G) The REP's customers are limited to its own affiliates;

(H) A REP files an affidavit stating that it does not serve small or medium non-residential customers, except for the low-use sites of the REP's large non-residential customers, or commonly owned or franchised affiliates of the REP's large non-residential customers and opts out of eligibility for either, or both of the small or medium non-residential customer classes; or

(I) The REP does not meet minimum financial, technical and managerial qualifications established by the commission under §25.107 of this title.

(3) For each term, the commission will [shall] publish the names of all [of the] REPs eligible to serve as a POLR provider under this section for each customer class in each POLR area and will [shall] provide notice to REPs determined to be eligible to serve as a POLR provider. A REP may challenge its eligibility determination within five business days of the notice of eligibility by filing with the commission additional documentation that includes the specific data, the specific calculation, and a specific explanation that clearly illustrate and prove the REP's assertion. Commission staff will [shall] verify the additional documentation and, if accurate, reassess the REP's eligibility. Commission staff will [shall] notify the REP of any change in eligibility status within 10 business days of the receipt of the additional documentation. A REP may then appeal to the commission through a contested case if the REP does not agree with the staff determination of eligibility. The contested status will not delay the designation of POLR providers.

(4) A standard form may be created by the commission for REPs to use in filing information concerning their eligibility to serve as a POLR provider.

(5) If ERCOT or a TDU has reason to believe that a REP is no longer capable of performing POLR responsibilities, ERCOT or the TDU must [shall] make a filing with the commission detailing the basis for its concerns and must [shall] provide a copy of the filing to the REP that is the subject of the filing. If the filing contains confidential information, ERCOT or the TDU must [shall] file the confidential...
information in accordance with §22.71 of this title (relating to Filing of Pleadings, Documents, and Other Materials). Commission staff will [shall] review the filing [ ] and will [shall] request that the REP demonstrate that it still meets the qualifications to provide the service. The commission staff may initiate a proceeding with the commission to disqualify the REP from providing POLR service. No ESI IDs will [shall] be assigned to a POLR provider after the commission staff initiates a proceeding to disqualify the POLR provider, unless the commission by order confirms the POLR provider’s designation.

(i) VREP list. Based on the information provided in accordance with this subsection and subsection (h) of this section, the commission will [shall] post the names of VREPs on its webpage, including the aggregate customer count offered by VREPs. A REP may submit a request to be a VREP no earlier than June 1, and no later than July 31, of each even-numbered year unless otherwise determined by the executive director. This filing must [shall] include a description of the REP’s capabilities to serve additional customers as well as the REP’s current financial condition in enough detail to demonstrate that the REP is capable of absorbing a mass transition of customers without technically or financially distressing the REP and the specific information set out in this subsection. The commission’s determination regarding eligibility of a REP to serve as a VREP, under the provisions of this section, will [shall] not be considered confidential information.

(1) A VREP must [shall] provide to the commission the name of the REP, the appropriate contact person with current contact information, which customer classes the REP is willing to serve within each POLR area, and the number of ESI IDs the REP is willing to serve by customer class and POLR area in each transition event.

(2) A REP that has met the eligibility requirements of subsection (h) of this section and provided the additional information set out in this subsection is eligible for designation as a VREP.

(3) Commission staff will [shall] make an initial determination of the REPs that are to serve as a VREP for each customer class in each POLR area and publish their names. A REP may challenge its eligibility determination within five business days of the notice of eligibility by submitting to commission staff additional evidence of its capability to serve as a VREP. Commission staff will [shall] reassess the REP’s eligibility and notify the REP of any change in eligibility status within 10 business days of the receipt of the additional documentation. A REP may then appeal to the commission through a contested case if the REP does not agree with the staff determination of eligibility. The contested status will not delay the designation of VREPs.

(4) A VREP may file a request at any time to be removed from the VREP list or to modify the number of ESI IDs that it is willing to serve as a VREP. If the request is to increase the number of ESI IDs, it must [shall] provide information to demonstrate that it is capable of serving the additional ESI IDs, and the commission staff will [shall] make an initial determination, which is subject to an appeal to the commission, in accordance with the timelines specified in paragraph (3) of this subsection. If the request is to decrease the number of ESI IDs, the request must [shall] be effective five calendar days after the request is filed with the commission; however, after the request becomes effective the VREP must [shall] continue to serve ESI IDs previously acquired through a mass transition event as well as ESI IDs the VREP acquires from a mass transition event that occurs during the five-day notice period. If in a mass transition a VREP is able to acquire more customers than it originally volunteered to serve, the VREP may work with commission staff and ERCOT to increase its designation. Changes approved by commission staff will [shall] be communicated to ERCOT and must [shall] be implemented for the current allocation if possible.

(5) ERCOT or a TDU may challenge a VREP’s eligibility. If ERCOT or a TDU has reason to believe that a REP is no longer capable of performing VREP responsibilities, ERCOT or the TDU must [shall] make a filing with the commission detailing the basis for its concerns and must [shall] provide a copy of the filing to the REP that is the subject of the filing. If the filing contains confidential information, ERCOT or the TDU must [shall] file it in accordance with §25.71 of this title (relating to General Procedures, Requirements and Penalties). Commission staff will [shall] review the filing of ERCOT and if commission staff concludes that the REP should no longer provide VREP service, it will [shall] request that the REP demonstrate that it still meets the qualifications to provide the service. The commission staff may initiate a proceeding with the commission to disqualify the REP from providing VREP service. No ESI IDs will [shall] be assigned to a VREP after the commission staff initiates a proceeding to disqualify the VREP, unless the commission by order confirms the VREP’s designation.

(j) LSPs. This subsection governs the selection and service of REPs as LSPs.

(1) The REPs eligible to serve as LSPs must [shall] be determined based on the information provided by REPs in accordance with subsection (h) of this section. However, for new TDU service areas that are transitioned to competition, the transition to competition plan approved by the commission may govern the selection of LSPs to serve as POLR providers.

(2) In each POLR area, for each customer class, the commission will [shall] designate up to 15 LSPs. The eligible REPs that have the greatest market share based upon retail sales in megawatt-hours, by customer class and POLR area must [shall] be designated as LSPs. Commission staff will [shall] designate the LSPs by October 15th of each even-numbered year, based upon the data submitted to the commission under subsection (h) of this section. Designation as a VREP does not affect a REP’s eligibility to also serve as an LSP.

(3) For the purpose of calculating the POLR rate for each customer class in each POLR area, an EFL must [shall] be completed by the LSP that has the greatest market share in accordance with paragraph (2) of this subsection. The Electricity Facts Label (EFL) must [shall] be supplied to commission staff electronically for placement on the commission webpage by January 1 of each year, and more often if there are changes to the non-bypassable charges. Where REP-specific information is required to be inserted in the EFL, the LSP supplying the EFL must [shall] note that such information is REP-specific.

(4) An LSP serving transitioned residential and small non-residential customers under a rate prescribed by subsection (m)(2) of this section must [shall] move such customers to a market-based month-to-month product, with pricing for such product to be effective no later than the 61st day of service by the LSP or beginning with the customer’s next billing cycle date following the 60th day of service by the LSP. For each transition event, all such transitioned customers in the same class and POLR area must be served pursuant to the same product terms, except for those customers specified in subparagraph (B) of this paragraph.

(A) The notice required by §25.475(d) of this title to inform the customers of the change to a market-based month-to-month product may be included with the notice required by subsection (i)(3) of this section or may be provided 14 days in advance of the change. If the §25.475(d) notice is included with the notice required by subsection (i)(3) of this section, the LSP may state that either or both the terms of service document and EFL for the market-based month-to-month product will [shall] be provided at a later time, but no later than 14 days before their effective date.
(B) The LSP is not required to transfer to a market-based product any transitioned customer who is delinquent in payment of any charges for POLR service to such LSP as of the 60th day of service. If such a customer becomes current in payments to the LSP, the LSP must make the customer to a market-based month-to-month product as described in this paragraph on the next billing cycle that occurs five business days after the customer becomes current. If the LSP does not plan to move customers who are delinquent in payment of any charges for POLR service as of the 60th day of service to a market-based month-to-month product, the LSP must inform the customer of that potential outcome in the notice provided to comply with §25.475(d) of this title.

(5) Upon a request from an LSP and a showing that the LSP will be unable to maintain its financial integrity if additional customers are transferred to it under this section, the commission may relieve an LSP from a transfer of additional customers. The LSP must continue providing continuous service until the commission issues an order relieving it of this responsibility. In the event the requesting LSP is relieved of its responsibility, the commission staff designee will, with 90 days' notice, designate the next eligible REP, if any, as an LSP, based upon the criteria in this subsection.

(k) Designation of an LSP affiliate to provide POLR service on behalf of an LSP.

(1) An LSP may request the commission designate an LSP affiliate to provide POLR service on behalf of the LSP either with the LSP's filing under subsection (h) of this section or as a separate filing in the current term project. The filing must be made at least 30 days prior to the date when the LSP affiliate is to begin providing POLR service on behalf of the LSP. To be eligible to provide POLR service on behalf of an LSP, the LSP affiliate must be certified to provide retail electric service; have an executed delivery service agreement with the service area TDU; and meet the requirements of subsection (h)(2) of this section, with the exception of subsection (h)(2)(B), (C), (D), and (E) of this section as related to serving customers in the applicable customer class.

(2) The request must include the name and certificate number of the LSP affiliate, information demonstrating the affiliation between the LSP and the LSP affiliate, and a certified agreement from an officer of the LSP affiliate stating that the LSP affiliate agrees to provide POLR service on behalf of the LSP. The request must also include an affidavit from an officer of the LSP stating that the LSP will be responsible and indemnify any affected parties for all financial obligations of the LSP affiliate associated with the provisioning of POLR service on behalf of the LSP in the event that the LSP affiliate defaults or otherwise does not fulfill such financial obligations.

(3) Commission staff will make an initial determination of the eligibility of the LSP affiliate to provide POLR service on behalf of an LSP and publish their names. The LSP or LSP affiliate may challenge commission staff's eligibility determination within five business days of the notice of eligibility by submitting to commission staff additional evidence of its capability to provide POLR service on behalf of the LSP. Commission staff will reassess the LSP affiliate's eligibility and notify the LSP and LSP affiliate of any change in eligibility status within 10 business days of the receipt of the additional documentation. If the LSP or LSP affiliate does not agree with staff's determination of eligibility, either or both may then appeal the determination to the commission through a contested case. The LSP must provide POLR service during the pendency of the contested case.

(4) ERCOT or a TDU may challenge an LSP affiliate's eligibility to provide POLR service on behalf of an LSP. If ERCOT or a TDU has reason to believe that an LSP affiliate is not eligible or is not performing POLR responsibilities on behalf of an LSP, ERCOT must make a filing with the commission detailing the basis for its concerns and must provide a copy of the filing to the LSP and the LSP affiliate that are the subject of the filing. If the filing contains confidential information, ERCOT or the LSP must file it in accordance with §25.71 of this title (relating to General Procedures, Requirements and Penalties). Commission staff will review the filing and if commission staff concludes that the LSP affiliate should not be allowed to provide POLR service on behalf of the LSP, it will request that the LSP affiliate demonstrate that it has the capability. The commission staff will review the LSP affiliate's filing and may initiate a proceeding with the commission to disqualify the LSP affiliate from providing POLR service. The LSP affiliate may continue providing POLR service to ESI IDs currently receiving the service during the pendency of the proceeding; however, the LSP must immediately assume responsibility to provide service under this section to customers who request POLR service, or are transferred to POLR service through a mass transition, during the pendency of the proceeding.

(5) Designation of an affiliate to provide POLR service on behalf of an LSP shall not change the number of ESI IDs served or the retail sales in megawatt-hours for the LSP for the reporting period nor does such designation relieve the LSP of its POLR service obligations in the event that the LSP affiliate fails to provide POLR service in accordance with the commission rules.

(6) The designated LSP affiliate must provide POLR service and all reports as required by the commission's rules on behalf of the LSP.

(7) The methodology used by a designated LSP affiliate to calculate POLR rates must be consistent with the methodology used to calculate LSP POLR rates in subsection (m) of this section.

(8) If an LSP affiliate designated to provide POLR service on behalf of an LSP cannot meet or fails to meet the POLR service requirements in applicable laws and Commission rules, the LSP must provide POLR service to any ESI IDs currently receiving the service from the LSP affiliate and to ESI IDs in a future mass transition or upon customer request.

(9) An LSP may elect to reammbone provision of POLR service from the LSP affiliate by filing a reversion notice with the commission and notifying ERCOT at least 30 days in advance.

(i) Mass transition of customers to POLR providers. The transfer of customers to POLR providers must be consistent with this subsection.

(1) ERCOT must first transfer customers to VREPs, up to the number of ESI IDs that each VREP has offered to serve for each customer class in the POLR area. ERCOT must use the VREP list to assign ESI IDs to the VREPs in a non-discriminatory manner, before assigning customers to the LSPs. A VREP must not be assigned more ESI IDs than it has indicated it is willing to serve pursuant to subsection (i) of this section. To ensure non-discriminatory assignment of ESI IDs to the VREPs, ERCOT must:

(A) Sort ESI IDs by POLR area;
(B) Sort ESI IDs by customer class;
(C) Sort ESI IDs numerically;
(D) Sort VREPs numerically by randomly generated number; and
(E) Assign ESI IDs in numerical order to VREPs, in the order determined in subparagraph (D) of this paragraph, in accordance with the number of ESI IDs each VREP indicated a willingness to serve pursuant to subsection (i) of this section. If the number of ESI IDs is less than the total that the VREPs indicated that they are willing to serve, each VREP must [shall] be assigned a proportionate number of ESI IDs, as calculated by dividing the number that each VREP indicated it was willing to serve by the total that all VREPs indicated they were willing to serve, multiplying the result by the total number of ESI IDs being transferred to the VREPs, and rounding to a whole number.

(2) If the number of ESI IDs exceeds the amount the VREPs are designated to serve, ERCOT must [shall] assign remaining ESI IDs to LSPs in a non-discriminatory fashion, in accordance with their percentage of market share based upon retail sales in megawatt-hours, on a random basis within a class and POLR area, except that a VREP that is also an LSP that volunteers to serve at least 1% of its market share for a class of customers in a POLR area must [shall] be exempt from the LSP allocation up to 1% of the class and POLR area. To ensure non-discriminatory assignment of ESI IDs to the LSPs, ERCOT must [shall]:

(A) Sort the ESI IDs in excess of the allocation to VREPs, by POLR area;

(B) Sort ESI IDs in excess of the allocation to VREPs, by customer class;

(C) Sort ESI IDs in excess of the allocation to VREPs, numerically;

(D) Sort LSPs, except LSPs that volunteered to serve 1% of their market share as a VREP, numerically by MWs served;

(E) Assign ESI IDs that represent no more than 1% of the total market for that POLR area and customer class less the ESI IDs assigned to VREPs that volunteered to serve at least 1% of their market share for each POLR area and customer class in numerical order to LSPs designated in subparagraph (D) of this paragraph, in proportion to the percentage of MWs served by each LSP to the total MWs served by all LSPs;

(F) Sort LSPs, including any LSPs previously excluded under subparagraph (D) of this paragraph; and

(G) Assign all remaining ESI IDs in numerical order to LSPs in proportion to the percentage of MWs served by each LSP to the total MWs served by all LSPs.

(3) Each mass transition must [shall] be treated as a separate event.

(m) Rates applicable to POLR service.

(1) A VREP must [shall] provide service to customers using a market-based, month-to-month product. The VREP must [shall] use the same market-based, month-to-month product for all customers in a mass transition that are in the same class and POLR area.

(2) Subparagraphs (A)-(C) of this paragraph establish the maximum rate for POLR service charged by an LSP. An LSP may charge a rate less than the maximum rate if it charges the lower rate to all customers in a mass transition that are in the same class and POLR area.

(A) Residential customers. The LSP rate for the residential customer class must [shall] be determined by the following formula: LSP rate (in $ per kWh) = (Non-bypassable charges + LSP customer charge + LSP demand charge + LSP energy charge) / kWh used Where:

(i) Non-bypassable charges must [shall] be all TDU charges and credits for the appropriate customer class in the applicable service territory and other charges including ERCOT administrative charges, nodal fees or surcharges, reliability unit commitment (RUC) capacity short charges attributable to LSP load, and applicable taxes from various taxing or regulatory authorities, multiplied by the level of kWh and kW used, where appropriate.

(ii) LSP customer charge must [shall] be $0.06 per kWh.

(iii) LSP energy charge must be the average of the actual Real-Time Settlement Point Prices (RTSPPs) for the customer’s load zone for the 12-month period ending September 1 of the preceding year multiplied by the number of kWh the customer used during that billing period and further multiplied by 120%. LSP energy charge shall be the sum over the billing period of the actual hourly Real-Time Settlement Point Prices (RTSPPs) for the customer’s load zone that is multiplied by the number of kWh the customer used during that hour and that is further multiplied by 120%.

(iv) “Number of kWhs the customer used” is based on interval data. [*Actual hourly RTSPP*] is an hourly rate based on a simple average of the actual interval RTSPPs over the hour.

[forn] [*Number of kWhs the customer used*] is based either on interval data or on an allocation of the customer’s total actual usage to the hour based on a ratio of the sum of the ERCOT backcasted profile interval usage data for the customer’s profile type and weather zone over the hour to the total of the ERCOT backcasted profile interval usage data for the customer’s profile type and weather zone over the customer’s entire billing period.

[fornii] For each billing period, if the sum over the billing period of the actual hourly RTSPP for a customer multiplied by the number of kWhs the customer used during that hour falls below the simple average of the RTSPPs for the load zone located partially or wholly in the customer’s TDU service territory that had the highest simple average price over the 12-month period ending September 1 of the preceding year multiplied by the number of kWhs the customer used during the customer’s billing period, then the LSP energy charge shall be the simple average of the RTSPPs for the load zone partially or wholly in the customer’s TDU service territory that had the highest simple average over the 12-month period ending September 1 of the preceding year multiplied by the number of kWhs the customer used during the customer’s billing period multiplied by 125%. This methodology shall apply until the commission issues an order suspending or modifying the operation of the floor after conducting an investigation.

(B) Small and medium non-residential customers. The LSP rate for the small and medium non-residential customer classes must [shall] be determined by the following formula:

LSP rate (in $ per kWh) = (Non-bypassable charges + LSP customer charge + LSP demand charge + LSP energy charge) / kWh used

Where:

(i) Non-bypassable charges must [shall] be all TDU charges and credits for the appropriate customer class in the applicable service territory, and other charges including ERCOT administrative charges, nodal fees or surcharges, RUC capacity short charges attributable to LSP load, and applicable taxes from various taxing or regulatory authorities, multiplied by the level of kWh and kW used, where appropriate.

(ii) LSP customer charge must [shall] be $0.025 per kWh.
(iii) LSP demand charge must [shall] be $2.00 per kW, per month, for customers that have a demand meter, and $50.00 per month for customers that do not have a demand meter.

(iv) LSP energy charge must be the average of the actual RTSPPs for the customer’s load zone for the previous 12-month period ending September 1 of the preceding year multiplied by the number of kWhs the customer used during that billing period and further multiplied by 125%. [LSP energy charge shall be the sum over the billing period of the actual hourly RTSPPs, for the customer’s load zone that is multiplied by number of kWhs the customer used during that hour and that is further multiplied by 125%]

(v) “Number of kWhs the customer used” is based on interval data. [“Actual hourly RTSPP is an hourly rate based on a simple average of the actual interval RTSPPs per the hour.”]

(vii) [Number of kWh the customer used] is based either on interval data or on an allocation of the customer’s total actual usage to the hour based on a ratio of the sum of the ERCOT backcasted profile interval usage data for the customer’s profile type and weather zone over the hour to the total of the ERCOT backcasted profile interval usage data for the customer’s profile type and weather zone over the customer’s entire billing period.

(viii) [For each billing period, if the sum over the billing period of the actual hourly RTSPP for a customer multiplied by the number of kWhs the customer used during that hour falls below the simple average of the RTSPPs for the load zone located partially, or wholly in the customer’s TDU service territory that had the highest simple average over the 12-month period ending September 1 of the preceding year multiplied by the number of kWhs the customer used during the customer’s billing period, then the LSP energy charge shall be the simple average of the RTSPPs for the load zone located partially, or wholly in the customer’s TDU service territory that had the highest simple average price over the 12-month period ending September 1 of the preceding year multiplied by the number of kWhs the customer used during the customer’s billing period multiplied by 125%. This methodology shall apply until the commission issues an order suspending or modifying the operation of the floor after conducting an investigation.]

(C) Large non-residential customers. The LSP rate for the large non-residential customer class must [shall] be determined by the following formula: LSP rate (in $ per kWh) = (Non-bypassable charges + LSP customer charge + LSP demand charge + LSP energy charge) / kWh used Where:

(i) Non-bypassable charges must [shall] be all TDU charges and credits for the appropriate customer class in the applicable service territory, and other charges including ERCOT administrative charges, nodal fees or surcharges, RUC capacity short charges attributable to LSP load, and applicable taxes from various taxing or regulatory authorities, multiplied by the level of kWh and KW used, where appropriate.

(ii) LSP customer charge must [shall] be $2,897.00 per month.

(iii) LSP demand charge must [shall] be $6.00 per kW, per month.

(iv) LSP energy charge must [shall] be the appropriate RTSPP, determined on the basis of 15-minute intervals, for the customer multiplied by 125%, multiplied by the level of kilowatt-hours used. The energy charge must [shall] have a floor of $7.25 per MWh.

If a result overcharged its customers, the LSP must [shall] issue refunds to the specific customers who were overcharged.

(4) On a showing of good cause, the commission may permit the LSP to adjust the rate prescribed by paragraph (2) of this subsection, if necessary to ensure that the rate is sufficient to allow the LSP to recover its costs of providing service. Notwithstanding any other commission rule to the contrary, such rates may be adjusted on an interim basis for good cause shown and after at least 10 business days’ notice and an opportunity for hearing on the request for interim relief. Any adjusted rate must [shall] be applicable to all LSPs charging the rate prescribed by paragraph (2) of this subsection to the specific customer class, within the POLR area that is subject to the adjustment.

(5) For transitioned customers, the customer and demand charges associated with the rate prescribed by paragraph (3) of this subsection must [shall] be pro-rated for partial month usage if a large non-residential customer switches from the LSP to a REP of choice.

(n) Challenges to customer assignments. A POLR provider is not obligated to serve a customer within a customer class or a POLR area for which the REP is not designated as a POLR provider, after a successful challenge of the customer assignment. A POLR provider must [shall] use the ERCOT market variance resolution tool to challenge a customer class assignment with the TDU. The TDU must [shall] make the final determination based upon historical usage data and not premise type. If the customer class assignment is changed and a different POLR provider for the customer is determined appropriate, the customer must [shall] then be served by the appropriate POLR provider. Back dated transactions may be used to correct the POLR assignment.

(o) Limitation on liability. A [The] POLR provider must [providers shall] make reasonable provisions to provide service under this section to any ESI IDs currently receiving the service and to ESI IDs obtained in a future mass transition or served upon customer request; however, liabilities not excused by reason of force majeure or otherwise must [shall] be limited to direct, actual damages.

(1) Neither the customer nor the POLR provider must [shall] be liable to the other for consequential, incidental, punitive, exemplary, or indirect damages. These limitations apply without regard to the cause of any liability or damage.

(2) In no event will [shall] ERCOT or a POLR provider be liable for damages to any REP, whether under tort, contract or any other theory of legal liability, for transitioning or attempting to transition a customer from such REP to the POLR provider to carry out this section, or for marketing, offering or providing competitive retail electric service to a customer taking service under this section from the POLR provider.

(p) REP obligations in a transition of customers to POLR service.

(1) A customer may initiate service with an LSP by requesting such service at the rate prescribed by subsection (m)(2) of this section with any LSP that is designated to serve the requesting customer’s service area. An LSP cannot refuse a customer’s request to make arrangements for POLR service, except as otherwise permitted under this title.

(2) The POLR provider is responsible for obtaining resources and services needed to serve a customer once it has been notified that it is serving that customer. The customer is responsible for charges for service under this section at the rate in effect at that time.

(3) If a REP terminates service to a customer, or transitions a customer to a POLR provider, the REP is financially responsible for
the resources and services used to serve the customer until it notifies the independent organization of the termination or transition of the service and the transfer to the POLR provider is complete.

(4) The POLR provider is financially responsible for all costs of providing electricity to customers from the time the transfer or initiation of service is complete until such time as the customer ceases taking service under this section.

(5) A defaulting REP whose customers are subject to a mass transition event must [shall] return the customers’ deposits within seven calendar days of the initiation of the transition.

(6) ERCOT must [shall] create a single standard file format and a standard set of customer billing contact data elements that, in the event of a mass transition, must [shall] be used by the exiting REP and the POLRs to send and receive customer billing contact information. The process, as developed by ERCOT, must [shall] be tested on a periodic basis. Each REP must [All REPs shall] submit timely, accurate, and complete files, as required by ERCOT in a mass transition event, as well as for periodic testing. The commission will [shall] establish a procedure for the verification of customer information submitted by REPs to ERCOT. ERCOT must [shall] notify the commission if any REP fails to comply with the reporting requirements in this subsection.

(7) When customers are to be transitioned or assigned to a POLR provider, the POLR provider may request usage and demand data, and customer contact information including email, telephone number, and address from the appropriate TDU and from ERCOT, once the transition to the POLR provider has been initiated. Customer proprietary information provided to a POLR provider in accordance with this section must [shall] be treated as confidential and must [shall] only be used for mass transition related purposes.

(8) Information from the TDU and ERCOT to the POLR providers must [shall] be provided in Texas SET format when Texas SET transactions are available. However, the TDU or ERCOT may supplement the information to the POLR providers in other formats to expedite the transition. The transfer of information in accordance with this section must [shall] not constitute a violation of the customer protection rules that address confidentiality.

(9) A POLR provider may require a deposit from a customer that has been transitioned to the POLR provider to continue to serve the customer. Despite the lack of a deposit, the POLR provider is obligated to serve the customer transitioned or assigned to it, beginning on the service initiation date of the transition or assignment, and continuing until such time as any disconnection request is effectuated by the TDU. A POLR provider may make the request for deposit before it begins serving the customer, but the POLR provider must [shall] begin providing service to the customer even if the service initiation date is before it receives the deposit - if any deposit is required. A POLR provider must [shall] not disconnect the customer until the appropriate time period to submit the deposit has elapsed. For the large non-residential customer class, a POLR provider may require a deposit to be provided in five calendar days. For the residential customer class, the POLR provider may require a deposit to be provided after 15 calendar days of service if the customer received 10 days’ notice that a deposit was required. For all other customer classes, the POLR provider may require a deposit to be provided in 10 calendar days. The POLR provider may waive the deposit requirement at the customer’s request if deposits are waived in a non-discriminatory fashion. If the POLR provider obtains sufficient data, it must [shall] determine whether a residential customer has satisfactory credit based on the criteria the POLR provider routinely applies to its other residential customers. If the customer has satisfactory credit, the POLR provider must [shall] not request a deposit from the residential customer.

(10) On the occurrence of one or more of the following events, ERCOT must [shall] initiate a mass transition to POLR providers[1] of all of the customers served by a REP:

(A) At the time of a mass transition, the Executive Director or staff designated by the Executive Director will [shall] distribute available proceeds from an irrevocable stand-by letter of credit in accordance with the priorities established in §25.107(f)(6) of this title. For a REP that has obtained a current list from the Low Income List Administrator (LILA) that identifies low-income customers, these funds must [shall] first be used to provide deposit payment assistance for that REP’s transitioned low-income customers. The Executive Director or staff designee will [shall], at the time of a transition event, determine the reasonable deposit amount up to $400 per customer ESI ID, unless good cause exists to increase the level of the reasonable deposit amount above $400. Such reasonable deposit amount may take into account factors such as typical residential usage and current retail residential prices, and, if fully funded, must [shall] satisfy in full the customers’ initial deposit obligation to the VREP or LSP.

(B) For a REP that has obtained a current list from the LILA that identifies low-income customers, the Executive Director or the staff designee will [shall] distribute available proceeds pursuant to §25.107(f)(6) of this title to the VREPs proportionate to the number of customers they received in the mass transition, who at the time of the mass transition were identified as low-income customers by the current LILA list, up to the reasonable deposit amount set by the Executive Director or staff designee. If funds remain available after distribution to the VREPs, the remaining funds must [shall] be distributed to the appropriate LSPs by dividing the amount remaining by the number of low-income customers identified in the LILA list that are allocated to the LSPs, up to the reasonable deposit amount set by the Executive Director or staff designee.

(C) If the funds distributed in accordance with §25.107(f)(6) of this title do not equal the reasonable deposit amount determined, the VREP and LSP may request from the customer payment of the difference between the reasonable deposit amount and the amount distributed. Such difference must [shall] be collected in accordance with §25.478(e)(3) of this title (relating to Credit Requirements and Deposits).

(D) Notwithstanding §25.478(d) of this title, 90 days after the transition date, the VREP or LSP may request payment of an amount that results in the total deposit held being equal to what the VREP or LSP would otherwise have charged a customer in the same customer class and service area in accordance with §25.478(e) of this title, at the time of the transition.

(11) A REP must [shall] not use the mass transition process in this section as a means to cease providing service to some cus-

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ters[,] while retaining other customers. A REP's improper use of the mass transition process may lead to de-certification of the REP.

(12) ERCOT may provide procedures for the mass transition process, consistent with this section.

(13) A mass transition under this section must [shall] not override or supersede a switch request made by a customer to switch an ESI ID to a new REP of choice, if the request was made before a mass transition is initiated. If a switch request has been made but is scheduled for any date after the next available switch date, the switch must [shall] be made on the next available switch date.

(14) ERCOT must identify customers [Customers] who are mass transitioned [shall be identified] for a period of 60 calendar days. The identification must [shall] terminate at the first completed switch or at the end of the 60-day period, whichever is first. If necessary, ERCOT system changes or new transactions must [shall] be implemented no later than 14 months from the effective date of this section to communicate that a customer was acquired in a mass transition and is not charged the out-of-cycle meter read pursuant to paragraph (16) of this subsection. To the extent possible, the systems changes should be designed to ensure that the 60-day period following a mass transition, when a customer switches away from a POLR provider, the switch transaction is processed as an unprotected, out-of-cycle switch, regardless of how the switch was submitted.

(15) In the event of a transition to a POLR provider or away from a POLR provider to a REP of choice, the switch notification notice detailed in §25.474(l) of this title (relating to Selection of Retail Electric Provider) is not required.

(16) In a mass transition event, the ERCOT initiated transactions must [shall] request an out-of-cycle meter read for the associated ESI IDs for a date two calendar days after the calendar date ERCOT initiates such transactions to the TDU. If an ESI ID does not have the capability to be read in a fashion other than a physical meter read, the out-of-cycle meter read may be estimated. An estimated meter read for the purpose of a mass transition to a POLR provider must [shall] not be considered a break in a series of consecutive months of estimates, but must [shall] not be considered a month in a series of consecutive estimates performed by the TDU. A TDU must [shall] create a regulatory asset for the TDU fees associated with a mass transition of customers to a POLR provider pursuant to this subsection. Upon review of reasonableness and necessity, a reasonable level of amortization of such regulatory asset must [shall] be included as a recoverable cost in the TDU's rates in its next rate case or such other rate recovery proceeding as deemed necessary. The TDU must [shall] not bill, as a discretionary charge, the costs included in this regulatory asset, which must [shall] consist of the following:

(A) fees for out-of-cycle meter reads associated with the mass transition of customers to a POLR provider; and

(B) fees for the first out-of-cycle meter read provided to a customer who transfers away from a POLR provider, when the out-of-cycle meter read is performed within 60 calendar days of the date of the mass transition and the customer is identified as a transitioned customer.

(17) In the event the TDU estimates a meter read for the purpose of a mass transition, the TDU must [shall] perform a true-up evaluation of each ESI ID after an actual meter reading is obtained. Within 10 days after the actual meter reading is obtained, the TDU must [shall] calculate the actual average kWh usage per day for the time period from the most previous actual meter reading occurring prior to the estimate for the purpose of a mass transition to the most current actual meter reading occurring after the estimate for the purpose of mass transition. If the average daily estimated usage sent to the exiting REP is more than 50% greater than or less than the average actual kWh usage per day, the TDU must [shall] promptly cancel and re-bill both the exiting REP and the POLR using the average daily actual usage.

(q) Termination of POLR service provider status.

(1) The commission may revoke a REP's POLR status after notice and opportunity for hearing:

(A) if the POLR provider fails to maintain REP certification;

(B) if the POLR provider fails to provide service in a manner consistent with this section;

(C) if the POLR provider fails to maintain appropriate financial qualifications; or

(D) for other good cause.

(2) If an LSP defaults or has its status revoked before the end of its term, after a review of the eligibility criteria, the commission may designate a [shall], as soon as practicable, designate the next eligible REP, if any, as an LSP, based on the criteria in subsection (j) of this section.

(3) At the end of the POLR service term, the outgoing LSP must [shall] continue to serve customers who have not selected another REP.

(r) Electric cooperative delegation of authority. An electric cooperative that has adopted customer choice may select to delegate to the commission its authority to select POLR providers under PURA §41.053(c) in its certificated service area in accordance with this section. After notice and opportunity for comment, the commission will [shall], at its option, accept or reject such delegation of authority. If the commission accepts the delegation of authority, the following conditions [shall] apply:

(1) The board of directors must [shall] provide the commission with a copy of a board resolution authorizing such delegation of authority;

(2) The delegation of authority must [shall] be made at least 30 calendar days prior to the time the commission issues a publication of notice of eligibility;

(3) The delegation of authority must [shall] be for a minimum period corresponding to the period for which the solicitation must [shall] be made;

(4) The electric cooperative wishing to delegate its authority to designate a [an] continuous provider must [shall] also provide the commission with the authority to apply the selection criteria and procedures described in this section in selecting the POLR providers within the electric cooperative's certificated service area; and

(5) If there are no competitive REPs offering service in the electric cooperative certificated area, the commission must [shall] automatically reject the delegation of authority.

(s) Reporting requirements. Each LSP that serves customers under a rate prescribed by subsection (m)(2) of this section must [shall] file the following information with the commission on a quarterly basis beginning January of each year in a project established by the commission for the receipt of such information. Each quarterly report must [shall] be filed within 30 calendar days of the end of the quarter.

(1) For each month of the reporting quarter, each LSP must [shall] report the total number of new customers acquired by the LSP
under this section and the following information regarding these customers:

(A) The number of customers from whom a deposit was requested pursuant to the provisions of §25.478 of this title, and the average amount of deposit requested;

(B) The number of customers from whom a deposit was received, including those who entered into deferred payment plans for the deposit, and the average amount of the deposit;

(C) The number of customers whose service was physically disconnected pursuant to the provisions of §25.483 of this title (relating to Disconnection of Service) for failure to pay a required deposit; and

(D) Any explanatory data or narrative necessary to account for customers that were not included in either subparagraph (B) or (C) of this paragraph.

(2) For each month of the reporting quarter each LSP must [shall] report the total number of customers to whom a disconnection notice was issued pursuant to the provisions of §25.483 of this title and the following information regarding those customers:

(A) The number of customers who entered into a deferred payment plan, as defined by §25.480(j) of this title (relating to Bill Payment and Adjustments) with the LSP;

(B) The number of customers whose service was physically disconnected pursuant to §25.483 of this title;

(C) The average amount owed to the LSP by each disconnected customer at the time of disconnection; and

(D) Any explanatory data or narrative necessary to account for customers that are not included in either subparagraph (A) or (B) of this paragraph.

(3) For the entirety of the reporting quarter, each LSP must [shall] report, for each customer that received POLR service, the TDU and customer class associated with the customer's ESI ID, the number of days the customer received POLR service, and whether the customer is currently the LSP's customer.

(t) Notice of transition to POLR service to customers. When a customer is moved to POLR service, the customer must [shall] be provided notice of the transition by ERCOT, the REP transitioning the customer, and the POLR provider. The ERCOT notice must [shall] be provided within two days of the time ERCOT and the transitioning REP know that the customer must [shall] be transitioned and customer contact information is available. If ERCOT cannot provide notice to customers within two days, it must [shall] provide notice as soon as practicable. The POLR provider must [shall] provide the notice required by paragraph (3) of this subsection to commission staff at least 48 hours before it is provided to customers, and must [shall] provide the notice to transitioning customers as soon as practicable. The POLR provider must [shall] email the notice to the commission staff members designated for receipt of the notice.

(1) ERCOT notice methods must [shall] include a postcard [postcard], containing the official commission seal with language and format approved by the commission. ERCOT must [shall] notify transitioned customers with an automated phone call [phone call] and email to the extent the information to contact the customer is available pursuant to subsection (p)(6) of this section. ERCOT must [shall] study the effectiveness of the notice methods used and report the results to the commission.

(2) Notice by the REP from which the customer is transferred must [shall] include:

(A) The reason for the transition;

(B) A contact number for the REP;

(C) A statement that the customer must [shall] receive a separate notice from the POLR provider that must [shall] disclose the date the POLR provider must [shall] begin serving the customer;

(D) Either the customer's deposit plus accrued interest, or a statement that the deposit must [shall] be returned within seven days of the transition;

(E) A statement that the customer can leave the assigned service by choosing a competitive product or service offered by the POLR provider, or another competitive REP, as well as the following statement: "If you would like to see offers from different retail electric providers, please access www.powertochoose.org, or call toll-free 1-866-PWR-4-TEX (1-866-797-4839) for a list of providers in your area;"

(F) For residential customers, notice from the commission in the form of a bill insert or a bill message with the header "An Important Message from the Public Utility Commission Regarding Your Electric Service" addressing why the customer has been transitioned to another REP, the continuity of service purpose, the option to choose a different competitive provider, and information on competitive markets to be found at www.powertochoose.org, or toll-free at 1-866-PWR-4-TEX (1-866-797-4839);

(G) If applicable, a description of the activities that the REP must [shall] use to collect any outstanding payments, including the use of consumer reporting agencies, debt collection agencies, small claims court, and other remedies allowed by law, if the customer does not pay or make acceptable payment arrangements with the REP; and

(H) Notice to the customer that after being transitioned to POLR service, the customer may accelerate a switch to another REP by requesting a special or out-of-cycle meter read.

(3) Notice by the POLR provider must [shall] include:

(A) The date the POLR provider began or must [shall] begin serving the customer and a contact number for the POLR provider;

(B) A description of the POLR provider's rate for service. In the case of a notice from an LSP that applies the pricing of subsection (m)(2) of this section, a statement that the price is generally higher than available competitive prices, that the price is unpredictable, and that the exact rate for each billing period must [shall] not be determined until the time the bill is prepared;

(C) The deposit requirements of the POLR provider and any applicable deposit waiver provisions and a statement that, if the customer chooses a different competitive product or service offered by the POLR provider, a REP affiliated with the POLR provider, or another competitive REP, a deposit may be required;

(D) A statement that the additional competitive products or services may be available through the POLR provider, a REP affiliated with the POLR provider, or another competitive REP, as well as the following statement: "If you would like to choose a different retail electric provider, please access www.powertochoose.org, or call toll-free 1-866-PWR-4-TEX (1-866-797-4839) for a list of providers in your area;"

(E) The applicable Terms of Service and Electricity Facts Label (EFL); and

(F) For residential customers that are served by an LSP under a rate prescribed by subsection (m)(2) of this section, a notice
to the customer that after being transitioned to service from a POLR provider, the customer may accelerate a switch to another REP by requesting a special or out-of-cycle meter read.

(u) Market notice of transition to POLR service. ERCOT must [shall] notify all affected Market Participants and the Retail Market Subcommittee (RMS) email listserv of a mass transition event within the same day of an initial mass-transition call after the call has taken place. The notification must [shall] include the exiting REP’s name, total number of ESI IDs, and estimated load.

(v) Disconnection by a POLR provider. The POLR provider must comply with the applicable customer protection rules as provided for under Subchapter R of this chapter, except as otherwise stated in this section. To ensure continuity of service, service under this section must [shall] begin when the customer's transition to the POLR provider is complete. A customer deposit is not a prerequisite for the initiation of service under this section. Once service has been initiated, a customer deposit may be required to prevent disconnection. Disconnection for failure to pay a deposit may not occur until after the proper notice and after that appropriate payment period detailed in §25.478 of this title has elapsed, except where otherwise noted in this section.

(w) Deposit payment assistance.

(1) The commission staff designee will [shall] distribute the deposit payment assistance monies to the appropriate POLRs on behalf of customers as soon as practicable.

(2) The Executive Director or staff designee will [shall] use best efforts to provide written notice to the appropriate POLRs of the following on or before the second calendar day after the transition:

(A) a list of the ESI IDs identified by the LILA that have been or must [shall] be transitioned to the applicable POLR (if available); and

(B) the amount of deposit payment assistance that must [shall] be provided on behalf of a POLR customer identified by the LILA (if available).

(3) Amounts credited as deposit payment assistance pursuant to this section must [shall] be refunded to the customer in accordance with §25.478(j) of this title.

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 August 2, 2021.

TRD-202102996
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Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 936-7244

SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE PROVIDERS


Statutory Authority

The new rule and amendments are proposed under Texas Water Code §13.041(b), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and §13.305, which establishes a voluntary process for the valuation of utilities or facilities acquired by Class A or Class B utilities.


(a) Application. This subchapter applies to aggregators and retail electric providers (REPs). In addition, where specifically stated, these rules apply to transmission and distribution utilities (TDUs), the registration agent, brokers and power generation companies. These rules specify when certain provisions are applicable only to some, but not all, of these providers.

(1) - (2) (No change.)

(3) The rules in this subchapter are minimum, mandatory requirements that must be offered to or complied with for all customers unless otherwise specified. Except for the provisions of §25.495 of this title (relating to Unauthorized Change of Retail Electric Provider), §25.481 of this title (relating to Unauthorized Charges), and §25.485(a)-(b) of this title (relating to Customer Access and Complaint Handling), and §25.499 (relating to Acknowledgement of Risk Requirements for Certain Commercial Contracts), a customer other than a residential or small commercial class customer, or a non-residential customer whose load is part of an aggregation in excess of 50 kilowatts, may agree to terms of service that reflect either a higher or lower level of customer protections than would otherwise apply under these rules. Any agreements containing materially different protections from those specified in these rules must be reduced to writing and provided to the customer. Additionally, copies of such agreements must be provided to the commission upon request.

(4) - (5) (No change.)

(b) - (d) (No change.)

§25.475. General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers.

(a) Applicability. The requirements of this section apply to retail electric providers (REPs) and aggregators, when specifically stated, in connection with the provision of service and marketing to residential and small commercial customers. When specifically stated, the requirements of this section apply to brokers, aggregators, and transmission and distribution utilities (TDUs). This section is effective for contracts entered into on or after September 1, 2021. [This section is effective April 1, 2021. REP are not required to modify contract documents related to contracts entered into before this date.] but must [shall] provide notice of expiration as required by subsection (e) of this section. Contracts entered into prior to September 1, 2021 must comply with the provisions of this section in effect at the time the contracts were executed.

(b) Definitions. The definitions set forth in §25.5 of this title (relating to Definitions) and §25.471(d) of this title (relating to General Provisions of Customer Protection Rules) apply to this section. In addition, the [the] following words and terms, when used in this section [shall] have the following meanings, unless the context indicates otherwise.

(1) Contract -- The Terms of Service document (TOS), the Electricity Facts Label (EFL), Your Rights as a Customer document (YRAC), and the documentation of enrollment pursuant to §25.474 of this title (relating to Selection of Retail Electric Provider), and, if applicable, the Acknowledgement of Risk (AOR).
(2) Contract documents -- The TOS, EFL, [and] YRAC, and, if applicable, the AOR.

(3) Contract expiration -- The time when the initial term contract is completed. A new contract is initiated when the customer begins receiving service pursuant to the new EFL.

(4) Contract term -- The time period the contract is in effect.

(5) Fixed rate product -- A retail electric product with a term of at least three months for which the price (including all recurring charges and ancillary service charges) for each billing period of the contract term is the same throughout the contract term, except that the price may vary from the disclosed amounts solely to reflect actual changes in TDU [the Transmission and Distribution Utility (TDU)] charges, changes to the Electric Reliability Council of Texas (ERCOT) or Texas Regional Entity, Inc. administrative fees charged to loads or changes resulting from federal, state or local laws that impose new or modified fees or costs on a REP that are beyond the REP's control.

(6) Indexed product -- A retail electric product for which the price, including recurring charges, can vary according to a pre-defined pricing formula that is based on publicly available indices or information and is disclosed to the customer, and to reflect actual changes in TDU charges, changes to the ERCOT or Texas Regional Entity, Inc. administrative fees charged to loads or changes resulting from federal, state or local laws or regulatory actions that impose new or modified fees or costs on a REP that are beyond the REP's control. An indexed product may be for a term of three months or more, or may be a month-to-month contract.

(7) Month-to-month contract -- A contract with a term of 31 days or less. A month-to-month contract may not contain a termination fee or penalty.

(8) Price -- The cost for a retail electric product that includes all recurring charges, including the cost of ancillary services, excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax.

(9) Recurring charge -- A charge for a retail electric product that is expected to appear on a customer's bill in every billing period or appear in three or more billing periods in a twelve month period. A charge is not considered recurring if it will be billed by the TDU and passed on to the customer and will either not be applied to all customers of that class within the TDU territory, or cannot be known until the customer enrolls or requests a specific service.

(10) Term contract -- A contract with a term in excess of 31 days.

(11) Variable price product -- A retail product for which price may vary according to a method determined by the REP, including a product for which the price, can increase no more than a defined percentage as indexed to the customer's previous billing month's price. For residential customers, a variable price product can be only a month-to-month contract.

(12) Wholesale Indexed Product -- A retail electric product in which the price a customer pays for electricity includes a direct pass-through of real-time settlement point prices determined by the independent organization certified under the Public Utility Regulatory Act (PURPA) §39.151 for the ERCOT power region.

(c) General Retail Electric Provider requirements.

(1) General Disclosure Requirements.

(A) All written, electronic, and oral communications, including advertising, websites, direct marketing materials, billing statements, TOSs, EFLs, YRACs, and, if applicable, AORs [YRACs] distributed by a REP or aggregator must [shall] be clear and not misleading, fraudulent, unfair, deceptive, or anti-competitive. Prohibited communications include, but are not limited to:

(i) Using the term or terms "fixed" to market a product that does not meet the definition of a fixed rate product.

(ii) Suggesting, implying, or otherwise leading someone to believe that a REP or aggregator has been providing retail electric service prior to the time the REP or aggregator was certified or registered by the commission.

(iii) Suggesting, implying or otherwise leading someone to believe that receiving retail electric service from a REP will provide a customer with better quality of service from the TDU.

(iv) Falsely suggesting, implying or otherwise leading someone to believe that a person is a representative of a TDU or any REP or aggregator.

(v) Falsely suggesting, implying or otherwise leading someone to believe that a contract has benefits for a period of time longer than the initial contract term.

(B) Written and electronic communications must [shall] not refer to laws, including commission rules without providing a link or website address where the text of those rules are available. All printed advertisements, electronic advertising over the Internet, and websites, must [shall] include the REP's certified name or commission authorized business name, or the aggregator's registered name, and the number of the certification or registration.

(C) The TOS, EFL, [and] YRAC, and, if applicable, AOR must [shall] be provided to each customer upon enrollment. Each document must [shall] be provided to the customer whenever a change is made to the specific document and upon a customer's request, at any time free of charge.

(D) A REP must [shall] retain a copy of each version of the TOS, EFL, [and] YRAC, and, if applicable, AOR during the time the plan is in effect for a customer and for four years after the contract ceases to be in effect for any customer. REPs must [shall] provide such documents at the request of the commission or its staff.

(2) General contracting requirements.

(A) Each [A] TOS, EFL, YRAC, and, if applicable, AOR must [YRAC shall] be complete, [shall] be written in language that is clear, plain and easily understood, and [shall] be printed in the full text of the applicable law or rule.

(B) Each [All] contract document must [documents shall] be available to the commission to post on its customer education website ([if the REP chooses to post offers to the website[)].

(C) A contract is limited to service to a customer at a location specified in the contract. If the customer moves from the location, the customer is under no obligation to continue the contract at another location. The REP may require a customer to provide evidence that it is moving to another location. There must [shall] be no early termination fee assessed to the customer as a result of the customer's relocation if the customer provides a forwarding address and, if required, reasonable evidence that the customer no longer occupies the location specified in the contract.
(D) A TOS and EFL must [shall] disclose the type of product being described, using one of the following terms: fixed rate product, indexed product or a variable price product.

(E) A REP must [shall] not use a credit score, a credit history, or utility payment data as the basis for determining the price for electric service for a product with a contract term of 12 months or less for an existing residential customer or in response to an applicant's request to become a residential customer.

(F) In any dispute between a customer and a REP concerning the terms of a contract, any vagueness, obscurity, or ambiguity in the contract will be construed in favor of the customer.

(G) For a variable price product, the REP must [shall] disclose on the REP's website and through a toll-free number the current price and, for residential customers, one year price history, or history for the life of the product, if it has been offered less than one year. A REP must [shall] not rename a product in order to avoid disclosure of price history. The EFL of a variable price product or indexed product must [shall] include a notice of how the current price and, if applicable, historical price information may be obtained by a customer.

(H) A REP must [shall] comply with its contracts.

(3) Specific contract requirements.

(A) The contract term must [shall] be conspicuously disclosed.

(B) The start and end dates of the contract must [shall] be available to the customer upon request. If the REP cannot determine the start date, the REP may estimate the start date. After the start date is known, the REP must [shall] specify the end date of the contract by:

(i) specifying a calendar date; or

(ii) referencing [reference to] the first meter read on or after a specific calendar date.

(C) If a REP specifies a calendar date as the end date, the REP may bill the term contract price through the first meter read on or after the end date of the contract.

(D) Each contract for service must include the terms of the default renewal product that the customer will be automatically enrolled in if the customer does not select another retail electric product before the expiration of the contract term after the customer has received all required expiration notices.

(E) If a REP does not provide proper notice of the expiration of a fixed rate contract and the customer does not select another REP before expiration of the contract term, the REP must continue to serve the customer under the pricing terms of the fixed rate product until the REP provides notice in accordance with applicable requirements of subsection (e)(2)(A)(i) or (ii) of this section or the customer selects another retail electric product.

(F) A REP, aggregator, or broker is prohibited from offering a wholesale indexed product to a residential or small commercial customer.

(G) A REP, aggregator, or broker may enroll a residential or small commercial customer in an indexed product or a product that contains a separate assessment of ancillary service charges only if the REP, aggregator, or broker obtains before the customer's enrollment an AOR in compliance with the requirements of this section.

(4) Website requirements.

(A) Each REP that offers residential retail electric products for enrollment on its website must [shall] prominently display the EFL for any products offered without a person having to enter any personal information other than zip code and information that allows determination of the type of offer the consumer wishes to review. Person-specific information must [shall] not be required.

(B) The EFL for each product must [shall] be printable in no more than a two page format. The EFL, TOS, and YRAC, and, if applicable, AOR for any products offered for enrollment on the website must [shall] be available for viewing or downloading.

(d) Changes in contract and price and notice of changes. A REP may make changes to the terms and conditions of a contract or to the price of a product as provided for in this section. Changes in term (length) of a contract require the customer to enter into a new contract and may not be made by providing the notice described in paragraph (3) of this subsection.

(1) Contract changes other than price.

(A) A REP may not change the price (other than as allowed by paragraph (2) of this subsection) or contract term of a term contract for a retail electric product[2] during its term[3] but may change any other provision of the contract[4] with notice under paragraph (3) of this subsection.

(B) A REP may not change the terms and conditions of a month-to-month product, indexed or variable price products, unless it provides notice under paragraph (3) of this subsection.

(2) Price changes.

(A) A REP may only change the price of a fixed rate product, an indexed product, or a variable product consistent with the definitions in this section and according to the product's EFL. Such price changes do not require notice under paragraph (3) of this subsection.

(B) For a fixed rate product, each bill must [shall] either show the price changes on one or more separate line items, or must [shall] include a conspicuous notice stating that the amount billed may include price changes allowed by law or regulatory actions.

(C) Each residential bill for a variable price product must [shall] include a statement informing the customer how to obtain information about the price that will apply on the next bill.

(3) Notice of changes to terms and conditions. A REP must provide written notice to its customers at least 14 days in advance of the date that the change in the contract will be applied to the customer's bill or take effect. Notice is not required for a change that benefits the customer.

(4) Contents of the notice to change terms and conditions. The notice must [shall]:

(A) be provided in or with the customer's bill or in a separate document;

(B) include the following statement, "Important notice regarding changes to your contract" clearly and conspicuously in the notice;

(C) identify the change and the specific contract provisions that address the change;

(D) clearly specify what actions the customer needs to take if the customer does not accept the proposed changes to the contract;

(E) state in bold lettering that if the new terms are not acceptable to the customer, the customer may terminate the contract and no termination penalty may [shall] apply for 14 days from the date

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that the notice is sent to the customer but may apply if action is taken after the 14 days have expired. No such statement is required if the customer would not be subject to a termination penalty under any circumstances; and

(F) state in bold lettering that establishing service with another REP may take up to seven business days.

(e) Contract expiration and renewal offers. [The REP shall send a written notice of contract expiration at least 30 days or one billing cycle prior to the date of contract expiration, but no more than 60 days or two billing cycles in advance of contract expiration for a residential customer, and at least 14 days but no more than 60 days or two billing cycles in advance of contract expiration for a small commercial customer. The REP shall send the notice by mail to a residential customer or shall send the required notice to a customer’s e-mail address if available to the REP and if the customer has requested to receive contract-related notices electronically. The REP shall send the notice to a small commercial customer by mail or may send the notice to the customer’s e-mail address if available to the REP and, if the customer has requested to receive contract-related notices electronically. Nothing in this section shall preclude a REP from offering a new contract to the customer at any other time during the contract term.]

(1) Notice Timeline for Expiration of a Non-Fixed Rate Term Product. For term products other than fixed rate products, the REP must send a written notice of contract expiration at least 30 days or one billing cycle prior to the date of contract expiration, but no more than 60 days or two billing cycles in advance of contract expiration for a residential customer, and at least 14 days but no more than 60 days or two billing cycles in advance of contract expiration for a small commercial customer. The REP must send the notice by mail to a residential customer or must send the required notice to a customer’s e-mail address if available to the REP and if the customer has requested to receive contract-related notices electronically. The REP must send the notice to a small commercial customer by mail or may send the notice to the customer’s e-mail address if available to the REP and, if the customer has requested to receive contract-related notices electronically. Nothing in this section shall preclude a REP from offering a new contract to the customer at any other time during the contract term.

(2) Notice Timeline for Expiration of a Fixed Rate Product.

(A) For fixed rate products, the REP must provide the customer with at least three written notices of the date the fixed rate product will expire. The notices must be provided during the last third of the fixed rate contract period and in intervals that allow for, as practicable, even distribution of the notices throughout the last third of the fixed rate contract period. For fixed rate contracts for a period:

(i) Of more than four months, the final notice must be provided at least 30 days before the date the fixed rate contract will expire.

(ii) Of four or fewer months, the final notice must be provided at least 15 days before the date the fixed rate contract will expire.

(B) The notices must be provided to the customer by mail at the customer's billing address, unless the customer has opted to receive communications electronically from the REP.

(C) If a REP does not provide the required notice of the expiration of a customer’s fixed rate contract and the customer does not select another retail electric product before expiration of the fixed rate contract term, the REP must continue serving the customer under the terms of the fixed rate contract until sufficient expiration notice is provided or the customer selects another retail electric product.

(1) Contract Expiration.

(A) If a customer takes no action in response to a notice of contract expiration for the continued receipt of retail electric service upon the contract’s expiration, the REP shall serve the customer pursuant to a default renewal product that is a month-to-month product.

(B) Written notice of contract expiration shall be provided in or with the customer’s bill, or in a separate document.

(C) If notice is provided with a residential customer’s bill, the notice shall be printed on a separate page. A statement shall be included on the outside of the envelope sent to a residential customer’s billing address by mail and in the subject line on the e-mail (if the REP sends the notice by e-mail) that states, “Contract Expiration Notice. See Enclosed.”

(D) If the notice is provided in or with a small commercial customer’s bill, the REP must include a statement on the outside of the billing envelope or in the subject line of an electronic bill that states, “Contract Expiration Notice” or “Contract Expiration Notice. See Enclosed.”

(E) A written notice of contract expiration (whether with the bill or in a separate envelope) shall set out the following:

(ii) The date as provided for in subsection (c)(3)(B) of this section that the existing contract will expire.

(F) If the REP provided a calendar date as the end date for the contract, a statement in bold lettering no smaller than 12 point font that no termination penalty shall apply to residential and small commercial customers 14 days prior to the date stated as the expiration date in the notice. In addition, a description of any fees or charges associated with the early termination of a residential customer’s fixed rate product that would apply before 14 days prior to the date stated as the expiration date in the notice shall be provided. No such statements are required if the original contract did not contain a termination fee.

(G) If the REP defined the contract end date by reference to the first meter read on or after a specific calendar date, a statement in bold lettering no smaller than 12 point font that no termination penalty shall apply to residential and small commercial customers 14 days prior to the date stated as the expiration date in the notice. In addition, a description of any fees or charges associated with the early termination of a residential customer’s fixed rate product that would apply before 14 days prior to the date stated as the expiration date in the notice shall be provided. No such statements are required if the original contract did not contain a termination fee.

(H) A description of any renewal offers the REP chooses to make available to the customer and the location of the TOS and EFL for each of those products and a description of actions the customer needs to take to continue to receive service from the REP under the terms of any of the described renewal offers and the deadline by which actions must be taken.

(I) A copy of the EFL for the default renewal product if the customer takes no action; or if the EFL is not included with the contract expiration notice, the REP must provide the EFL to the customer at least 14 days before the expiration of the contract using the same delivery method as was used for the notice. The contract expiration notice must specify how and when the EFL will be made available to the customer.
(iii) If notice is provided in a separate document, a statement must be included in a manner readily visible on the outside of the envelope and in the subject line of the e-mail (if customer has agreed to receive official documents by e-mail) that states, "Contract Expiration Notice. See Enclosed." For residential customers or for small commercial customers, "Contract Expiration Notice. See Enclosed."

(C) A written notice of contract expiration (whether with the bill or in a separate envelope) must set out the following:

(i) The date, in boldfaced and underlined text, as provided for in subsection (c)(3)(B) of this section that the existing contract will expire.

(ii) If the REP provided a calendar date as the end date for the contract, a statement in bold lettering no smaller than 12 point font that no termination penalty applies to residential and small commercial customers 14 days prior to the date stated as the expiration date in the notice. In addition, a description of any fees or charges associated with the early termination of a residential customer's fixed rate product that would apply before 14 days prior to the date stated as the expiration date in the notice must be provided. No such statements are required if the original contract did not contain a termination fee.

(iii) If the REP defined the contract end date by reference to the first meter read on or after a specific calendar date, a statement in bold lettering no smaller than 12 point font that no termination penalty applies to residential customers for 14 days prior to the date provided as the "on or after" date included in connection with the first meter read language referenced in the notice, or that no termination penalty applies to small commercial customers for 14 days prior to the contract end date. No such statement is required if the original contract did not contain a termination fee.

(iv) A description of any renewal offers the REP chooses to make available to the customer and the location of the TOS and EFL for each of those products and a description of actions the customer needs to take to continue to receive service from the REP under the terms of any of the described renewal offers and the deadline by which actions must be taken.

(v) The final notice provided pursuant to subsection (e)(3) of this section must include a copy of the EFL for the default renewal product if the customer takes no action or if the EFL is not included with the contract expiration notice, the REP must provide the EFL to the customer at least 14 days before the expiration of the contract using the same delivery method as was used for the notice. The contract expiration notice must specify how and when the EFL will be made available to the customer.

(vi) A statement that if the customer takes no action, service to the customer will continue pursuant to the EFL for the default renewal product that must be included as part of the notice of contract expiration. The TOS for the default renewal product must be included as part of the notice, unless the TOS applicable to the customer’s existing service also applies to the default renewal product.

(vii) The final notice provided pursuant to subsection (e)(3) of this section must include a statement that the default service is month-to-month and may be cancelled at any time with no fee.

(4) Affirmative consent. A customer that is currently receiving service from a REP may be re-enrolled with the REP for service with the same product under which the customer is currently receiving service, or a different product, by conducting an enrollment pursuant to §25.474 of this title or by obtaining the customer's consent in a recording, electronic document, or written letter of authorization consistent with the requirements of this subsection. Affirmative consent is not required when a REP serves the customer under a default renewal product
pursuant to paragraph (1) of this subsection. Each recording, electronic document, or written consent form must:

(A) Indicate the customer's name, billing address, and service address (for small commercial customers, the ESI ID may be used rather than the service address);

(B) Indicate the identification number of the TOS and EFL under which the customer will be served;

(C) Indicate if the customer has received, or when the customer will receive copies of the TOS, EFL, YRAC, and, if applicable, AOR;

(D) Indicate the price(s) which the customer is agreeing to pay;

(E) Indicate the date or estimated date of the re-enrollment, the contract term, and the estimated start and end dates of contract term;

(F) Affirmatively inquire whether the customer has decided to enroll for service with the product, and contain the customer's affirmative response; and

(G) Be entirely in plain, easily understood language, in the language that the customer has chosen for communications.

(f) Terms of service document. The following information must [shall] be conspicuously contained in the TOS:

(1) Identity and contact information. The REP's certified name and business name (dba) (if applicable), mailing address, e-mail and Internet address (if applicable), certification number, and a toll-free telephone number (with hours of operation and time-zone reference).

(2) Pricing and payment arrangements.

(A) Description of the amount of any routine non-recurring charges resulting from a move-in or switch that may be charged to the customer, including but not limited to an out-of-cycle meter read, and connection or reconnection fees;

(B) For small commercial customers, a description of the demand charge and how it will be applied, if applicable;

(C) An itemization, including name and cost, of any non-recurring charges for services that may be imposed on the customer for the retail electric product, including an application fee, charges for default in payment or late payment, and returned checks charges;

(D) A description of any collection fees or costs that may be assessed to the customer by the REP and that cannot be quantified in the TOS; and

(E) A description of payment arrangements and bill payment assistance programs offered by the REP.

(3) Deposits. If the REP requires deposits from its customers:

(A) a description of the conditions that will trigger a request for a deposit;

(B) the maximum amount of the deposit or the manner in which the deposit amount will be determined;

(C) a statement that interest will be paid on the deposit at the rate approved by the commission, and the conditions under which the customer may obtain a refund of a deposit;

(D) an explanation of the conditions under which a customer may establish satisfactory credit pursuant to §25.478 of this title (relating to Credit Requirements and Deposits); and

(E) if applicable, the customer's right to post a letter of guarantee in lieu of a deposit pursuant to §25.478(i) of this title.

(4) Rescission, Termination and Disconnection.

(A) In a conspicuous and separate paragraph or box:

(i) A description of the right of a customer, for switch requests, to rescind service without fee or penalty of any kind within three federal business days after receiving the TOS, pursuant to §25.474 of this title; and

(ii) Detailed instructions for rescinding service, including the telephone number and, if available, facsimile number or e-mail address that the customer may use to rescind service.

(B) A statement as to how service can be terminated and any penalties that may apply;

(C) A statement of customer's ability to terminate service without penalty if customer moves to another premises and provides evidence that it is moving, if required, and a forwarding address; and

(D) If the REP has disconnection authority, pursuant to §25.483 of this title (relating to Disconnection of Service), a statement that the REP may order disconnection of the customer for non-payment.

(5) Antidiscrimination. A statement informing the customer that the REP cannot deny service or require a prepayment or deposit for service based on a customer's race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, level of income, disability, familial status, location of a customer in an [a] economically distressed geographic area, or qualification for low income or energy efficiency services. For residential customers, a statement informing the customer that the REP cannot use a credit score, a credit history, or utility payment data as the basis for determining the price for electric service for a product with a contract term of 12 months or less.

(6) Other terms. Any other material terms and conditions, including exclusions, reservations, limitations of liability, or special equipment requirements, that are a part of the contract for the retail electric product.

(7) Contract expiration notice. For a term contract, the TOS must [shall] contain a statement informing the customer that a contract expiration notice will be sent at least 14 days prior to the end of the initial contract term. The TOS must [shall] also state that if the customer fails to take action to ensure the continued receipt of retail electric service upon the contract's expiration, the customer will continue to be served by the REP automatically pursuant to a default renewal product, which must [shall] be a month-to-month product.

(8) A statement describing the conditions under which the contract can change and the notice that will be provided if there is a change.

(9) Version number. A REP must [shall] assign an identification number to each version of its TOS, and must [shall] publish the number on the terms of service document.

(g) Electricity Facts Label. The EFL must [shall] be unique for each product offered and must [shall] include the information required in this subsection. Nothing in this subsection precludes a REP from charging a price that is less than its EFL would otherwise provide.
(1) Identity and contact information. The REP’s certified name and business name (dba) (if applicable), mailing address, e-mail and Internet address (if applicable), certification number, and a toll-free telephone number (with hours of operation and time-zone reference).

(2) Pricing disclosures. Pricing information must [shall] be disclosed by a REP in an EFL. The EFL must [shall] state specifically whether the product is a fixed rate, variable price or indexed product.

(A) For a fixed rate product, the EFL must [shall] provide the total average price for electric service reflecting all recurring charges, excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax, to the customer.

(B) For an indexed product, the EFL must [shall] provide sample prices for electric service reflecting all recurring charges, excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax, resulting from a reasonable range of values for the inputs to the pre-defined pricing formula.

(C) For a variable price product, the EFL must [shall] provide the total average price for electric service for the first billing cycle reflecting all recurring charges, including any TDU charges that may be passed through and excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax, to the customer. Actual changes in TDU charges, changes to the ERCOT or Texas Regional Entity administrative fees charge to loads or changes resulting from federal, state or local laws or regulatory actions that impose new or modified fees or costs on a REP that were not implemented prior to the issuance of the EFL and were not included in the average price calculation may be directly passed through to customers beginning with the customer's first billing cycle.

(D) The total average price for electric service must [shall] be expressed in cents per kilowatt hour, rounded to the nearest one-tenth of one cent for the following usage levels:

(i) For residential customers, 500, 1,000 and 2,000 kilowatt hours per month; and

(ii) For small commercial customers, 1,500, 2,500, and 3,500 kilowatt hours per month. If demand charges apply assume a 30 percent load factor.

(E) If a REP combines the charges for retail electric service with charges for any other product, the REP must [shall]:

(i) If the electric product is sold separately from the other products, disclose the total price for electric service separately from other products; and

(ii) If the REP does not permit a customer to purchase the electric product without purchasing the other products or services, state the total charges for all products and services as the price of the total electric service. If the product has a one-time cost up front, for the purposes of the average price calculation, the cost of the product may be figured in over a 12-month period with 1/12 of the cost being attributed to a single month.

(F) The following must [shall] be included on the EFL for specific product types:

(i) For indexed products, the formula used to determine an indexed product, including a website and phone number customers may contact to determine the current price.

(ii) For a variable price product that increases no more than a defined percentage as indexed to the customer's previous billing month's price, a notice in bold type no smaller than 12 point font: "Except for price changes allowed by law or regulatory action, this price is the price that will be applied during your first billing cycle; this price may increase by no more than {insert percentage} percent from month-to-month." For residential customers, the following additional statement is required: "Please review the historical price of this product available at {insert specific website address and toll-free telephone number}.

In the disclosure chart, the box describing whether the price can change during the contract period must [shall] include the following statement: "The price applied in the first billing cycle may be different from the price in this EFL if there are changes in TDSP charges; changes to the Electric Reliability Council of Texas or Texas Regional Entity, Inc. administrative fees charged to loads; or changes resulting from federal, state or local laws or regulatory actions that impose new or modified fees or costs that are outside our control." (iii) For all other variable price products, a notice in bold type no smaller than 12 point font: "Except for price changes allowed by law or regulatory action, this is the price that will be applied during your first billing cycle; this price may change in subsequent months at the sole discretion of {insert REP name}. In the disclosure chart, the box describing whether the price can change during the contract period must [shall] include the following statement: "The price applied in the first billing cycle may be different from the price in this EFL if there are changes in TDSP charges; changes to the Electric Reliability Council of Texas or Texas Regional Entity, Inc. administrative fees charged to loads; or changes resulting from federal, state or local laws or regulatory actions that impose new or modified fees or costs that are outside our control." For residential customers, the following additional statement is required: "Please review the historical price of this product available at {insert specific website address and toll-free telephone number}.

(3) Fee Disclosures.

(A) If the customer [customers] may be subject to a special charge for underground service or any similar charge that applies only in a part of the TDU service area, the EFL must [shall] include a statement in the electricity price section that some customers will be subject to a special charge that is not included in the total average price for electric service and must [shall] disclose how the customer can determine the price and applicability of the special charge.

(B) A listing of all fees assessed by the REP that may be charged to the customer and whether the fee is included in the recurring charges.

(4) Term Disclosure. EFL must [shall] include disclosure of the length of term, minimum service term, if any, and early termination penalties, if any.

(5) Renewable Energy Disclosures. The EFL must [shall] include the percentage of renewable energy of the electricity product and the percentage of renewable energy of the statewide average generation mix.

(6) Format of Electricity Facts Label. REPs must use the following format for the EFL with the pricing chart and disclosure chart shown. The additional language is for illustrative purposes. It does not include all reporting requirements as outlined above. Such subsections should be referred to for determination of the required reporting items on the EFL. Each EFL must [shall] be printed in type no smaller than ten points in size, unless a different size is specified in this section, and must [shall] be formatted as shown in this paragraph:

Figure: 16 TAC § 25.475(g)(6)

Figure: 16 TAC § 25.475(g)(6)

(7) Version number. A REP must [shall] assign an identification number to each version of its EFL, and must [shall] publish the number on the EFL.
(h) Your Rights as a Customer disclosure. The information set out in this section must [shall] be included in a REP's "Your Rights as a Customer" document in plain language, to summarize the standard customer protections provided by this subchapter or additional protections provided by the REP.

(1) A YRAC document must [shall] be consistent with the TOS for the retail product.

(2) The YRAC document must [shall] inform the customer of the REP's complaint resolution policy pursuant to §25.485 of this title (relating to Customer Access and Complaint Handling) and payment arrangements and deferred payment policies pursuant to §25.480 of this title (relating to Bill Payment and Adjustments).

(3) The YRAC document must [shall] inform the customer of the REP's procedures for reporting outages and the steps necessary to have service restored or reconnected after an involuntary suspension or disconnection.

(4) The YRAC must provide information the REP has received from the TDU pursuant to PURA §17.003(e) regarding the TDU's procedures for implementing involuntary load shedding initiated by the independent organization certified under PURA §39.151 for the ERCOT power region, and, if applicable, where any additional details regarding those procedures or relevant updates may be located. The REP must fulfill this requirement by providing a website address with the required information. Each TDU must develop such information and resources by September 1, 2021 and make the website address where such information can be viewed available to REPs. A REP may provide this information at a website address other than the website addresses made available by the TDU. A TDU or other entity providing a website address is required to update this information within 30 days of any material change in the information.

(5) The YRAC document must [shall] inform the customer of the availability of:

(A) Financial and energy assistance programs for residential customers;

(B) Any special services such as readers or notices in Braille or TTY;

(C) Special policies or programs available to residential customers designated as chronic condition or critical care under §25.497 of this title and the procedure for a customer to apply to be considered for such designations; and [Special policies or programs available to residential customers with physical disabilities, including residential customers who have a critical need for electric service to maintain life support systems; and]

(D) Any available discounts that may be offered by the REP for qualified low-income residential customers. A REP may comply with this requirement by providing the customer with instructions for how to inquire about such discounts.

(6) The YRAC document must [shall] inform the customer of the following customer rights and protections:

(A) Unauthorized switch protections applicable under §25.495 of this title (relating to Unauthorized Change of Retail Electric Provider);

(B) The customer's right to dispute unauthorized charges on the customer's bill as set forth in §25.481 of this title (relating to Unauthorized Charges);

(C) Protections relating to disconnection of service pursuant to §25.483 of this title;

(D) Non-English language requirements pursuant to §25.473 of this title (relating to Non-English Language Requirements);

(E) Availability of a Do Not Call List pursuant to §25.484 of this title (relating to Electric No-Call List) and §26.37 of this title (relating to Texas No-Call List); and

(F) Privacy rights regarding customer proprietary information as provided by §25.472 of this title (relating to Privacy of Customer Information).

(8) Identity and contact information. The REP's certified name and business name (dba), certification number, mailing address, e-mail address and Internet address (if applicable), and a toll-free telephone number (with hours of operation and time-zone reference) at which the customer may obtain information concerning the product.

(i) Advertising claims. If a REP or aggregator advertises or markets the specific benefits of a particular electric product, the REP or aggregator must [shall] provide the name of the electric product offered in the advertising or marketing materials to the commission or its staff, upon request. All advertisements and marketing materials distributed by or on behalf of a REP or aggregator must [shall] comply with this section. REPs and aggregators are responsible for representations to customers and prospective customers by employees or other agents of the REP concerning retail electric service that are made through advertising, marketing or other means.

(1) Print advertisements. Print advertisements and marketing materials, including direct mail solicitations that make any claims regarding price, savings, or environmental quality for an electricity product of the REP compared to a product offered by another REP must [shall] include the EFL of the REP making the claim. In lieu of including an EFL, the following statement must [shall] be provided: "You can obtain important standardized information that will allow you to compare this product with other offers. Contact (name, telephone number, and Internet address (if available) of the REP)." If the REP's phone number or website address is included on the advertisement, such phone number or website address is not required in the disclaimer statement. Upon request, a REP must [shall] provide to the commission the contract documents relating to a product being advertised and any information used to develop or substantiate comparisons made in the advertisement.

(2) Television, radio, and internet advertisements. A REP must [shall] include the following statement in any television, Internet, or radio advertisement that makes a specific claim about price, savings, or environmental quality for an electricity product of the REP compared to a product offered by another REP: "You can obtain important standardized information that will allow you to compare this product with other offers. Contact (name, telephone number and website (if available) of the REP)." If the REP's phone number or website address is included on the advertisement, such phone number or website address is not required in the disclaimer statement. This statement is not required for general statements regarding savings or environmental quality, but must [shall] be provided if a specific price is included in the advertisement, or if a specific statement about savings or environmental quality compared to another REP is made. Upon request, a REP
must [shall] provide to the commission the contract documents relating to a product being advertised and any information used to develop or substantiate comparisons made in the advertisement.

(3) Outdoor advertisements. A REP must [shall] include, in a font size and format that is legible to the intended audience, its certified name or commission authorized business name, certification number, telephone number and [website] [Internet address] (if available).

(4) Renewable energy claims. A REP must [shall] authenticate its sales of renewable energy in accordance with §25.476 of this title (relating to Renewable and Green Energy Verification). If a REP relies on supply contracts to authenticate its sales of renewable energy, it must [shall] file a report with the commission, not later than March 15 of each year demonstrating its compliance with this paragraph and §25.476 of this title.

(j) Acknowledgement of Risk. Before a residential or small commercial customer's enrollment in an indexed product or a product that contains a separate assessment of ancillary service charges, an aggregator, broker, or retail electric provider must obtain an AOR, signed by the customer, verifying that the customer accepts the potential price risks associated with the product.

(1) for indexed products other than wholesale indexed products the AOR must include the following statement in clear, boldfaced text: "This is an indexed product. I understand that if I enroll in this product, the rate I will be charged for electricity can change for reasons beyond my control. These changes may result in unexpectedly high bills, potentially significantly higher than previous bills, and I must pay any amount I am properly billed. I understand the risks involved with this plan."

(2) for products that contain a separate assessment of ancillary service charges the AOR must include the following statement in clear, boldfaced text: "This product contains a separate assessment of ancillary service charges. I understand that if I enroll in this product, the rate I will be charged for electricity can change for reasons beyond my control. These changes may result in unexpectedly high bills, potentially significantly higher than previous bills, and I must pay any amount I am properly billed. I understand the risks involved with this plan."

§25.479. Issuance and Format of Bills.

(a) Application. This section applies, beginning April 1, 2010, to a retail electric provider (REP) that is responsible for issuing electric service bills to retail customers, unless the REP is issuing a consolidated bill (both energy services and transmission and distribution services) on behalf of an electric cooperative or municipally owned utility. This section does not apply to a municipally owned utility or electric cooperative issuing bills to its customers in its own service territory.

(b) Frequency and delivery of bills.

(1) A REP must [shall] issue a bill monthly to each customer, unless service is provided for a period of less than one month. A REP may issue a bill less frequently than monthly if both the customer and the REP agree to such an arrangement.

(2) A bill must [Bills shall be] be issued no later than 30 days after the REP receives the usage data and any related invoices for non-bypassable charges, unless validation of the usage data and invoice received from a transmission and distribution utility by the REP or other efforts to determine the accuracy of usage data or invoices delay billing by a REP past 30 days. The number of days to issue a bill must [shall be] be extended beyond 30 days to the extent necessary to support agreements between REPs and customers for less frequent billing, as provided in paragraph (1) of this subsection or for consolidated billing.

(3) A REP must [shall] issue bills to residential customers in writing and delivered via the United States Postal Service. REPs may provide bills to a customer electronically in lieu of written mailings if both the customer and the REP agree to such an arrangement. An affiliated REP or a provider of last resort must [shall] not require a customer to agree to such an arrangement as a condition of receiving electric service.

(4) A REP must [shall] not charge a customer a fee for issuing a standard bill, which is a bill delivered via U.S. mail that complies with the requirements of this section. The customer may be charged a fee or given a discount for non-standard billing in accordance with the terms of service document.

(c) Bill content.

(1) Each customer's bill must [shall] include the following information:

(A) The certified name and address of the REP and the number of the license issued to the REP by the commission;

(B) A toll-free telephone number, in bold-face type, which the customer can call during specified hours for inquiries and to make complaints to the REP about the bill;

(C) A toll-free telephone number that the customer may call 24 hours a day, seven days a week, to report power outages and concerns about the safety of the electric power system;

(D) The service address, electric service identifier (ESI), and account number of the customer;

(E) The service period for which the bill is rendered;

(F) The date on which the bill was issued;

(G) The payment due date of the bill and, if different, the date by which payment from the customer must be received by the REP to avoid a late charge or other collection action;

(H) The current charges for electric service as disclosed in the customer's terms of service document, including applicable taxes and fees labeled "current charges." If the customer is on a level or average payment plan, the level or average payment due must [shall] be clearly shown in addition to the current charges;

(I) A calculation of the average unit price for electric service for the current billing period, labeled, "The average price you paid for electric service this month." The calculation of the average price for electric service must [shall] reflect the total of all fixed and variable recurring charges, but not include state and local sales taxes, reimbursement for the state miscellaneous gross receipts tax, and any nonrecurring charges or credits, divided by the kilowatt-hour consumption, and must [shall] be expressed as a cents per kilowatt-hour amount rounded to the nearest one-tenth of one cent;

(J) The identification and itemization of charges other than for electric service as disclosed in the customer's terms of service document;

(K) The itemization and amount of any non-recurring charge, including late fees, returned check fees, restoration of service fees, or other fees disclosed in the REP's terms of service document provided to the customer;

(L) The balances from the preceding bill, payments made by the customer since the preceding bill, and the amount the customer is required to pay by the due date, labeled "amount due;"
(M) A notice that the customer has the opportunity to voluntarily donate money to the bill payment assistance program, pursuant to §25.480(g)(2) of this title (relating to Bill Payment and Adjustments);

(N) If available to the REP on a standard electronic transaction, if the bill is based on kilowatt-hour (kWh) usage, the following information:

   (i) the meter reading at the beginning of the period for which the customer is being billed, labeled "previous meter read," and the meter reading at the end of the period for which the customer is being billed, labeled "current meter read," and the dates of such readings;

   (ii) the kind and number of units measured, including kWh, actual kilowatts (kW), or kilovolt ampere (kVA);

   (iii) if applicable, billed kW or kVA;

   (iv) whether the bill was issued based on estimated usage; and

   (v) any conversions from meter reading units to billing units, or any other calculations to determine billing units from recording or other devices, or any other factors used in determining the bill, unless the customer is provided conversion charts;

(O) Any amount owed under a written guarantee agreement, provided the guarantor was previously notified in writing by the REP of an obligation on a guarantee as required by §25.478 of this title (relating to Credit Requirements and Deposits);

(P) A conspicuous notice of any services or products being provided to the customer that have been added since the previous bill;

(Q) Notification of any changes in the customer's prices or charges due to the operation of a variable rate feature previously disclosed by the REP in the customer's terms of service document;

(R) The notice required by §25.481(d) of this title (relating to Unauthorized Charges); and

(S) For residential customers, on the first page of the bill in at least 12-point font the phrase, "for more information about residential electric service please visit www.powertochoose.com."

(2) If a REP separately identifies a charge defined by one of the terms in this paragraph on the customer's bill, then the term in this paragraph must be used to identify that charge, and such term and its definition must be easily located on the REP's website and available to a customer free of charge upon request. Nothing in this paragraph precludes a REP from aggregating transmission and distribution utility (TDU) or REP charges. For any TDU charge(s) listed in this paragraph, the amount billed by the REP must not exceed the amount of the TDU tariff charge(s). The label for any TDU charge(s) may also identify the TDU that issued the charge(s). A REP may use a different term than a defined term by adding or deleting a suffix, by adding the word "total" to a defined term, where appropriate, changing the use of lower-case or capital letters or punctuation, or using the acceptable abbreviation specified in this paragraph for a defined term. If an abbreviation other than the acceptable abbreviation is used for the term, then the term must also be identified on the customer's bill.

(A) Advanced metering charge -- A charge assessed to recover a TDU's charges for Advanced Metering Systems, to the extent that they are not recovered in a TDU's standard metering charge. Acceptable abbreviation: Advanced Meter.

(B) Competition Transition Charge -- A charge assessed to recover a TDU's charges for nonsecuritized costs associated with the transition to competition. Acceptable abbreviation: Competition Transition.

(C) Energy Efficiency Cost Recovery Factor -- A charge assessed to recover a TDU's costs for energy efficiency programs, to the extent that the TDU charge is a separate charge exclusively for that purpose that is approved by the Public Utility Commission. Acceptable abbreviation: Energy Efficiency.

(D) Late Payment Penalty -- A charge assessed for late payment in accordance with Public Utility Commission rules.

(E) Meter Charge -- A charge assessed to recover a TDU's charges for metering a customer's consumption, to the extent that the TDU charge is a separate charge exclusively for that purpose that is approved by the Public Utility Commission.

(F) Miscellaneous Gross Receipts Tax Reimbursement -- A fee assessed to recover the miscellaneous gross receipts tax imposed on retail electric providers operating in an incorporated city or town having a population of more than 1,000. Acceptable abbreviation: Gross Receipts Reimb.

(G) Nuclear Decommissioning Fee -- A charge assessed to recover a TDU's charges for decommissioning of nuclear generating sites. Acceptable abbreviation: Nuclear Decommission.

(H) PUC Assessment -- A fee assessed to recover the statutory fee for administering the Public Utility Regulatory Act.

(I) Sales tax -- Sales tax collected by authorized taxing authorities, such as the state, cities and special purpose districts.

(J) TDU Delivery Charges -- The total amounts assessed by a TDU for the delivery of electricity to a customer over poles and wires and other TDU facilities not including discretionary charges.

(K) Transmission Distribution Surcharges -- One or more TDU surcharge(s) on a customer's bill in any combination. Surcharges include charges billed as tariff riders by the TDU. Acceptable abbreviation: TDU Surcharges.

(L) Transition Charge -- A charge assessed to recover a TDU's charges for securitized costs associated with the transition to competition.

(3) If the REP includes any of the following terms in its bills, the term must be applied in a manner consistent with the definitions, and such term and its definition must be easily located on the REP's website and available to a customer free of charge upon request:

   (A) Base Charge -- A charge assessed during each billing cycle without regard to the customer's demand or energy consumption.

   (B) Demand Charge -- A charge based on the rate at which electric energy is delivered to or by a system at a given instant, or averaged over a designated period, during the billing cycle.

   (C) Energy Charge -- A charge based on the electric energy (kWh) consumed.

   (4) A REP must provide an itemization of charges, including non-bypassable charges, to the customer upon the customer's request and, to the extent that the charges are consistent with the terms set out in paragraph (2), of this subsection, the terms must be used in the itemization.
A customer's electric bill must not contain charges for electric service from a service provider other than the customer's designated REP.

A REP must include on each residential and small commercial billing statement, in boldfaced and underlined type, the date, as provided for in §25.475(c)(3)(B) of this title (relating to General Retail Electric Provider Requirements and Information Disclosure to Residential and Small Commercial Customers) that a fixed rate product will expire.

To the extent that a REP uses the concepts identified in this paragraph in a customer's bill, it must use the term set out in this paragraph, and the definitions in this paragraph must be easily located on the REP's website. A REP may not use a different term for a concept that is defined in this paragraph.

(A) kW -- Kilowatt, the standard unit for measuring electricity demand, equal to 1,000 watts;

(B) kWh -- Kilowatt-hour, the standard unit for measuring electricity energy consumption, equal to 1,000 watt-hours; and

Notice of contract expiration may be provided in a bill in accordance with §25.475 of this title.

Public service notices. A REP must, as required by the commission after reasonable notice, provide brief public service notices to its customers. The REP must provide these public service notices to its customers on its billing statements, as a separate document issued with its bill, by electronic communication, or by other acceptable mass communication methods, as approved by the commission. Additionally, in April and October of each year, or as otherwise directed by the commission, the REP must provide information to each customer along with the customer's bill about:

1. The electric utility's procedures for implementing involuntary load shedding initiated by the independent organization certified for the ERCOT power region under PURA §39.151; and

2. The types of customers who may be considered critical care residential customers, critical load industrial customers, or critical load according to commission rules adopted under PURA §38.076;

3. The procedure for a customer to apply to be considered a critical care customer, a critical load industrial customer, or critical load according to commission rules adopted under PURA §38.076; and

4. Reducing electricity use at times when involuntary load shedding events may be implemented.

Estimated bills. If a REP is unable to issue a bill based on actual meter reading due to the failure of the TDU, the registration agent, municipally owned utility or electric cooperative to obtain or transmit a meter reading or an invoice for non-bypassable charges to the REP on a timely basis, the REP may issue a bill based on the customer's estimated usage and inform the customer of the reason for the issuance of the estimated bill.

Non-recurring charges. A REP may pass through to its customers all applicable non-recurring charges billed to the REP by a TDU, municipally owned utility, or electric cooperative as a result of establishing, switching, disconnecting, reconnecting, or maintaining service to an applicant or customer. In the event of a meter test, the TDU, municipally owned utility, electric cooperative, and REP must comply with the requirements of §25.124 of this title (relating to Meter Testing) or with the requirements of the tariffs of a TDU, municipally owned utility, or electric cooperative, as applicable. The TDU, municipally owned utility, or electric cooperative must maintain a record of all meter tests performed at the request of a REP or a REP's customers.

Record retention. A REP must maintain monthly billing and payment records for each account for at least 24 months after the date the bill is mailed. The billing records must contain sufficient data to reconstruct a customer's billing for a given period. A copy of a customer's billing records may be obtained by that customer on request, and may be obtained once per 12-month period, at no charge.

Transfer of delinquent balances or credits. If the customer has an outstanding balance or credit owed to the customer's current REP that is due from a previous account in the same customer class, then the customer's current REP may transfer that balance to the customer's current account. The delinquent balance and specific account or address must be identified as such on the bill. There must be no balance transfers between REPs, other than transfer of a deposit, as specified in §25.478(j)(2) of this title.

§25.498 Prepaid Service.

Applicability. This section applies to retail electric providers (REPs) that offer a payment option in which a customer pays for retail service prior to the delivery of service and to transmission and distribution utilities (TDUs) that have installed advanced meters and related systems. A REP may not offer prepaid service to residential or small commercial customers unless it complies with this section. The following provisions do not apply to prepaid service, unless otherwise expressly stated:

1. §25.479 of this title (relating to Issuance and Format of Bills);

2. §25.480(b), (e)(3), (h), (i), (j), and (k) of this title (relating to Bill Payment and Adjustments); and

3. §25.483 of this title (relating to Disconnection of Service), except for §25.483(b)(2)(A) and (B), (d), and (e)(1)-(6) of this title.

Definitions. The following terms, when used in this section, have the following meanings unless the context indicates otherwise.

Connection balance -- A current balance, not to exceed $75 for a residential customer, required to establish prepaid service or reconnect prepaid service following disconnection.

Current balance -- An account balance calculated consistent with subsection (c)(6) of this section.

Customer prepayment device or system (CPDS) -- A device or system that includes metering and communications capabilities that meet the requirements of this section, including a device or system that accesses customer consumption information from a TDU's advanced metering system (AMS). The CPDS may be owned by the REP, and installed by the TDU consistent with subsection (c)(2)-(4) of this section.

Disconnection balance -- An account balance, not to exceed $10 for a residential customer, below which the REP may initiate disconnection of the customer's service.

Landlord -- A landlord or property manager or other agent of a landlord.

Postpaid service -- A payment option offered by a REP for which the customer normally makes a payment for electric service after the service has been rendered.
(7) Prepaid service -- A payment option offered by a REP for which the customer normally makes a payment for electric service before service is rendered.

(8) Prepaid disclosure statement (PDS) -- A document described by subsection (e) of this section.

(9) Summary of usage and payment (SUP) -- A document described by subsection (h) of this section.

(c) Requirements for prepaid service.

(1) A REP must [shall] file with the commission a notice of its intent to provide prepaid service prior to offering such service. The notice of intent must [shall] include a description of the type of CPDS the REP will use, and the initial Electricity Facts Label (EFL), Terms of Service (TOS), and PDS for the service. Except as provided in subsection (m) of this section, a REP-controlled CPDS or TDU settlement provisioned meter is required for any prepaid service.

(2) A CPDS that relies on metering equipment other than the TDU meter must [shall] conform to the requirements and standards of §25.121(e) of this title (relating to Meter Requirements), §25.122 of this title (relating to Meter Records), and section 4.7.3 of the tariff for retail electric delivery service, which is prescribed by §25.214 of this title (relating to Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities).

(3) A TDU may, consistent with its tariff, install CPDS equipment, including meter adapters and collars on or near the TDU's meters. Such installation does not constitute competitive energy services as this term is defined in §25.341(3) of this title (relating to Definitions).

(4) A CPDS must [shall] not cause harmful interference with the operation of a TDU's meter or equipment, or the performance of any of the TDU's services. If a CPDS interferes with the TDU's meter or equipment, or TDU's services, the CPDS must [shall] be promptly corrected or removed. A CPDS that relies on communications channels other than those established by the TDU must [shall] protect customer information in accordance with §25.472 of this title (relating to Privacy of Customer Information).

(5) A REP may choose the means by which it communicates required information to a customer, including an in-home device at the customer's premises, United States Postal Service, email, telephone, mobile phone, or other electronic communications. The means by which the REP will communicate required information to a customer must [shall] be described in the TOS and the PDS.

(A) A REP must [shall] communicate time-sensitive notifications required by paragraph (7)(B), (D), and (E) of this subsection by telephone, mobile phone, or electronic means.

(B) A REP must [shall] , as required by the commission after reasonable notice, provide brief public service notices to its customers. The REP must [shall] provide these public service notices to its customers by electronic communication, or by other acceptable mass communication methods, as approved by the commission.

(6) A REP must [shall] calculate the customer's current balance by crediting the account for payments received and reducing the account balance by known charges and fees that have been incurred, including charges based on estimated usage as allowed in paragraph (11)(E) of this subsection.

(A) The REP may also reduce the account balance by:

(i) estimated applicable taxes; and

(ii) estimated TDU charges that have been incurred in serving the customer and that, pursuant to the TOS, will be passed through to the customer.

(B) If the customer's balance reflects estimated charges and taxes authorized by subparagraph (A) of this paragraph, the REP must [shall] promptly reconcile the estimated charges and taxes with actual charges and taxes, and credit or debit the balance accordingly within 72 hours after actual consumption data or a statement of charges from the TDU is available.

(C) A REP may reverse a payment for which there are insufficient funds available or that is otherwise rejected by a bank, credit card company, or other payor.

(D) If usage sent by the TDU is estimated or the REP estimates consumption according to paragraph (11)(E) of this subsection, the REP must [shall] promptly reconcile the estimated consumption and associated charges with the actual consumption and associated charges within 72 hours after actual consumption data is available to the REP.

(7) A REP must [shall]:

(A) on the request of the customer, provide the customer's current balance calculated pursuant to paragraph (6) of this subsection, including the date and time the current balance was calculated and the estimated time or days of paid electricity remaining; and

(B) make the current balance available to the customer either:

(i) continuously, via the internet, phone, or an in-home device; or

(ii) within two hours of the REP's receipt of a customer's balance request, by the means specified in the Terms of Service for making such a request.

(C) communicate to the customer the current price for electric service calculated as required by §25.475(g)(2)(A)-(E) of this title (relating to General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers);

(D) provide a warning to the customer at least one day and not more than seven days before the customer's current balance is estimated by the REP to drop to the disconnection balance;

(E) provide a confirmation code when the customer makes a payment by credit card, debit card, or electronic check. A REP is not required to provide a confirmation code or receipt for payment sent by mail or electronic bill payment system. The REP must [shall] provide a receipt showing the amount paid in person. At the customer's request, the REP must [shall] confirm all payments by providing to the customer the last four digits of the customer's account number or Electric Service Identifier (ESI ID), payment amount, and the date the payment was received;

(F) ensure that a CPDS controlled by the REP does not impair a customer's ability to choose a different REP or any electric service plans offered by the REP that do not require prepayment. When the REP receives notice that a customer has chosen a new REP, the REP must [shall] take any steps necessary to facilitate the switch on a schedule that is consistent with the effective date stated on the Electric Reliability Council of Texas (ERCOT) enrollment transaction and ERCOT's rules for processing such transactions; and

(G) refund to the customer or an energy assistance agency, as applicable, any unexpended balance from the account.
within ten business days after the REP receives the final bill and final meter read from the TDU.

(ii) In the case of unexpended funds provided by an energy assistance agency, the REP must request refund the funds to the energy assistance agency and identify the applicable customer and the customer's address associated with each refund.

(iii) In the case of unexpended funds provided by the customer that are less than five dollars, the REP must request refund the balance with ten business days.

(8) Nothing in this subsection limits a customer from obtaining a SUP.

(9) The communications provided under paragraph (7)(A)-(D) of this subsection and any confirmation of payment as described in paragraph (7)(E) of this subsection, except a receipt provided when the payment is made in person at a third-party payment location, must be provided in English or Spanish, at the customer's election.

(10) A REP must cooperate with energy assistance agencies to facilitate the provision of energy assistance payments to requesting customers.

(11) A REP must not:

(A) tie the duration of an electric service contract to the duration of a tenant's lease;

(B) require, or enter into an agreement with a landlord requiring, that a tenant select the REP as a condition of a lease;

(C) require a connection balance in excess of $75 for a residential customer;

(D) require security deposits for electric service; or

(E) base charges on estimated usage, other than usage estimated by the TDU or estimated by the REP in a reasonable manner for a time period in which the TDU has not provided actual or estimated usage data on a web portal within the time prescribed by §25.130(g) of this title (relating to Advanced Metering) and in which the TDU-provided portal does not provide the REP the ability to obtain demand usage data.

(12) A REP providing service not charge a customer any fee for:

(A) transitioning from a prepaid service to a postpaid service, but notwithstanding §25.478(c)(3) of this title (relating to Credit Requirements and Deposits), a REP may require the customer to pay a deposit for postpaid service consistent with §25.478(b) or (c)(1) and (2) of this title and may:

(i) require the deposit to be paid within ten days after issuance of a written disconnection notice that requests a deposit; or

(ii) bill the deposit to the customer;

(B) the removal of equipment; or

(C) the switching of a customer to another REP, or otherwise cancelling or discontinuing taking prepaid service for reasons other than nonpayment, but may charge and collect early termination fees pursuant to §25.475 of this title.

(13) If a customer owes a debt to the REP for electric service, the REP may reduce the customer's account balance by the amount of the debt. Before reducing the account balance, the REP must notify the customer of the amount of the debt and that the customer's account balance will be reduced by the amount of the debt no sooner than 10 days after the notice required by this paragraph is issued.

(14) In addition to the connection balance, a REP may require payment of applicable TDU fees, if any, prior to establishing electric service or reconnecting electric service.

(15) A REP that provides prepaid service to a residential customer must not charge an amount for electric service that is higher than the price charged by the POLR in the applicable TDU service territory. The price for prepaid service to a residential customer calculated as required by §25.475(g)(2)(A)-(E) of this title must be equal to or lower than at least one of the tests described in subparagraphs (A)-(C) of this paragraph:

(A) The minimum POLR rate for the residential customer class at the 500 kilowatt-hour (kWh), 1,000 kWh, and 2,000 kWh usage levels as shown on the POLR EFL posted on the commission's website for the applicable TDU service territory. When an updated POLR EFL is posted on the commission's website, the REP, at the REP's option, may continue to reference the prior POLR EFL to ensure compliance with this paragraph for prepaid service prices charged during the first 30 days, beginning the date that the updated POLR EFL is posted.

(B) The maximum POLR rate for the residential customer class calculated pursuant to §25.43(m)(4) of this title (relating to Provider of Last Resort (POLR)).

(C) The average POLR rate for the residential customer class at the 500 kWh, 1,000 kWh, and 2,000 kWh usage levels using the formula described in §25.43(m)(4) of this title for the applicable TDU service territory, with the LSP energy charge calculated as the simple average of the RTSPs over the prior month for the load zone located partially or wholly in the customer's TDU service territory that had the highest simple average price. For prepaid service prices charged by a REP up to and including the tenth business day of a month, the test may be met by using the average POLR rate calculation for the month preceding the prior month.

(D) For a fixed rate product, the REP must show that the prepaid service prices calculated under §25.475(g)(2)(A), (D)-(E) of this title are equal to or lower than one of the tests described in subparagraphs (A) and (C) of this paragraph at the time the REP makes the offer and provided that the customer accepts the offer within 30 days.

(d) Customer acknowledgement. As part of the enrollment process, a REP must obtain the applicant's or customer's acknowledgement of the following statement: "The continuation of electric service depends on your prepaying for service on a timely basis and if your balance falls below [insert dollar amount of disconnection balance], your service may be disconnected with little notice. Some electric assistance agencies may not provide assistance to customers that use prepaid service." The REP must obtain this acknowledgement using any of the authorization methods specified in §25.474 of this title (relating to Selection of Retail Electric Provider).

(e) Prepaid disclosure statement (PDS). A REP must provide a PDS contemporaneously with the delivery of the contract documents to a customer pursuant to §25.474 of this title and as required by subsection (f) of this section. A REP must also provide a PDS contemporaneously with any advertisement or other marketing materials not addressed in subsection (f) of this section that include a specific price or cost for prepaid service. The commission may adopt
a form for a PDS. The PDS must [shall] be a separate document and must [shall] be at a minimum written in 12-point font, and must [shall]:

(1) provide the following statement: "The continuation of electric service depends on you paying for service on a timely basis and if your current balance falls below the disconnection balance, your service may be disconnected with little notice."

(2) inform the customer of the following:

(A) the connection balance that is required to initiate or reconnect electric service;

(B) the acceptable forms of payment, the hours that payment can be made, instructions on how to make payments, any requirement to verify payment and any fees associated with making a payment;

(C) when service may be disconnected and the disconnection balance;

(D) that prepaid service is not available to critical care or chronic condition residential customers as these terms are defined in §25.497 of this title (relating to Critical Load Industrial Customers, Critical Load Public Safety Customers, Critical Care Residential Customers and Chronic Condition Residential Customers);

(E) the means by which the REP will communicate required information;

(F) the availability of deferred payment plans and, if a REP reserves the right to apply a switch-hold while the customer is subject to a deferred payment plan, that a switch-hold may apply until the customer satisfies the terms of the deferred payment plan, and that a switch-hold means the customer will not be able to buy electricity from other companies while the switch-hold is in place;

(G) the availability of energy bill payment assistance, including the disclosure that some electric assistance agencies may not provide assistance to customers that use prepaid service and the statement "If you qualify for low-income status or low-income assistance, have received energy assistance in the past, or you think you will be in need of energy assistance in the future, you should contact the billing assistance program to confirm that you can qualify for energy assistance if you need it."; and

(H) an itemization of any non-recurring REP fees and charges that the customer may be charged.

(3) be prominently displayed in the property management office of any multi-tenant commercial or residential building at which the landlord is acting as an agent of the REP.

(f) Marketing of prepaid services.

(1) This paragraph applies to advertisements conveyed through print, television, radio, outdoor advertising, prerecorded telephonic messages, bill inserts, bill messages, and electronic media other than [Internet] websites. If the advertisement includes a specific price or cost, the advertisement must [shall] include in a manner that is clear and conspicuous to the intended audience:

(A) any non-recurring fees, and the total amount of those fees, that will be deducted from the connection balance to establish service;

(B) the following statement, if applicable: "Utility fees may also apply and may increase the total amount that you pay."

(C) the maximum fee per payment transaction that may be imposed by the REP; and

(D) the following statement: "You can obtain important standardized information that will allow you to compare this product with other offers. Contact (name, telephone number, and website [Internet address] (if available) of the REP)." If the REP's phone number or website address is already included on the advertisement, the REP need not repeat the phone number or website as part of this required statement. The REP must [shall] provide the PDS and EFL to a person who requests standardized information for the product.

(2) This paragraph applies to all advertisements and marketing that include a specific price or cost conveyed through [Internet] websites, direct mail, mass e-mails, and any other media not addressed by paragraphs (1), (3), and (4) of this subsubsection. In addition to meeting the requirements of §25.474(d)(7) of this title, a REP must [shall] include the PDS and EFL on [Internet] websites and in direct mail, mass e-mails, and any other media not addressed by paragraphs (1), (3), and (4) of this subsubsection. For electronic communications, the PDS and EFL may be provided through a hyperlink.

(3) This paragraph applies to outbound telephonic solicitations initiated by the REP. A REP must [shall] disclose the following:

(A) information required by paragraph (1)(A)-(C) of this subsubsection;

(B) when service may be disconnected, the disconnection balance, and any non-TDU disconnection fees;

(C) the means by which the REP will communicate required information; and

(D) the following statement: "You have the right to review standardized documents before you sign up for this product." The REP must [shall] provide the PDS and EFL to a person who requests standardized information for the product.

(4) This paragraph applies to solicitations in person. In addition to meeting the requirements of §25.474(c)(8) of this title, before obtaining a signature from an applicant or customer who is being enrolled in prepaid service, a REP must [shall] provide the applicant or customer a reasonable opportunity to read the PDS.

(g) Landlord as customer of record. A REP offering prepaid service to multiple tenants at a location may designate the landlord as the customer of record for the purpose of transactions with ERCOT and the TDU.

(1) For each ESI ID for which the REP chooses to designate the landlord as the customer of record, the REP must [shall] provide to the TDU the name, service and mailing addresses, and ESI ID, and keep that information updated as required in the TDU's Tariff for Retail Delivery Service.

(2) The REP must [shall] treat each end-use consumer as a customer for purposes of this subchapter, including §25.471 of this title (relating to General Provisions of Customer Protection Rules). Nothing in this subsection affects a REP's responsibility to provide customer billing contact information to ERCOT in the format required by ERCOT.

(h) Summary of usage and payment (SUP).

(1) A REP must [shall] provide a SUP to each customer upon the customer's request within three business days of receipt of the request. The SUP must [shall] be delivered by an electronic means of communications that provides a downloadable and printable record of the SUP or, if the customer requests, by the United States Postal Service. If a customer requests a paper copy of the SUP, a REP may charge a fee for the SUP, which must be specified in the TOS and PDS.
provided to the customer. For purposes of the SUP, a billing cycle must [shall] conform to a calendar month.

(2) A SUP must [shall] include the following information:
(A) the certified name and address of the REP and the number of the license issued to the REP by the commission;
(B) a toll-free telephone number, in bold-face type, that the customer can call during specified hours for questions and complaints to the REP about the SUP;
(C) the name, meter number, account number, ESI ID of the customer, and the service address of the customer;
(D) the dates and amounts of payments made during the period covered by the summary;
(E) a statement of the customer's consumption and charges by calendar month during the period covered by the summary;
(F) an itemization of non-recurring charges, including returned check fees and reconnection fees; and
(G) the average price for electric service for each calendar month included in the SUP. The average price for electric service must [shall] reflect the total of all fixed and variable recurring charges, but not including state and local sales taxes, reimbursement for the state miscellaneous gross receipts tax, and any nonrecurring charges or credits, divided by the kilowatt-hour consumption, and must [shall] be expressed as a cents per kilowatt-hour amount rounded to the nearest one-tenth of one cent.

(3) If a REP separately identifies a charge defined by one of the terms in this paragraph on the customer's SUP, then the term in this paragraph must be used to identify the charge, and such term and its definition must [shall] be easily located on the REP's website and available to a customer free of charge upon request. Nothing in the paragraph precludes a REP from aggregating TDU or REP charges. For any TDU charge(s) listed in this paragraph, the amount billed by the REP must [shall] not exceed the amount of the TDU charge(s). The label for any TDU charge(s) may also identify the TDU that issued the charge(s). A REP may use a different term than a defined term by adding or deleting a suffix, adding the word "total" to a defined term, where appropriate, changing the use of lower-case or capital letters or punctuation, or using the acceptable abbreviation specified in this paragraph for a defined term. If an abbreviation other than the acceptable abbreviation is used for the term, then the term must also be identified on the customer's SUP.

(A) Advanced metering charge -- A charge assessed to recover a TDU's charges for Advanced Metering Systems, to the extent that they are not recovered in a TDU's standard metering charge. Acceptable abbreviation: Advanced Meter.

(B) Competition Transition Charge -- A charge assessed to recover a TDU's charges for nonsecuritized costs associated with the transition to competition. Acceptable abbreviation: Competition Transition.

(C) Energy Efficiency Cost Recovery Factor -- A charge assessed to recover a TDU's costs for energy efficiency programs, to the extent that the TDU charge is a separate charge exclusively for that purpose that is approved by the Public Utility Commission. Acceptable abbreviation: Energy Efficiency.

(D) Late Payment Penalty -- A charge assessed for late payment in accordance with Public Utility Commission rules.

(E) Meter Charge -- A charge assessed to recover a TDU's charges for metering a customer's consumption, to the extent that the TDU charge is a separate charge exclusively for that purpose that is approved by the Public Utility Commission.

(F) Miscellaneous Gross Receipts Tax Reimbursement -- A fee assessed to recover the miscellaneous gross receipts tax imposed on retail electric providers operating in an incorporated city or town having a population of more than 1,000. Acceptable abbreviation: Gross Receipts Reimb.

(G) Nuclear Decommissioning Fee -- A charge assessed to recover a TDU's charges for decommissioning of nuclear generating sites. Acceptable abbreviation: Nuclear Decommission.

(H) PUC Assessment -- A fee assessed to recover the statutory fee for administering the Public Utility Regulatory Act.

(I) Sales tax -- Sales tax collected by authorized taxing authorities, such as the state, cities and special purpose districts.

(J) TDU Delivery Charges -- The total amounts assessed by a TDU for the delivery of electricity to a customer over poles and wires and other TDU facilities not including discretionary charges.

(K) Transmission Distribution Surcharges -- One or more TDU surcharge(s) on a customer's bill in any combination. Surcharges include charges billed as tariff riders by the TDU. Acceptable abbreviation: TDU Surcharges.

(L) Transition Charge -- A charge assessed to recover a TDU's charges for securitized costs associated with the transition to competition.

(4) If the REP includes any of the following terms in its SUP, the term must [shall] be applied in a manner consistent with the definitions, and such term and its definition must [shall] be easily located on the REP's website and available to a customer free of charge upon request:

(A) Base Charge -- A charge assessed during each billing cycle of service without regard to the customer's demand or energy consumption.

(B) Demand Charge -- A charge based on the rate at which electric energy is delivered to or by a system at a given instant, or averaged over a designated period during the billing cycle.

(C) Energy Charge -- A charge based on the electric energy (kWh) consumed.

(5) Unless a shorter time period is specifically requested by the customer, information provided must [shall] be for the most recent 12 months, or the longest period available if the customer has taken prepaid service from the REP for less than 12 months.

(6) In accordance with §25.472(b)(1)(D) of this title, a REP must [shall] provide a SUP to an energy assistance agency within one business day of receipt of the agency's request, and must [shall] not charge the agency for the SUP.

(i) Deferred payment plans. A deferred payment plan for a customer taking prepaid service is an agreement between the REP and a customer that requires a customer to pay a negative current balance over time. A deferred payment plan may be established in person, by telephone, or online, but all deferred payment plans must [shall] be confirmed in writing by the REP to the customer.

(1) The REP must [shall] place a residential customer on a deferred payment plan, at the customer's request:

(A) when the customer's current balance reflects a negative balance of $50 or more during an extreme weather emergency, as
defined in §25.483(j)(1) of this title, if the customer makes the request within one business day after the weather emergency has ended; or

(B) during a state of disaster declared by the governor pursuant to Texas Government Code §418.014 if the customer is in an area covered by the declaration and the commission directs that deferred payment plans be offered.

(2) The REP must [shall] offer a deferred payment plan to a residential customer who has been underbilled by $50 or more for reasons other than theft of service.

(3) The REP may offer a deferred payment plan to a customer who has expressed an inability to pay.

(4) The deferred payment plan must [shall] include both the negative current balance and the connection balance.

(5) The customer has the right to satisfy the deferred payment plan before the prescribed time.

(6) The REP may require that:

(A) no more than 50% of each transaction amount be applied towards the deferred payment plan; or

(B) an initial payment of no greater than 50% of the amount due be made, with the remainder of the deferred amount paid in installments. The REP must [shall] inform the customer of the right to pay the remaining deferred balance by reducing the deferred balance by five equal monthly installments. However, the customer can agree to fewer or more frequent installments. The installments to repay the deferred balance must [shall] be applied to the customer's account on a specified day of each month.

(7) The REP may initiate disconnection of service if the customer does not meet the terms of a deferred payment plan or if the customer's current balance falls below the disconnection balance, excluding the remaining deferred amount. However, the REP must [shall] not initiate disconnection of service unless it has provided the customer at least one day's notice that the customer has not met the terms of the plan or, pursuant to subsection (c)(7)(D) of this section, a timely notice that the customer's current balance was estimated to fall below the disconnection balance, excluding the remaining deferred amount.

(8) The REP may apply a switch-hold while the customer is on a deferred payment plan.

(9) A copy of the deferred payment plan must [shall] be provided to the customer.

(A) The plan must [shall] include a statement, in clear and conspicuous type, that states, "If you have any questions regarding the terms of this agreement, or if the agreement was made by telephone and you believe this does not reflect your understanding of that agreement, contact [insert name and contact number of REP]."

(B) If a switch-hold will apply, the plan must [shall] include a statement, in a clear and conspicuous type, that states, "By entering into this agreement, you understand that [company name] will put a switch-hold on your account. A switch-hold means that you will not be able to buy electricity from other companies until you pay this past due amount. The switch-hold will be removed after your final payment on this past due amount is processed. While a switch-hold applies, if you are disconnected for not paying, you will need to pay [us or company name], to get your electricity turned back on."

(C) If the customer and the REP's representative or agent meet in person, the representative must [shall] read to the customer the statement in subparagraph (A) of this paragraph and, if applicable, the statement in subparagraph (B) of this paragraph.

(D) The plan may include a one-time penalty in accordance with §25.480(c) of this title, but [shall] not include a finance charge.

(E) The plan must [shall] include the terms for payment of deferred amounts, consistent with paragraph (6) of this subsection.

(F) The plan must [shall] state the total amount to be paid under the plan.

(G) The plan must [shall] state that a customer's electric service may be disconnected if the customer does not fulfill the terms of the deferred payment plan, or if the customer's current balance falls below the disconnection balance, excluding the remaining deferred amount.

(10) The REP must [shall] not charge the customer a fee for placing the customer on a deferred payment plan.

(11) The REP, through a standard market process, must [shall] submit a request to remove the switch-hold, pursuant to §25.480(m)(2) of this title if the customer pays the deferred balance owed to the REP. On the day the REP submits the request to remove the switch-hold, the REP must [shall] notify the customer that the customer has satisfied the deferred payment plan and that the switch-hold is being removed.

(j) Disconnection of service. As provided by subsection (a)(4) of this section, §25.483 (b)(2)(A) and (B), (d), (c)(1)-(6), and the definition of extreme weather in §25.483(j)(1) of this title apply to prepaid service. In addition to those provisions, this subsection applies to disconnection of a customer receiving prepaid service.

(1) Prohibition on disconnection. A REP must [shall] not initiate disconnection for a customer's failure to maintain a current balance above the disconnection balance on a weekend day or during any period during which the mechanisms used for payments specified in the customer's PDS are unavailable; or during an extreme weather emergency, as this term is defined in §25.483 of this title, in the county in which the service is provided.

(2) Initiation of disconnection. A REP may initiate disconnection of service when the current balance falls below the disconnection balance, but only if the REP provided the customer a timely warning pursuant to subsection (c)(7)(D) of this section; or when a customer fails to comply with a deferred payment plan, but only if the REP provided the customer a timely warning pursuant to subsection (i)(7) of this section. A REP may initiate disconnection if the customer's current balance falls below the disconnection balance due to reversal of a payment found to have insufficient funds available or is otherwise rejected by a bank, credit card company, or other payor.

(3) Pledge from electric assistance agencies. If a REP receives a pledge, letter of intent, purchase order, or other commitment from an energy assistance agency to make a payment for a customer, the REP must [shall] immediately credit the customer's current balance with the amount of the pledge.

(A) The REP must [shall] not initiate disconnection of service if the pledge from the energy assistance agency (or energy assistance agencies) establishes a current balance above the customer's disconnection balance or, if the customer has been disconnected, must [shall] request reconnection of service if the pledge from the energy assistance agency establishes a current balance for the customer that is at or above the customer's connection balance required for reconnection.

(B) The REP may initiate disconnection of service if payment from the energy assistance agency is not received within 45 days of the REP's receipt of the commitment or if the payment is not sufficient to satisfy the customer's disconnection balance in the case of
a currently energized customer, or the customer’s connection balance if the customer has been disconnected for falling below the disconnection balance.

(4) Reconnection of service. Within one hour of a customer establishing a connection balance or any otherwise satisfactory correction of the reasons for disconnection, the REP must [shall] request that the TDU reconnect service or, if the REP disconnected service using its CPDS, reconnect service. The REP’s payment mechanism may include a requirement that the customer verify the payment using a card, code, or other similar method in order to establish a connection balance or current balance above the disconnection balance when payment is made to a third-party processor acting as an agent of the REP.

(k) Service to Critical Care Residential Customers and Chronic Condition Residential Customers. A REP must [shall] not knowingly provide prepaid service to a customer who is a critical care residential customer or chronic condition residential customer as those terms are defined in §25.497 of this title. In addition, a REP must [shall] not enroll an applicant who states that the applicant is a critical care residential customer or chronic condition residential customer.

(1) If the REP is notified by the TDU that a customer receiving prepaid service is designated as a critical care residential customer or chronic condition residential customer, the REP must [shall] diligently work with the customer to promptly transition the customer to postpaid service or another REP in a manner that avoids a service disruption. The REP must [shall] not charge the customer a fee for the transition, including an early termination or disconnection fee.

(2) If the customer is unresponsive, the REP must [shall] transfer the customer to a competitively offered, month-to-month postpaid product at a rate no higher than the rate calculated pursuant to §25.43(f)(2)(A) of this title. The REP must [shall] provide the customer notice that the customer has been transferred to a new product and must [shall] provide the customer the new product’s Terms of Service and Electricity Facts Label.

(l) Compliance period. No later than October 1, 2011, prepaid service offered by a REP pursuant to a new contract to a customer being served using a “settlement provisioned meter,” as that term is defined in Chapter 1 of the TDU’s tariff for retail delivery service, or using a REP-controlled collar or meter must [shall] comply with this section. Before October 1, 2011, prepaid service offered by a REP to a customer served using a settlement provisioned meter or REP-controlled collar or meter must [shall] comply with this section as it currently exists or as it existed in 2010, except as provided in subsection (m) of this section.

(m) Transition of Financial Prepaid Service Customers. A REP may continue to provide a financial prepaid service (i.e., one that does not use a settlement provisioned meter or REP-controlled collar or meter) only to its customer that was receiving financial prepaid service at a particular location on October 1, 2011. A customer who is served by a financial prepaid service must [shall] be transitioned to a service that complies with the other subsections of this section by the later of October 1, 2011 or sixty days after the customer begins to be served using either a settlement provisioned meter or a REP-controlled collar or meter. The customer must [shall] be notified by the REP that the customer’s current prepaid service will no longer be offered as of a date specified by the REP by the later of either October 1, 2011 or sixty days after the customer begins to be served using either a settlement provisioned meter or REP-controlled collar or meter, as applicable. The REP must [shall] provide the notification no sooner than 60 days and not less than 30 days prior to the termination of the customer’s current prepaid service. The customer must [shall] be notified that the customer will be moved to a new prepaid service, and the REP must transmit an EFL and PDS to the customer with the notification, if the customer does not choose another service or REP.


(a) Purpose. This section establishes requirements for the offering of wholesale indexed products and products containing separate assessment of ancillary services costs to a customer other than a residential or small commercial customer.

(b) Application. This section applies to all retail electric providers (REPs), aggregators and brokers. This section is effective for enrollments or re-enrollments entered into on or after September 1, 2021. REPs are not required to modify contract documents related to contracts or enrollments entered into before this date.

(c) Definitions. The definitions set forth in §25.5 of this title (relating to Definitions) and §25.471(d) of this title (relating to General Provisions of Customer Protection Rules) apply to this section. In addition, wholesale indexed product, when used in this section, means a retail electric product in which the price a customer pays for electricity includes a direct pass-through of real-time settlement point prices determined by the independent organization certified under the Public Utility Regulatory Act (PURPA) §39.151 for the ERCOT power region.

(d) Acknowledgement of Risk (AOR). Before a customer other than a residential or small commercial customer is enrolled in a wholesale indexed product, or a product that contains a separate assessment of ancillary service charges, an aggregator, broker, or REP must obtain an AOR, signed by the customer, verifying that the customer accepts the potential price risks associated with the product.

(1) For Wholesale Indexed Products, the AOR must include the following statement in clear, boldfaced text: “I understand that the volatility and fluctuation of wholesale energy pricing may cause my energy bill to be multiple times higher in a month in which wholesale energy prices are high. I understand that I will be responsible for charges caused by fluctuations in wholesale energy prices.”

(2) For products that contain a separate assessment of ancillary service charges the AOR must include the following statement in clear, boldfaced text: “I understand that my energy bill may include a separate assessment of ancillary service charges, which may cause my energy bill to be multiple times higher in a month in which ancillary services charges are high. I understand that I will be responsible for charges caused by fluctuations in ancillary service charges.”

(3) An AOR may be included as an addendum to a contract.

(4) A REP, aggregator, or broker must retain a record of the AORs for each customer during the time the applicable plan is in effect and for four years after the contract ceases to be in effect for any customer. A REP must provide such documents at the request of the commission or its staff.

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 August 2, 2021.
TRD-202102997
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Early possible date of adoption: September 12, 2021
For further information, please call: (512) 936-7244

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 85. VEHICLE STORAGE FACILITIES

16 TAC §85.722

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 85, §85.722, regarding the Vehicle Storage Facilities Program. These proposed changes are referred to as "proposed rule."

EXPLANATION OF AND JUSTIFICATION FOR THE RULE

The rules under 16 TAC Chapter 85 implement Texas Occupations Code, Chapter 2303, Vehicle Storage Facilities.

The proposed rule addresses the maximum amounts for vehicle storage and impoundment fees that may be charged by a vehicle storage facility company. The proposed rule increases the allowable vehicle storage facility impoundment fee and daily storage fees in accordance with changes in the Consumer Price Index (CPI) during the preceding state fiscal biennium, as authorized by statute. Pursuant to Texas Occupations Code §2303.1552, the Texas Commission of Licensing and Regulation (Commission) is authorized to adjust the vehicle impound and storage fees based upon changes in the CPI not later than November 1 of every odd-numbered year. The proposed rule, based upon analysis of the CPI during the preceding state fiscal biennium by Department staff, is necessary to comply with the statutory requirements to implement changes in the vehicle impound and storage fees for 2021.

The proposed rule was presented to and discussed by the Towing and Storage Advisory Board at its meeting on July 29, 2021. The Advisory Board did not make any changes to the proposed rule. The Advisory Board voted and recommended that the proposed rule be published in the Texas Register for public comment.

SECTION-BY-SECTION SUMMARY

The proposed rule amends §85.722(d) by reflecting the new maximum amounts for daily storage fees that may be charged by a vehicle storage facility in connection with receipt and storage of a vehicle, as authorized by statute.

The proposed rule amends §85.722(e) by reflecting the new maximum amount for the vehicle impoundment fee that may be charged by a vehicle storage facility in connection with impoundment and custody of a vehicle, as authorized by statute.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

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 or reductions in costs to state or local 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 rule is in effect, there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rule will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed rule is in effect, the public benefit will be putting consumers on notice of the increase in fees that would be incurred if a towed vehicle is stored at a VSF. The proposed rule updates the allowable fees for storage and impoundment of vehicles based on the percentage increase in the Consumer Price Index during the previous state fiscal biennium, as authorized by statute. The increase in fees allows vehicle storage facilities to keep pace with inflation and current costs for operating such a facility.

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 rule is in effect, there will be additional costs to persons who are required to comply with the proposed rules. The statutorily authorized increase in the amount of fees allowed to be charged for vehicle storage and impoundment would have an increased economic cost on those who pay to have a stored vehicle released from a vehicle storage facility. However, the maximum additional amount a person would be required to pay is $0.78 or $1.08 on the first day, depending on the size of the vehicle, and $0.39 or $0.69 each day afterward. This small increase would have a minimal effect, if at all.

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 rule does not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. 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 rule does not create or eliminate a government program.

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

3. Implementation of the proposed rule does not require an increase or decrease in future legislative appropriations to the agency.
4. The proposed rule does not require an increase or decrease in fees paid to the agency.
5. The proposed rule does not create a new regulation.
6. The proposed rule does not expand, limit, or repeal an existing regulation.
7. The proposed rule does not increase or decrease the number of individuals subject to the rules’ applicability.
8. The proposed rule does 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 rule does 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 government action. As a result, the proposed rule does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

PUBLIC COMMENTS

Comments on the proposed rule may be submitted electronically on the Department’s website at https://tdt.texas.gov/form/gerules; by facsimile to (512) 475-3032; or by mail to Vanessa Vasquez, 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.

STATUTORY AUTHORITY

The proposed rule is proposed under Texas Occupations Code, Chapters 51 and 2303, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rule are those set forth in Texas Occupations Code, Chapters 51 and 2303. No other statutes, articles, or codes are affected by the proposed rule.

§§85.722. Responsibilities of Licensee–Storage Fees and Other Charges.

(a) For the purposes of this section, "VSF" includes a garage, parking lot, or other facility that is:
   (1) owned by a governmental entity; and
   (2) used to store or park at least 10 vehicles each year.
   (b) The fees outlined in this section have precedence over any conflicting municipal ordinance or charter provision.
   (c) Notification fee.
   (1) A VSF may not charge a vehicle owner or authorized representative more than $50 for notification under these rules. If a notification must be published, and the actual cost of publication exceeds 50% of the notification fee, the VSF may recover the additional amount of the cost of publication. The publication fee is in addition to the notification fee.
   (2) If a vehicle is removed by the vehicle owner or authorized representative within 24 hours after the date the VSF receives the vehicle, notification is not required by these rules.

(3) If a vehicle is removed by the vehicle owner or authorized representative before notification is sent or within 24 hours from the time VSF receives the vehicle, the VSF may not charge a notification fee to the vehicle owner.

(d) Daily storage fee. A VSF may charge $20 for each day or part of a day for storage of a vehicle that is 25 feet or less in length and may charge $35 for each day or part of a day for storage of a vehicle that exceeds 25 feet in length, subject to a biennial adjustment as set forth in Texas Occupations Code §2303.1552(b)(1).
   (1) Per the 2021 [2019] biennial adjustment, the maximum amount that a VSF may charge for a daily storage fee is as follows:
   (A) Vehicle that is 25 feet or less in length: $21.03 [20.64].
   (B) Vehicle that exceeds 25 feet in length: $36.80 [36.11].

   (2) A daily storage fee may be charged for any part of the day, except that a daily storage fee may not be charged for more than one day if the vehicle remains at the VSF less than 12 hours. In this paragraph a day is considered to begin and end at midnight.

(3) A VSF that has accepted into storage a vehicle registered in this state shall not charge for more than five days of storage fees until a notice, as prescribed in §85.703 of these rules, is mailed or published.

(4) A VSF that has accepted into storage a vehicle not registered in Texas shall not charge for more than five days of storage before the date the request for owner information is sent to the appropriate governmental entity or to the private entity authorized by that governmental entity to obtain title, registration, and lienholder information using a single vehicle identification inquiry.

(5) A VSF shall charge a daily storage fee after notice, as prescribed in §85.703, is mailed or published for each day or portion of a day the vehicle is in storage until the vehicle is removed and all accrued charges are paid.

   (e) Impoundment fee. A VSF may charge a vehicle owner or authorized representative an impoundment fee of $20, subject to a biennial adjustment as set forth in Texas Occupations Code §2303.1552(b)(1). Per the 2021 [2019] biennial adjustment, the maximum amount that a VSF may charge for an impoundment fee is $21.03 [20.64]. If the VSF charges a fee for impoundment, the written bill for services must specify the exact services performed for that fee and the dates those services were performed.

   (f) Governmental or law enforcement fees. A VSF may collect from a vehicle owner or authorized representative any fee that must be paid to a law enforcement agency, the agency's authorized agent, or a governmental entity.

   (g) Additional fees. A VSF may not charge additional fees related to the storage of a vehicle other than fees authorized by these rules or a nonconsent-towing fee authorized by Texas Occupations Code, §2308.2065.

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 July 30, 2021.
TRD-202102980
Mr. Couvillon has determined that for each year of the first five years the proposed rule is in effect, there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the proposed rule.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rule will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed rule is in effect, the public benefit will be that the rule allows towing companies to adjust their private property tow fees to keep pace with inflation and current tow company costs. The fee changes help tow companies to be more financially secure in their operations and the rule also puts the public on notice of the fees that could be incurred if a vehicle is subject to a private property tow.

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 rule is in effect, there will be additional costs to persons who are required to comply with the proposed rule. The statute requires change in the amount of fees that may be charged for a private property tow could have an economic impact on some members of the general public who have a vehicle towed through a private property tow, or who request the release of a hooked-up vehicle prior to it being towed. However, having to pay an increased fee may be avoided by members of the public through compliance with all parking requirements at private parking facilities and therefore not being subject to a tow and its associated fees.

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 rule. 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, is not required.

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

The proposed rule does not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. 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 rule. For each year of the first five years the proposed rule will be in effect, the agency has determined the following:

1. The proposed rule does not create or eliminate a government program.
2. Implementation of the proposed rule does not require the creation of new employee positions or the elimination of existing employee positions.

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

4. The proposed rule does not require an increase or decrease in fees paid to the agency.

5. The proposed rule does not create a new regulation.

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

7. The proposed rule does not increase or decrease the number of individuals subject to the rule’s applicability.

8. The proposed rule does 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 rule and the proposed rule does 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 government action. As a result, the proposed rule does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

PUBLIC COMMENTS

Comments on the proposed rule may be submitted electronically on the Department’s website at https://texas.gov:1443/form/gcerules; by facsimile to (512) 475-3032; or by mail to Vanessa Vasquez, 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.

STATUTORY AUTHORITY

The proposed rule is proposed under Texas Occupations Code, Chapters 51 and 2308, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rule are those set forth in Texas Occupations Code, Chapters 51 and 2308. No other statutes, articles, or codes are affected by the proposed rule.

§86.455. Private Property Tow Fees.

(a) For purposes of this section:

(1) light-duty means the tows of motor vehicles with a gross weight rating of 10,000 pounds or less;

(2) medium-duty means the tows of motor vehicles with a gross weight rating of more than 10,000 pounds, but less than 25,000 pounds; [and]

(3) heavy-duty means the tows of motor vehicles with a gross weight rating that exceeds 25,000 pounds; and

(4) drop charge means the maximum that may be charged for the release of the vehicle before its removal from the property or parked location.

(b) The maximum amount that may be charged for private property tows is as follows:

<table>
<thead>
<tr>
<th>Category</th>
<th>Maximum Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>light-duty tows</td>
<td>$135</td>
</tr>
<tr>
<td>medium-duty tows</td>
<td>$190</td>
</tr>
<tr>
<td>heavy-duty tows</td>
<td>$244</td>
</tr>
</tbody>
</table>

PART 8. TEXAS RACING COMMISSION

CHAPTER 303. GENERAL PROVISIONS

SUBCHAPTER D. TEXAS BRED INCENTIVE PROGRAMS

DIVISION 3. PROGRAMS FOR GREYHOUNDS

16 TAC §303.102

The Texas Racing Commission ("the Commission") proposes amendments to 16 TAC §303.102, Greyhound Rules. The proposed amendments would allow for the Texas Greyhound Association (TGA), rather than the National Greyhound Association, to register greyhounds as Texas-bred. These amendments were requested by the TGA as a cost-saving measure for its members.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENT

Chuck Trout, Executive Director, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for local or state government as a result of enforcing the amendments. Enforcing or administering the amend-
ments does not have foreseeable implications relating to cost or revenues of the state or local governments.

ANTICIPATED PUBLIC BENEFIT AND COST

Mr. Trout has determined that for each year of the first five years that the amendments are in effect, the anticipated public benefit will be reduced cost to persons wishing to register Texas-bred greyhounds. There is no probable economic cost to persons required to comply with the amendments.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Trout has determined that the proposed amendments will not adversely affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

For each year of the first five years that the proposed amendments are in effect, the government growth impact is as follows: the amendments do not create or eliminate a government program; the amendments do not create any new employee positions or eliminate any existing employee positions; implementation of the amendments does not require an increase or decrease in future legislative appropriations to the agency; the amendments do not require an increase or decrease in fees paid to the agency; the amendments do not create new regulations; the amendments do not expand existing regulations; the amendments do not repeal existing regulations; the amendments do not increase or decrease the number of individuals subject to the rule’s applicability; and the amendments are not expected to have an adverse effect on this state’s economy.

EFFECT ON SMALL AND MICRO-BUSINESSES

The proposed amendments will have no adverse economic effect on small or micro-businesses, and therefore preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis is not required.

IMPACT ON EMPLOYMENT CONDITIONS

There are no negative impacts upon employment conditions in this state as a result of the proposed amendments.

ADVERSE ECONOMIC EFFECT ON RURAL COMMUNITIES

There will be no adverse effect on rural communities as a result of the proposed amendments. Because the agency has determined that the proposed amendments will have no adverse economic effect on rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

Mr. Trout has determined that these proposed amendments do not constitute a "major environmental rule" as defined by Government Code, §2001.0225. Accordingly, an environmental impact analysis is not required.

TAKINGS IMPACT STATEMENT

Mr. Trout has determined that the proposed amendments will not affect private real property and will not restrict, limit, or impose a burden on an owner’s right to his or her private real property and, therefore, will not constitute a taking. As a result, a takings impact assessment is not required, as provided by Government Code §2007.043.

EFFECT ON AGRICULTURAL, HORSE, AND GREYHOUND INDUSTRIES

The proposed amendments will not have an adverse effect on the state’s agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

PUBLIC COMMENTS

All comments or questions regarding the proposed amendments may be submitted in writing within 30 days following publication of this notice in the Texas Register by mail to Robert Elrod, Public Information Officer for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, by e-mail to info@txrc.texas.gov, by telephone to (512) 833-6699, or by fax to (512) 833-6907.

STATUTORY AUTHORITY

The amendments are proposed under Tex. Occ. Code § 2023.004, which authorizes the Commission to adopt rules to administer the Act.

No other statute, code, or article is affected by the proposed amendments.

§303.102 Greyhound Rules
(a) Registration as a Texas-Bred Greyhound.
   (1) - (2) (No change.)
   (3) Registration Procedure.
   (A) - (C) (No change.)
   (D) If the litter qualifies to be registered as Texas-bred greyhounds, the TGA will stamp the "Litter Registration Acknowledgement" and "Certificate of Registration" of each affected greyhound as "Texas Bred" and return them to the sender. [The TGA will notify the NGA of all litters registered as "Texas Bred"]

(E) [It notice that a litter has been registered as "Texas Bred", the NGA will stamp the "Certificate of Registration" of each affected greyhound as "Texas Bred"]

(F) [If a person who submits an application for registration knowing that the application contains false information is subject to discipline by the TGA Executive Committee, including suspension from the TGA.
   (b) - (d) (No change.)

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 July 28, 2021.
TRD-202102915
Chuck Trout
Executive Director
Texas Racing Commission
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 833-6699

TITLE 22. EXAMINING BOARDS
PART 9. TEXAS MEDICAL BOARD
CHAPTER 174. TELEMEDICINE

PROPOSED RULES  August 13, 2021  46 TexReg 4969
SUBCHAPTER A.  TELEMEDICINE

22 TAC §174.5

The Texas Medical Board (Board) proposes amendments to 22 TAC §174.5, relating to the Issuance of Prescriptions.

The amendments to §174.5(e) allow physicians to utilize teledicine to continue issuing previous prescription(s) for scheduled medications to established chronic pain patients, if the physician has, within the past 90 days, seen a patient in-person or via a teledicine visit using two-way audio and video communication. The amendments will consistently and conveniently provide patients access to schedule drugs needed to ensure on-going treatment of chronic pain and avoid potential adverse consequences associated with the abrupt cessation of pain medication.

Scott Freshour, General Counsel for the Texas Medical Board, has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing the proposed amendments will be to allow physicians and other health care professionals to provide necessary medical services to related to issuance of prescriptions including controlled substances for patients. The amendments eliminate the required travel to the physician or healthcare provider for an in-person visit each time the patient needs a refill for pain medication and improves the overall continuity of care for these patients, while still meeting the standard of care and complying with state and federal law.

Mr. Freshour has also determined that for the first five-year period the amendments are in effect, there will be no fiscal impact or effect on government growth as a result of enforcing the proposed amendments.

Mr. Freshour has also determined that for the first five-year period these amendments are in effect there will be no probable economic cost to individuals required to comply with these proposed amendments.

Pursuant to Texas Government Code §2006.002, the agency provides the following economic impact statement for these proposed amendments and determined that for each year of the first five years the amendments will be in effect, there will be no effect on small businesses, micro businesses, or rural communities. The agency has considered alternative methods of achieving the purpose of the proposed amendments and found none.

Pursuant to Texas Government Code §2001.024(a)(4), Mr. Freshour certifies that this proposal has been reviewed and the agency has determined that for each year of the first five years the amendments are in effect:
(1) there is no additional estimated cost to the state or to local governments expected as a result of enforcing or administering the proposed amendments;
(2) there is no estimated reduction in costs to the state or to local governments as a result of enforcing or administering the proposed amendments;
(3) there is no estimated loss or increase in revenue to the state or to local governments as a result of enforcing or administering the proposed amendments; and
(4) there is no foreseeable implication relating to cost or revenues of the state or local governments with regard to enforcing or administering the proposed amendments.

Pursuant to Texas Government Code §2001.024(a)(6) and §2001.022, the agency has determined that for each year of the first five years the amendments will be in effect, there will be no effect on local economy and local employment.

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

(1) The proposed amendments do not create or eliminate a government program.
(2) Implementation of the proposed amendments do not require the creation of new employee positions or the elimination of existing employee positions.
(3) Implementation of the proposed amendments do not require an increase or decrease in future legislative appropriations to the agency.
(4) The proposed amendments do not require an increase or decrease in fees paid to the agency.
(5) The proposed amendments do not create new regulations.
(6) The proposed amendments do not repeal existing regulations. The proposed amendments do not expand or limit an existing regulation.
(7) The proposed amendments do not increase the number of individuals subject to the rules’ applicability.
(8) The proposed amendments do not positively or adversely affect this state’s economy.

Comments on the proposals may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The proposed amendments are proposed under the authority of Texas Occupations Code §§153.001, which provides authority for the Board to adopt rules necessary to administer and enforce the Medical Practice Act and to adopt rules necessary to regulate and license physicians.

Other statutes affected by this rule are Chapters 111 of the Texas Occupations Code.

§174.5  Issuance of Prescriptions.

(a) The validity of a prescription issued as a result of a teledicine medical service is determined by the same standards that would apply to the issuance of the prescription in an in-person setting.

(b) This rule does not limit the professional judgment, discretion or decision-making authority of a licensed practitioner. A licensed practitioner is expected to meet the standard of care and demonstrate professional practice standards and judgment, consistent with all applicable statutes and rules when issuing, dispensing, delivering, or administering a prescription medication as a result of a teledicine medical service.

(c) A valid prescription must be:

(1) issued for a legitimate medical purpose by a practitioner as part of patient-practitioner relationship as set out in §111.005, of Texas Occupations Code; and

(2) meet all other applicable laws before prescribing, dispensing, delivering or administering a dangerous drug or controlled substance.
(d) Any prescription drug orders issued as the result of a
telemedicine medical service, are subject to all regulations, limitations,
and prohibitions set out in the federal and Texas Controlled Substances
Act, Texas Dangerous Drug Act and any other applicable federal and
state law.

(e) Limitation on Treatment of Chronic Pain. Chronic pain
is a legitimate medical condition that needs to be treated but must be
balanced with concerns over patient safety and the public health crisis
involving overdose deaths. The Legislature has already put into place
laws regarding the treatment of pain and requirements for registration
and inspection of pain management clinics. Therefore, the Board has
determined clear legislative intent exists for the limitation of chronic
pain treatment through a telemedicine medical service.

1. Treatment for Chronic Pain. For purposes of this rule,
chronic pain has the same definition as used in §170.2(4) of this title
(relating to Definitions). Telemedicine medical services used for the
treatment of chronic pain with scheduled drugs by any means other
than via audio and video two-way communication is prohibited, unless
a patient:

(A) is an established chronic pain patient of the provider
issuing the prescription;

(B) is receiving a prescription that is identical to a pre-
scription issued at the previous visit; and

(C) has been seen by the prescribing physician or health
professional defined under Chap 111.001(1) of Texas Occupations
Code, in the last 90 days either:

(i) in-person; or

(ii) via telemedicine using audio and video two-way
communication.

2. Treatment for Acute Pain. For purposes of this rule,
acute pain has the same definition as used in §170.2(2) of this title.
Telemedicine medical services may be used for the treatment of acute
pain with scheduled drugs, unless otherwise prohibited under federal
and state law.

(A) Treatment of chronic pain with scheduled drugs
through use of telemedicine medical services is prohibited, unless oth-
erwise allowed under federal and state law.

(B) Treatment of acute pain with scheduled drugs
through use of telemedicine medical services is allowed, unless oth-
erwise prohibited under federal and state law.

The agency certifies that legal counsel has reviewed the pro-
posal and found it to be within the state agency’s legal authority
to adopt.

Filed with the Office of the Secretary of State on August 2, 2021.
TRD-202102995
Scott Freshour
General Counsel
Texas Medical Board
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 305-7016

PART 11. TEXAS BOARD OF NURSING
CHAPTER 217. LICENSURE, PEER
ASSISTANCE AND PRACTICE

22 TAC §217.24
The Texas Board of Nursing (Board) proposes amendments to
22 TAC §217.24(e), relating to Telemedicine Service
Prescriptions. The amendments are being proposed under the
authority of the Occupations Code §301.151.

Background.
On March 13, 2020, the Governor of the State of Texas certified
COVID-19 as posing an imminent threat of disaster to the public
health and safety and declared a state of disaster in all counties
of Texas. This declaration has been renewed each month there-
after, the most recent renewal taking effect July 30, 2021. On
March 23, 2020, the Office of the Governor granted a waiver of
22 Texas Administrative Code §217.24(e), which prohibits an
advanced practice registered nurse (APRN) from treating chronic
pain with scheduled drugs through the use of telemedicine med-
ic services, unless otherwise permitted under federal and state
law. The waiver, however, expired on June 6, 2020.

The Board held a public meeting on June 8, 2020, to consider the
adoption of an emergency rule to permit APRNs to treat chronic
pain with scheduled drugs through the use of telemedicine med-
ic services under certain conditions during the COVID-19 pand-
demic. At the conclusion of the meeting, the Board voted to
adopt emergency amendments to 22 Texas Administrative Code
§217.24(e).

Subsequently, the Board found that the continued effects of the
COVID-19 pandemic necessitated the continuation of emer-
gency amendments to §217.24(e) and re-adopted emergency
amendments to the section several times, the last adoption
taking effect on August 1, 2021. During its most recent public
meeting on July 30, 2021, the Board determined that permanent
rule amendments to §217.24(e), consistent with those amend-
ments adopted on an emergency basis during the pandemic,
should also be considered due to the continuation of the pand-
demic and recent increases in the number of new COVID-19 cases
throughout the state. Further, the Board determined it
would routinely evaluate the continued need for the permanent
rule as the pandemic progresses to ensure ongoing compliance
with state and federal law and to determine when, and if, the
necessity of the permanent rule ceases to exist.

Section by Section Overview.

The proposed amendments to §217.24(e) are necessary to allow
APRNs to provide necessary treatment to established patients
with chronic pain while mitigating the risk of exposure to COVID-
19. Under the proposed amendments, the treatment of chronic
pain with scheduled drugs through the use of telemedicine med-
ic services by any means other than via audio and video two-
way communication is prohibited, unless certain conditions are
met. First, a patient must be an established chronic pain pa-
tient of the APRN. Second, the patient must be receiving a pre-
scription that is identical to a prescription issued at the previous
visit. Third, the patient must have been seen by the prescrib-
ing APRN or physician or health professional as defined in Tex.
Occ. Code §111.001(1) in the last 90 days, either in-person or
via telemedicine using audio and video two-way communication.

These requirements are consistent with the rules adopted by
the Texas Medical Board at 22 Texas Administrative Code §174.5
(relating to issuance of Prescriptions) on an emergency basis,
effective July 31, 2021, and being proposed by the Texas Medi-
cal Board as a permanent rule, as well as the provisions of fed-
eral law that currently permit the use of telemedicine medical
services for the prescription of controlled substances during the COVID-19 pandemic.

Further, an APRN must exercise appropriate professional judgment in determining whether to utilize telemedicine medical services for the treatment of chronic pain with controlled substances. In order to ensure that telemedicine medical services are appropriate for the APRN to use, the adopted rule requires an APRN to give due consideration to factors that include, at a minimum, the date of the patient’s last in-person visit, patient co-morbidities, and occupational related COVID-19 risks. These are not the sole, exclusive, or exhaustive factors an APRN should consider under this rule. Further, the proposed amendments only apply to those APRNs whose delegating physicians permit them to issue re-fills for patients, and the refills are limited to controlled substances contained in Schedules III through V only. If a patient is treated for chronic pain with scheduled drugs through the use of telemedicine medical services as permitted by this rule, the medical records must document the exception and the reason that a telemedicine visit was conducted instead of an in-person visit.

The remaining proposed changes make conforming changes to the definitions of the terms acute pain and chronic pain, consistent with the definition used by the Texas Medical Board, in 22 Texas Administrative Code §170.2(2) and (4) (relating to Definitions).

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no change in the revenue to state government as a result of the enforcement or administration of the proposal.

Public Benefit/Cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be the adoption of rules that eliminate the required travel for in-person visits each time a patient needs a refill of pain medications and ensures the continuity of care for the patient during the ongoing pandemic. It is anticipated that the proposed amendments will improve the overall continuity of care for these patients, while still meeting applicable standards of care and current provisions of state and federal law.

It is not anticipated that any new costs of compliance will result from enforcement of the proposal. The proposed amendments provide an additional method for providers to serve their patients, but it is not mandated that providers utilize these telemedicine capabilities. Providers and patients may still choose to engage in in-person visits. For those providers who choose to offer telemedicine medical services under the proposal, each provider is free to choose the most economical method to do so. Since the proposal only requires audio and video two-way communication, it is also anticipated that most providers will already have access to such technology without additional cost resulting from this proposal.

Costs Under the Government Code §2001.0045. The Government Code §2001.0045 prohibits agencies from adopting a rule that imposes costs on regulated persons unless the agency repeals a rule that imposes a total cost on regulated persons that is equal to or greater than the total cost imposed on regulated persons by the proposed rule or amends a rule to decrease the total cost imposed on regulated persons by an amount that is equal to or greater than the cost imposed on the persons by the proposed rule. There are no anticipated costs associated with the proposal of this rule.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. The Government Code §2006.002(c) and (f) require, that if a proposed rule may have an economic impact on small businesses, micro businesses, or rural communities, state agencies must prepare, as part of the rulemaking process, an economic impact statement that assesses the potential impact of the proposed rule on these businesses and communities and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. Since there are no anticipated costs associated with the proposal, there will be no effect on small businesses, micro businesses, or rural communities.

Government Growth Impact Statement. The Board is required, pursuant to Tex. Gov’t Code §2001.0221 and 34 Texas Administrative Code §11.1, to prepare a government growth impact statement. The Board has determined for each year of the first five years the proposed amendments will be in effect: (i) the proposal does not create or eliminate a government program; (ii) the proposal is not expected to have an effect on current agency positions; (iii) implementation of the proposal does not require an increase or decrease in future legislative appropriations to the Board; (iv) the proposal does not affect the fees paid to the Board; (v) the proposal does not create a new regulation, although it does provide an additional option for individuals already subject to its provisions; (vi) the proposal does not expand, limit, or repeal an existing regulation; (vii) the proposal does not increase or decrease the number of individuals subject to its applicability; and (viii) the proposal will not affect the state’s economy.

Takings Impact Assessment. The Board has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner’s right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Request for Public Comment. To be considered, written comments on this proposal should be submitted to both Kristin Benton, Director of Nursing, and James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to Kristin.Benton@bon.texas.gov and Dusty.Johnston@bon.texas.gov, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The amendments are proposed under the authority of the Occupations Code §301.151.

Section 301.151 addresses the Board’s rulemaking authority. Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders under Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Cross Reference To Statute. The following statutes are affected by this proposal: the Occupations Code §301.151.

§217.24. Telemedicine Medical Service Prescriptions.

(a) - (d) (No change.)
(e) Limitation on Treatment of Chronic Pain. Chronic pain is a legitimate medical condition that needs to be treated, but must be balanced with concerns over patient safety and the public health crisis involving overdose deaths. The Legislature has already put into place laws regarding the treatment of pain and requirements for registration and inspection of pain management clinics. Therefore, the Board has determined clear legislative intent exists for the limitation of chronic pain treatment through a telemedicine medical service.

(1) For purposes of this rule, chronic pain has the same definition as used in 22 Texas Administrative Code §170.2(4) (relating to Definitions). [Treatment of chronic pain with prescribed drugs or through use of telemedicine medical services is permitted, unless otherwise allowed under federal and state law. For purposes of this section, “chronic pain” means a state in which pain persists beyond the usual course of an acute disease or healing of an injury. Chronic pain may be associated with a chronic pathological process that causes continuous or intermittent pain over months or years.]

(A) Telemedicine medical services used for the treatment of chronic pain with scheduled drugs by any means other than via audio and video two-way communication is prohibited, unless a patient:

(i) is an established chronic pain patient of the

APRN:

(ii) is receiving a prescription that is identical to a prescription issued at the previous visit; and

(iii) has been seen by the prescribing APRN or physician or health professional as defined in Tex. Occ. Code §111.001(1) in the last 90 days, either:

(I) in-person; or

(II) via telemedicine using audio and video two-way communication.

(B) An APRN, when determining whether to utilize telemedicine medical services for the treatment of chronic pain with controlled substances as permitted by paragraph (1)(A) of this subsection, shall give due consideration to factors that include, at a minimum, the date of the patient’s last in-person visit, patient co-morbidities, and occupational related COVID risks. These are not the sole, exclusive, or exhaustive factors an APRN should consider under this rule.

(C) If a patient is treated for chronic pain with scheduled drugs through the use of telemedicine medical services as permitted by paragraph (1)(A) of this subsection, the medical records must document the exception and the reason that a telemedicine visit was conducted instead of an in-person visit.

(2) For purposes of this rule, acute pain has the same definition as used in 22 Texas Administrative Code §170.2(2). Telemedicine medical services may be used for the treatment of acute pain with scheduled drugs, unless otherwise prohibited under federal and state law. [Treatment of acute pain with scheduled drugs through use of telemedicine medical services is allowed, unless otherwise prohibited under federal and state law. For purposes of this section, “acute pain” means the normal, predictable, physiological response to a stimulus, such as trauma, disease, and operative procedures. Acute pain is time limited.]

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 August 2, 2021.

PART 41. TEXAS BEHAVIORAL HEALTH EXECUTIVE COUNCIL

CHAPTER 883. RENEWALS

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §883.1

The Texas Behavioral Health Executive Council proposes amendments to 22 TAC §883.1, relating to Renewal of a License.

Overview and Explanation of the Proposed Rule. The proposed amendment is intended to modify the assessment of late fees such that licensees need only pay a late renewal fee for late renewals, rather than a late fee in addition to the standard renewal fee.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs of state or local government. Conversely, Mr. Spinks has determined there will be a decrease or loss in revenues to state government as a result of this proposed amendment. Under the proposed amendment a licensee filing a late renewal would only have to pay the late renewal fee, as opposed to currently having to pay the renewal fee in addition to the late fee. If the same historical number of licensees that filed late renewals this past year continue to do so, then the amount of fees collected by this agency will be reduced by approximately $241,769.00 on an annual basis.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees because the proposed rule will provide greater equity in the Executive Council’s rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the
Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to the agency; it does not require an increase in fees paid to the agency but it is estimated to result in a decrease in fees paid to this agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule’s applicability; and it does not positively or adversely affect the state’s economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the Texas Register. Comments may also be submitted via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council proposes this amended rule pursuant to the authority found in §507.154 of the Tex. Occ. Code which authorizes the Executive Council to set fees necessary to cover the costs of administering Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code; as well as §507.255 of the Tex. Occ. Code which requires the Executive Council to charge late renewal fees.

The Executive Council also proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§883.1. Renewal of a License.
(a) All licenses subject to the jurisdiction of the Council are renewable on a biennial basis and must be renewed online.
(b) Renewals are due on the last day of the license holder's birth month, but may be completed up to 60 days in advance.
(c) Renewal Conditions:
(1) Licensees must pay all applicable renewal and late fees, indicate compliance with any continuing education requirements, and comply with any other requests for information or requirements contained within the online renewal system as a prerequisite for renewal of a license. This paragraph is effective for licenses with expiration dates prior to November 30, 2021.
(2) Licensees must pay all applicable renewal or late renewal fees, indicate compliance with any continuing education requirements, and comply with any other requests for information or requirements contained within the online renewal system as a prerequisite for renewal of a license. This paragraph is effective for licenses with expiration dates on or after November 30, 2021.
(e) Licensees must pay all applicable renewal and late fees, indicate compliance with any continuing education requirements, and comply with any other requests for information or requirements contained within the online renewal system as a prerequisite for renewal of a license.
(d) In addition to the requirements of subsection (c) of this section, licensees must also show compliance with each of the following as a condition of renewal:
(1) provide or update the standardized set of information about their training and practices required by §105.003 of the Health and Safety Code; and
(2) affirm or demonstrate successful completion of a training course on human trafficking prevention described by §116.002 of the Occupations Code.
(e) Licensed psychologists must update their online profile information when renewing their license.
(f) A license may not be renewed until a licensee has complied with the requirements of this rule.
(g) A licensee who falsely reports compliance with continuing education requirements on his or her renewal form or who practices with a license renewed under false pretenses will be subject to disciplinary action.
These Disability and Service (relating to Subchapter 31; and administrative under Subchapter (512) further
For date 12, of possible Earliest adoption: TRD-202103000
Secretary State
TITLE
PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS
CHAPTER 31. EMPLOYMENT AFTER RETIREMENT
The Teacher Retirement System of Texas (TRS) proposes to repeal §§31.1 - 31.3 under Subchapter A (relating to General Provisions) of Chapter 31 in Part 3 of Title 34 of the Texas Administrative Code; §§31.11 - 31.15 under Subchapter B (relating to Employment After Service Retirement) of Chapter 31; and §§31.31 - 31.37 and 31.41 of Subchapter C (relating to Employment After Disability Retirement) of Chapter 31. These repeals are proposed in conjunction with the proposed new rules under Chapter 31 published elsewhere in this issue of the Texas Register.

BACKGROUND AND PURPOSE
TRS proposes to repeal its existing sixteen rules under Chapter 31 as part of a complete restructuring and revision of that chapter in order to implement new legislation passed by the 87th Texas Legislature. For the same purpose, TRS is also proposing eighteen new rules under Chapter 31 elsewhere in this issue of the Texas Register. These proposed new rules effectively incorporate most of the substantive requirements of the proposed repealed rules but make formatting and stylistic changes to those provisions for readability purposes. In some cases, the proposed new rules also remove obsolete requirements or make other substantive changes for policy or legislative reasons. A complete description of these changes can be found in the preamble to the proposed new Chapter 31 rules.

TRS has determined that the proposed repealed rules, if adopted, shall become effective on the same date that the proposed new Chapter 31 rules become effective. TRS has proposed that the proposed new Chapter 31 rules, published elsewhere in this issue of the Texas Register, shall become effective on November 1, 2021 or on the earliest first day of a calendar month after twenty days after TRS submits the adopted new rules to the Secretary of State.

FISCAL NOTE
Don Green, TRS Chief Financial Officer, has determined that for each year of the first five years the proposed repealed rules will be in effect, there will be no foreseeable fiscal implications for state or local governments as a result of administering the proposed repealed rules.

PUBLIC COST/BENEFIT
For each year of the first five years the proposed repealed rules will be in effect, Mr. Green also has determined that the public benefit anticipated as a result of adopting the proposed repealed rules will permit TRS to adopt its proposed new Chapter 31 rules in order to conform with recent statutory changes. In addition, Mr. Green has determined that the public will benefit from increased readability of the proposed new rules if adopted in place of the proposed repealed rules.

Mr. Green has also determined that the public will incur no new costs as a result of the proposed repealed rules.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS
TRS has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed repealed rules. Therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under Government Code §2006.002.

LOCAL EMPLOYMENT IMPACT STATEMENT
TRS has determined that there will be no effect on local employment because of the proposed repealed rules. Therefore, no local employment impact statement is required under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT
TRS has determined that for the first five years the proposed repealed rules are in effect, the proposed repealed rules will not create or eliminate any TRS programs; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to TRS; will not eliminate any fees currently paid to TRS; will not create a new regulation; will not expand or limit an existing regulation; will not increase or decrease the number of individuals subject to the rule’s applicability; and will not affect the state’s economy.

The proposed repealed rules will repeal sixteen existing rules for the reasons stated above in this preamble.

TAKINGS IMPACT ASSESSMENT
TRS has determined that there are no private real property interests affected by the proposed repealed rules; therefore, a takings impact assessment is not required under Government Code §2007.043.

COSTS TO REGULATED PERSONS
TRS has determined that Government Code §2001.0045 does not apply to the proposed repealed rules because the proposed repealed rules do not impose a cost on regulated persons.

COMMENTS
Comments may be submitted in writing to Brian Guthrie, TRS Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the Texas Register.
SUBCHAPTER A.  GENERAL PROVISIONS
34 TAC §§31.1 - 31.3

STATUTORY AUTHORITY

The proposed repealed rules are proposed under the authority of Government Code §824.604, which provides that the board of trustees may adopt rules to administer laws under Subchapter G of Chapter 824 of the Government Code; and Government Code §825.102, which authorizes the board of trustees to adopt rules for the transaction of the business of the board.

CROSS-REFERENCE TO STATUTE

The proposed repealed rules affect the following statutes: Government Code §824.601, which relates to loss of monthly benefits; Government Code §824.602, which relates to exceptions; and Government Code §825.4092, relating to employer contributions for employed retirees.

§31.1.  Definitions.
§31.3.  Exception Apply only to Effective Retirement.

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 July 30, 2021.
TRD-202102987
Don Green
Chief Financial Officer
Teacher Retirement System of Texas
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 542-6560

SUBCHAPTER B.  EMPLOYMENT AFTER SERVICE RETIREMENT
34 TAC §§31.11 - 31.15

STATUTORY AUTHORITY

The proposed repealed rules are proposed under the authority of Government Code §824.604, which provides that the board of trustees may adopt rules to administer laws under Subchapter G of Chapter 824 of the Government Code; and Government Code §825.102, which authorizes the board of trustees to adopt rules for the transaction of the business of the board.

CROSS-REFERENCE TO STATUTE

The proposed repealed rules affect the following statutes: Government Code §824.601, which relates to loss of monthly benefits; and Government Code §824.602, which relates to exceptions.

§31.11.  Employment Resulting in Forfeiture of Service Retirement Annuity.
§31.12.  Exceptions to Forfeiture of Service Retirement Annuity.
§31.15.  Full-time Employment after 12 Consecutive Month Break in Service.

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 July 30, 2021.
TRD-202102987
Don Green
Chief Financial Officer
Teacher Retirement System of Texas
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 542-6560

SUBCHAPTER C.  EMPLOYMENT AFTER DISABILITY RETIREMENT
34 TAC §§31.31 - 31.37, 31.41

STATUTORY AUTHORITY

The proposed repealed rules are proposed under the authority of Government Code §824.604, which provides that the board of trustees may adopt rules to administer laws under Subchapter G of Chapter 824 of the Government Code; and Government Code §825.102, which authorizes the board of trustees to adopt rules for the transaction of the business of the board.

CROSS-REFERENCE TO STATUTE

The proposed repealed rules affect the following statutes: Government Code §824.310, relating to purpose of disability benefit; limit on supplemental income; Government Code §824.601, which relates to loss of monthly benefits; and Government Code §824.602, which relates to exceptions.

§31.31.  Employment Resulting in Forfeiture of Disability Retirement Annuity.
§31.32.  Half-time Employment Up to 90 Days.
§31.33.  Substitute Service Up to 90 Days.
§31.34  Employment Up to Three Months on a One-Time Only Trial Basis.
§31.36.  Forfeiture of Disability Retirement Annuity Payments Due to Excess Compensation.
§31.41.  Return to Work Employer Pension Surcharges.

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 July 30, 2021.
TRD-202102989
Don Green
Chief Financial Officer
Teacher Retirement System of Texas
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 542-6560

CHAPTER 31.  EMPLOYMENT AFTER RETIREMENT

of Chapter 31 in Part 3 of Title 34 of the Texas Administrative Code; and new §§31.31 - 31.33 of new Subchapter C (relating to Disability Retiree Compensation Limits) of Chapter 31 in Part 3 of Title 34 of the Texas Administrative Code. These new rules are proposed in conjunction with the proposed amendments to §41.4 (relating to Employer Health Benefit Surcharge) and the proposed repeals of all current rules under Chapter 31 (relating to Employment After Retirement) in Part 3 of Title 34 of the Texas Administrative Code as published elsewhere in this issue of the Texas Register.

BACKGROUND AND PURPOSE

TRS proposes eighteen new rules relating to employment after retirement (EAR) for TRS retirees in order to implement new legislation passed by the 87th Texas Legislature. Specifically, these proposed new rules are necessary to implement House Bill 1585 (HB 1585), Senate Bill 202 (SB 202), Senate Bill 288 (SB 288), and Senate Bill 1356 (SB 1356). Each of these bills made substantial changes to EAR for TRS retirees.

HB 1585 amended, most relevantly, Government Code §824.601 to make two key changes to TRS's EAR requirements. First, HB 1585 amended Government Code §824.601(b-1) to change the current "safe harbor" retirement date for service retirees who are exempt from EAR restrictions from January 1, 2011, to January 1, 2021. Second, HB 1585 amended Government Code §824.601 by creating a "three strikes" process under new subsection (b-3) that must be completed before a service retiree forfeits the retiree's full annuity for a month based on that retiree's employment with TRS-covered employers during that month. The "three strikes" consist of a series of warnings and an alternate "dollar-for-dollar" payment option that TRS must provide a service retiree before the retiree may be subject to total forfeiture of the retiree's annuity.

SB 202 amended Government Code §825.4092 and prohibits employers from directly or indirectly passing on the cost of either the pension or health benefit surcharge to retirees through payroll deductions, fees, or any other means designed to recover the cost.

SB 288 created new Government Code §§31.602 and amended Government Code §825.4092. These changes created a new EAR and surcharge exception for certain service retirees who are employed in positions dedicated to mitigating learning loss caused by the COVID-19 pandemic. The positions must be in addition to normal staffing levels, funded by specific federal relief funds, and end no later than December 31, 2024. This exception does not apply to disability retirees or retirees employed with institution of higher education.

Lastly, SB 1356 amended, most relevantly, Government Code §824.602 to create a new exception to TRS's EAR requirements. Specifically, under new Education Code §33.913, SB 1356 established a new method for nonprofit organizations to establish tutoring programs in cooperation with public schools. The amendment to Government Code §824.602 provides that TRS retirees may be employed in these programs up to full-time during a month without forfeiting their annuity for that month. These retirees remain subject to employer surcharges.

In addition to implementing legislation, the proposed new rules also make two key substantive changes to TRS's EAR requirements outside of the changes required by new legislation.

First, the proposed new rules change TRS's existing standard for one-half time employment from the current variable monthly limit equal to four clock hours per workday in a given calendar month to a uniform monthly limit of 92 hours per month regardless of the number of workdays in that month or 11 days if the retiree combines one-half time and substitute employment in that month. This new uniform limit will simplify EAR requirements for retirees and reporting employers, and the change is retiree-friendly because in no case would it reduce the hours or days available for a retiree to work on a one-half time or less basis during a month. If ultimately adopted, the new limit would not only apply for purposes of EAR, but it would also apply to employer surcharges. This application does mean that, in certain instances, TRS could possibly not receive surcharges that it currently does based on a retiree's employment during a month, but TRS's actuary of record, Gabriel, Roeder, Smith & Company (GRS), determined the change would not have a material negative impact on the pension fund.

Second, the proposed new rules expressly expand the definition of "substitute" for the purposes of EAR to include an employee who, on a temporary basis, monitors an in-person class while the classroom teacher temporarily instructs the class virtually. This is a novel employment arrangement that TRS has encountered during the COVID-19 public health emergency, and, based on an interpretation of its current rule, TRS has permitted this arrangement to qualify as substitute employment for the purposes of EAR. This change to the rule codifies TRS's current interpretation of its substitute rule and places clear parameters upon when it may be used by school districts and retirees.

The proposed new rules also make several additional minor changes necessary to ensure that the EAR rules conform with current TRS practice and nomenclature, and the proposed new rule incorporate many existing provisions from the proposed repealed EAR rules. TRS has included a detailed, rule-by-rule summary of changes below in its "Section-by-Section Summary."

Lastly, TRS has determined that the proposed new rules, if adopted, shall become effective on November 1, 2021, or on the earliest first day of a calendar month after twenty days after TRS submits the adopted new rules to the Secretary of State.

SECTION-BY-SECTION SUMMARY

Proposed New §31.1 (relating to Definitions) defines several terms for use throughout Chapter 31. The proposed new rule incorporates existing definitions from current §31.1 and also adds several new definitions, such as for the terms "disability retiree," "service retiree," and "employment," to simplify and clarify rule language throughout the chapter.

Proposed New §31.2 (relating to Monthly Certified Statement) largely incorporates the existing provisions of current §31.2 with some nonsubstantive changes for style and clarity purposes. Proposed New §31.2 also adds provisions relating to how employers can report retirees working under EAR exceptions and makes other minor changes to conform the rule's requirements with how employer reporting works under TRS's current reporting system.

Proposed New §31.3 (relating to Return-to-Work Employer Pension Surcharge) largely incorporates the existing provisions of current §31.41 with some nonsubstantive changes for style and clarity purposes. In addition, Proposed New §31.3 adds provisions relating to the surcharge pass-through prohibition created by SB 202 and the new surcharge exception for certain federally-funded COVID-19 positions created by SB 288. Lastly, Proposed New §31.3 provides that a 92-hour uniform standard
for one-half time employment (or the combination standards for one-half time employment under Proposed New §31.19) shall be used to determine when employer surcharges are due.

Proposed New §31.4 (relating to Employment Resulting in Forfeiture of Retirement Annuity) incorporates provisions from current §31.11 and §31.31. Proposed New §31.4 also adds provisions to clarify the consequences for exceeding the limits on EAR for service retirees with an effective date of retirement on or before January 1, 2021; service retirees with an effective date of retirement after January 1, 2021; and disability retirees regardless of effective of retirement.

Proposed New §31.5 (relating to Notice and Forfeiture Requirements for Certain Service Retirees) implements the "three strikes" process from HB 1585. Proposed New §31.5 describes how TRS shall implement the three strikes process; how late adjustments to EAR reporting and retiree appeals will be incorporated into the process; and how TRS shall determine the date of issuance for a warning under the three strikes process.

Proposed New §31.6 (relating to Second EAR Warning Payments) implements the "dollar-for-dollar" payment option from the new "three-strikes" process. Proposed New §31.6 describes what compensation shall be used to determine the amount of the payment due under this requirement and how employers may adjust that compensation amount when a correction is needed. Proposed new §31.6 also provides that, by default, TRS will assume that a retiree who is subject to a second EAR warning must repay to TRS the lesser of either the total monthly annuity payments that the retiree received for the relevant months or the total compensation earned for all employment with TRS-covered employers for that month. Proposed new §31.6 also provides that a retiree may elect to pay TRS the greater of these two amounts if the retiree wishes to do so.

Proposed New §31.11 (relating to Exceptions to Forfeiture of Retirement Annuity) primarily incorporates provisions from current §31.3 and §31.12 but clarifies that EAR exceptions only apply for service retirees with a retirement date after January 1, 2021.

Proposed New §31.12 (relating to Substitute Service) primarily incorporates provisions from current §§31.1, 31.13, and 31.32. Proposed New §31.12 also extends the definition of "substitute" to include an employee monitoring an in-person class on a temporary basis while the classroom teacher is temporarily instructing the class virtually. In addition, Proposed New §31.12 also clarifies how the 90-day limit for disability retirees who work as substitutes interacts with the new tutor exception provided by SB 1356.

Proposed New §31.13 (relating to One-half Time Employment) largely incorporates provisions from current §31.14 and §31.33. In addition, Proposed New §31.13 provides for the new 92-hour uniform standard for determining whether a retiree has worked one-half time or less during a month. Proposed New §31.13 also clarifies how the 90-day limit for disability retirees who work one-half time or less interacts with the new tutor exception provided by SB 1356.

Proposed New §31.14 (relating to Full-time Employment after 12 Consecutive Month Break in Service) largely incorporates provisions from current §31.15. In addition, Proposed New §31.14 clarifies that employment under either of the new EAR exceptions (the tutor exception or federally-funded COVID-19 position exception) counts as employment with a TRS-covered employer for the purposes of determining whether the retiree has had a 12 full, calendar month break in service after retirement.

Proposed New §31.15 (relating to Tutors under Education Code §33.913) implements the tutor exception to EAR created by SB 1356. In addition, Proposed New §31.15 clarifies that employment under the tutor exception count is subject to the general 90-day per school year limit for disability retirees who return to work for a TRS-covered employer.

Proposed New §31.16 (relating to Federally-Funded COVID-19 Personnel) implements the new federally-funded COVID-19 position exception provided by SB 288. Proposed New §31.16 also clarifies that, for the purposes of EAR, a position will be considered to end by December 31, 2024 if the position no longer exists after that date or if the position is no longer funded by federal funds after that date.

Proposed New §31.17 (relating to Employment Up to Three Months on a One-time Trial Basis) primarily reincorporates the provisions of current §31.34 with only minor conforming changes.

Proposed New §31.18 (relating to Combining EAR Exceptions) incorporates provisions from existing §§31.13, 31.14, 31.32, and 31.33 regarding how one-half time employment and substitute employment combine for the purposes of EAR. In addition, Proposed New §31.18 provides for how the new tutor exception and federally-funded COVID-19 position exception combine with the existing EAR exceptions. Specifically, the rule clarifies that the federally-funded COVID-19 position exception shall be accounted for separately from other EAR exceptions and shall not affect employment under other EAR exceptions. More than one-half time employment under the tutor exception, however, may not be combined with employment under any other exception during a month unless all of the retiree’s employment during that month qualifies as substitute employment or the retiree qualifies for the twelve-month break-in-service exception. If a retiree works one-half time or less under the tutor exception during a month, however, the retiree may combine that employment during a month just as a retiree could combine any other one-half time employment during a month. Lastly, Proposed New §31.18 provides for how TRS shall consider employment in a single position that qualifies for more than one EAR exception, most notably providing that a position that qualifies for the federally-funded COVID-19 position exception shall only be subject to the requirements and limits of that exception.

Proposed New §31.19 (relating to Combining EAR Exceptions and Employer Surcharges) incorporates existing provisions from current §31.41. Proposed New §31.19 provides for how TRS shall consider a retiree’s employment during a month if the retiree combines employment under more than one EAR exception. The combination requirements largely mirror the combination limits under Proposed New §31.18 for the purpose of determining whether a retiree is subject to EAR forfeiture requirements except that, for the purposes of employer surcharges, employment more than one-half time under the tutor exception or under the twelve-month break-in-service exception is subject to employer surcharges.

Proposed New §31.31 (relating to Disability Retiree Report of Excess Compensation) primarily reincorporates the provisions of current §31.35 with only minor conforming changes.

Proposed New §31.32 (relating to Forfeiture of Disability Retirement Annuity Payments Due to Excess Compensation) primarily reincorporates the provisions of current §31.36 with only minor conforming changes.
Proposed New §31.33 (relating to Applicability of Excess Compensation Provisions to Employment in Texas Public Educational Institutions) primarily reincorporates the provisions of current §31.37 with only minor conforming changes.

FISCAL NOTE

Don Green, TRS Chief Financial Officer, has determined that for each year of the first five years the proposed new rules will be in effect, there will be no foreseeable fiscal implications for state or local governments as a result of administering the proposed new rules.

PUBLIC COST/BENEFIT

For each year of the first five years the proposed new rules will be in effect, Mr. Green also has determined that the public benefit anticipated as a result of adopting the proposed new rules will be for TRS's EAR rules to conform with recent statutory changes. In addition, Mr. Green has determined that the change to a uniform one-half time standard will simplify and improve administration of EAR requirements for retirees, employers, and TRS, and TRS's actuary of record, Gabriel, Roeder, Smith & Company, has stated that the change would not materially harm the fund. Lastly, Mr. Green has determined that the public will benefit from increased readability of the proposed new rules.

Mr. Green also has determined that the public will incur no new costs as a result of complying with the proposed new rules.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

TRS has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed new rules. Therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under Government Code §2006.002.

LOCAL EMPLOYMENT IMPACT STATEMENT

TRS has determined that there will be no effect on local employment because of the proposed new rules. Therefore, no local employment impact statement is required under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

TRS has determined that for the first five years the proposed new rules are in effect, the proposed new rules will not create or eliminate any TRS programs; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to TRS; will not eliminate any fees currently paid to TRS; will not expand, limit or repeal an existing regulation; will not increase or decrease the number of individuals subject to the rule's applicability; and will not affect the state's economy.

The proposed new rules will create 18 new rules but almost all these provisions either substantively reincorporate and reorganize provisions from existing Chapter 31 rules that are proposed for repeal elsewhere in this issue of the Texas Register or include language necessary to implement legislation.

TAKINGS IMPACT ASSESSMENT

TRS has determined that there are no private real property interests affected by the proposed new rules, therefore, a takings impact assessment is not required under Government Code §2007.043.

COSTS TO REGULATED PERSONS

TRS has determined that Government Code §2001.0045 does not apply to the proposed new rules because the proposed new rules do not impose a cost on regulated persons.

COMMENTS

Comments may be submitted in writing to Brian Guthrie, TRS Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the Texas Register.

SUBCHAPTER A. GENERAL PROVISIONS AND PROCEDURES

34 TAC §§31.1 - 31.6

STATUTORY AUTHORITY

The proposed new rules are proposed under the authority of Government Code §824.604, which provides that board of trustees may adopt rules to administer laws under Subchapter G of Chapter 824 of the Government Code; Government Code §825.4092, which relates to employer contributions for employed retirees; and Government Code §825.102, which authorizes the board of trustees to adopt rules for the transaction of the business of the board.

CROSS-REFERENCE TO STATUTE

The proposed new rules affect the following statutes: Government Code §824.601, which relates to loss of monthly benefits; Government Code §824.602, which relates to exceptions; Government Code §824.6021, relating to temporary exception to mitigate learning loss attributable to COVID-19 pandemic, as enacted by SB 288 to be effective on September 1, 2021; and Government Code §825.4092, relating to employer contributions for employed retirees.

§31.1. Definitions.

In this chapter, the following words and terms shall have the following meanings:

(1) Disability retiree--A TRS retiree receiving a disability annuity payment under Subchapter D of Chapter 824, Government Code.

(2) EAR--Employment after retirement.

(3) Employer--Any employer required to report the employment of active members or TRS retirees to TRS in accordance with Subtitle C of Title 8 of the Government Code.

(4) Employer surcharge--The return-to-work employer pension surcharge described under Section §31.3 of this title (relating to Return-to-Work Employer Pension Surcharge) and Government Code §825.4092.

(5) Employment--Any work arrangement between a Texas public educational institution and a TRS retiree that qualifies as employment under Government Code §824.601, including any work by a TRS retiree who is:

(A) employed by a third-party entity unless the retiree does not perform duties or provide services on behalf of or for the benefit of the institution; or

(B) performing duties or providing services for or on behalf of the institution in the first 12 full, consecutive calendar months after the retiree's effective date of retirement that an employee of the institution would otherwise perform or provide, and.
(i) waiving, deferring, or foregoing compensation for the services or duties;

(ii) performing the duties or providing the services as an independent contractor; or

(iii) serving as a volunteer without compensation and performing the same duties or providing the same services for the institution that the retiree performed or provided immediately before retiring and the retiree has an agreement to perform those duties or provide those services after the first 12 full, consecutive calendar months after the retiree's effective date of retirement.

(6) Report month--The calendar month to which a monthly certified statement under §31.2 of this title (relating to Monthly Certified Statement) applies, rather than the month in which it is submitted to TRS.

(7) Retiree--A service retiree or disability retiree.

(8) School year--For purposes of employment after retirement, a twelve-month period beginning on September 1 and ending on August 31 of the calendar year.

(9) Service retiree--A retiree receiving a service annuity payment under Subchapter C of Chapter 824, Government Code.

(10) Third-party entity--An entity retained by a Texas public educational institution to provide personnel to the institution who perform duties or provide services that employees of that institution would otherwise perform or provide.

(11) TRS--The Teacher Retirement System of Texas.


(a) In accordance with the requirements of Government Code § 824.6022, an employer shall submit to TRS a monthly certified statement of employment for all retirees employed by the employer during each month of a school year.

(b) Employers must submit the monthly certified statement and all required employer surcharges under §31.3 of this title (relating to Return-to-Work Employer Pension Surcharges) for each report month from September through July before the eleventh day of the month following the applicable report month. For the monthly certified statement for the report month of August, the employer shall submit the monthly certified statement and all required employer surcharges before the seventh day of September.

(c) If the due date for submission of a monthly certified statement and required employer surcharges under subsection (b) of this section falls on a weekend or federal holiday, an employer shall submit the monthly certified statement and required employer surcharges on the last business day prior to the due date.

(d) An employer that fails to timely submit a monthly certified statement and all required employer surcharges must also pay all applicable interest and late fees provided in subsections (f) and (g) of this section.

(e) A monthly certified statement is not considered submitted to TRS until it is completed. To be complete, the monthly certified statement must include all the following information regarding a retiree employed by the employer during the report month:

(1) the number of hours and days worked by the retiree;

(2) whether the retiree's employment qualifies as one or more of the following types:

   (A) substitute employment;

   (B) one-half time or less employment;

   (C) employment as a tutor under Section 33.913 of the Education Code;

   (D) employment in a federally-funded COVID-19 personnel position that meets the requirements of Section 824.6021 of the Government Code and §31.16 of this title (relating to Federally-funded COVID-19 Personnel);

   (E) full-time employment;

   (F) trial employment of a disability retiree for up to three months; or

   (G) any combination of these types.

(3) the amount of gross compensation paid to the retiree during the report month;

(4) the total amount due under §41.4 of this title (relating to Employer Health Benefit Surcharge); and

(5) any other information requested by TRS to administer this chapter.

(f) Employers that fail to timely submit a monthly certified statement, any required employer surcharges, or interest on unpaid amounts as required in this section shall pay to TRS the late fee established in this subsection for each business day that the monthly certified statement is past due. The late fees required to be paid are as follows:

(1) For employers with fewer than 100 employees, the late fee for the first business day the monthly certified statement is past due is $100. For each subsequent business day that the monthly certified statement is past due, the employer shall pay an additional $10.

(2) For employers with at least 100 employees but no more than 500 employees, the late fee for the first business day the monthly certified statement is past due is $250. For each subsequent business day that the monthly certified statement is past due, the employer shall pay an additional $25.

(3) For employers with more than 500 employees but no more than 1,000 employees, the late fee for the first business day the monthly certified statement is past due is $500. For each subsequent business day that the monthly certified statement is past due, the employer shall pay an additional $50.

(4) For employers with more than 1,000 employees, the late fee for the first business day the monthly certified statement is past due is $1,000. For each subsequent business day that the monthly certified statement is past due, the employer shall pay an additional $100.

(g) In determining the number of employees for purposes of assessing the late fee in subsection (f) of this section, TRS shall base the fee on the number of employees reflected on the employer's monthly certified statement for May of the preceding school year. New employers will pay late fees for the first school year as provided in subsection (f)(1) of this section.

§31.3. Return-to-Work Employer Pension Surcharges.

(a) For each report month a retiree is employed by an employer for more than 92 hours in a calendar month and that retiree is not exempt from surcharge under subsection (b) of this section, the employer shall pay to TRS a surcharge based on the compensation paid to the retiree during that report month. The criteria used to determine if a retiree is working more than 92 hours in a calendar month are the same as the criteria for determining one-half time employment under §31.13 of this title (relating to One-half Time Employment) even if the retiree's employment also qualifies for an exception under §31.14 of this title (relating to Full-time Employment after 12 Consecutive Month Breaks).
in Service), or §31.15 of this title (relating to Tutors under Education Code §33.913).

(b) Employers are not required to submit employer surcharges based on the employment of a retiree during a calendar month if:

(1) the retiree works 92 hours or less during the applicable report month;

(2) the retiree retired prior to September 1, 2005;

(3) the retiree is employed solely as a substitute and that employment meets all the requirements §31.12 of this title (relating to Substitute Service) even if the retiree's substitute employment also qualifies for another exception under Subchapter B of this chapter (relating to Employment After Retirement Exceptions);

(4) the retiree is employed in multiple positions during the calendar month and does not exceed the limits for such combined employment under §31.19 of this title (relating to Combining EAR Exceptions and Employer Surcharges); or

(5) the retiree's employment is in a position that qualifies as a federally-funded COVID-19 position under §31.16 of this title (relating to Federally-funded COVID-19 Personnel) and Government Code §824.0021.

(c) The amount of the employer surcharge that an employer must contribute to TRS for each retiree subject to surcharge under this section is equal to the sum of the compensation paid to the retiree during the report month multiplied by the member contribution rate in effect for the report month plus the compensation paid to the retiree during the report month multiplied by the state contribution rate in effect for that report month.

(d) If a retiree is employed concurrently in more than one position, the employer surcharge is owed if the combined employment exceeds the monthly limits described by §31.19 of this title. If the employment is with more than one employer, the employer surcharge is owed by each employer.

(e) Employers shall not directly or indirectly pass the cost of the employer surcharge under this section on to the retiree through payroll deduction, by imposition of a fee, or by any other means designed to recover the cost.

§31.4. Employment Resulting in Forfeiture of Retirement Annuity. 

(a) A service retiree with an effective date of retirement prior to January 1, 2021, may be employed in any capacity in Texas public education without forfeiture of benefits for the months of employment.

(b) A service retiree with an effective date of retirement after January 1, 2021, is subject to the forfeiture requirements of §31.5 of this title (relating to Notice and Forfeiture Requirements for Certain Service Retirees) for any month in which the retiree is employed by a Texas public educational institution unless the employment qualifies for an exception under Subchapter B of this chapter (relating to Employment After Retirement Exceptions).

(c) Disability retirees, regardless of their effective date of retirement, are not entitled to an annuity payment for any month in which the retiree is employed by a Texas public educational institution unless the employment qualifies for an exception under Subchapter B of this chapter.

(d) A retiree may be employed in private schools, public schools in other states, in private business, or in other entities that are not TRS-covered employers without forfeiting their annuities unless any of these entities also qualify as a third-party entities for the purposes of this chapter.

(e) This chapter applies only to persons retired under TRS. It does not apply to persons retired under other retirement or pension systems.

§31.5. Notice and Forfeiture Requirements for Certain Service Retirees.

(a) A service retiree with an effective date of retirement after January 1, 2021, shall only forfeit the service retiree's monthly annuity payment based on the service retiree's employment by a Texas public educational institution during a calendar month if the retiree has previously received the warnings required by subsections (b) and (c) of this section.

(b) If TRS determines that a service retiree's employment by a Texas public educational institution does not qualify for an exception under Subchapter B of this chapter (relating to Employment After Retirement Exceptions), TRS shall issue a written EAR warning to the service retiree notifying the retiree of this fact. The EAR warning under this subsection may address multiple months of the service retiree's employment.

(c) If TRS determines that a service retiree's employment by a Texas public educational institution does not qualify for an exception under Subchapter B of this chapter and that employment occurs in a month after the month TRS issued the service retiree the warning under subsection (b) of this section, then TRS shall issue a second EAR warning to the service retiree that:

(1) notifies the service retiree of this fact; and

(2) requires the service retiree to pay TRS an amount equal to the lesser of the total amount of either:

(A) the service retiree's gross monthly annuity payments for the months addressed by this warning; or

(B) the total gross amount of compensation earned by the service retiree during the months addressed by this warning as described by §31.6 of this title (relating to Second EAR Warning Payments).

(d) The EAR warning under subsection (c) of this section may address multiple months of the service retiree's employment.

(e) If TRS determines that a service retiree's employment by a Texas public educational institution does not qualify for an exception under Subchapter B of this chapter and that employment occurred in a month prior to or during the month TRS issued such a warning but was not included in the warning, then TRS shall:

(1) issue an EAR warning in accordance with subsection (b) of this section if the excluded month was the month TRS issued the EAR warning under that subsection or an earlier month; or

(2) issue an EAR warning and request for payment under subsection (c) of this section if the excluded month was the month TRS issued the EAR warning under that subsection or in an earlier month that was also after the month TRS issued the EAR warning under subsection (b) of this section.
(g) If a service retiree appeals a TRS determination regarding the service retiree's employment with a Texas public educational institution during a month or months that TRS included in an EAR warning under subsection (b) or (c) of this section, the EAR warning shall still be considered to have been issued by TRS unless the service retiree's appeal contests every month addressed by the applicable warning. If the service retiree contests the TRS determination for every month included in an EAR warning, that EAR warning shall not be considered to have been issued during the pendency of the service retiree's appeal.

(h) If a service retiree prevails on an appeal of every month included in an EAR warning under subsection (b) or (c) of this section, then TRS shall rescind the EAR warning. If the service retiree's appeal does not prevail on any month included in an EAR warning under subsection (b) or (c) of this section, then the EAR warning shall be reinstated and TRS shall adjust the amounts owed by the service retiree to TRS, if any, for months after the issuance of the reinstated EAR warning in which TRS determined the service retiree's employment by a Texas public educational institution did not qualify for an exception to the limits on EAR as provided by Subchapter B of this chapter.

(i) TRS shall consider an EAR warning under this section to have been issued on the date TRS sends the warning to the service retiree.


(a) A service retiree who receives a second EAR warning as provided in §31.5 of this title (relating to Notice and Repayment Requirements for Certain Service Retirees) shall pay to TRS an amount equal to the lesser of either:

1. the service retiree's gross monthly annuity payments for the months addressed by this warning; or

2. the total gross amount of compensation earned by the service retiree during the month addressed by this warning as described by this section.

(b) The amount in subsection (a)(2) of this section shall only include all compensation earned by the service retiree based on the service retiree's employment with a Texas public educational institution during a month subject to the second EAR warning regardless of when such an amount is paid to the service retiree. The amount shall not include:

1. compensation paid to the service retiree during the applicable months unless the service retiree also earned the compensation based on the service retiree's employment with a Texas public educational institution during a month subject to the second warning;

2. compensation earned by the service retiree in a position that qualifies for the exception under §31.16 of this title (relating to Federally-funded COVID-19 Personnel); and

3. compensation paid to the service retiree that would not qualify as creditable compensation if paid to an active member by an employer for the same services.

(c) A service retiree may elect to pay the greater of the two amounts described by subsection (a) of this section. If a retiree elects to pay the greater amount, the retiree must notify TRS of this election in writing.

(d) If an employer adjusts the compensation earned by a service retiree in a month subject to a second EAR warning payment under this section but does not adjust the hours or days worked by the retiree relating to that compensation, the amount due shall be adjusted for that payment, and TRS shall request or return any amounts necessary to correct the payment so long as the adjustment is received no later than 12 months after the end of the school year in which the compensation was earned.

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 July 30, 2021.
TRD-202102983
Don Green
Chief Financial Officer
Teacher Retirement System of Texas
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 542-6560

SUBCHAPTER B. EMPLOYMENT AFTER RETIREMENT EXCEPTIONS

34 TAC §§31.11 - 31.19

STATUTORY AUTHORITY

The proposed new rules are proposed under the authority of Government Code §824.002, which provides that board of trustees may adopt rules to administer laws under Subchapter G of Chapter 824 of the Government Code; Government Code §825.4092, which relates to employer contributions for employed retirees; and Government Code §825.102, which authorizes the board of trustees to adopt rules for the transaction of the business of the board.

CROSS-REFERENCE TO STATUTE

The proposed new rules affect the following statutes: Government Code §824.601, which relates to loss of monthly benefits; Government Code §824.602, which relates to exceptions; Government Code §824.6021, relating to temporary exception to mitigate learning loss attributable to COVID-19 pandemic, as enacted by SB 288 to be effective on September 1, 2021; and Government Code §825.4092, relating to employer contributions for employed retirees.

§31.11. Exceptions to Forfeiture of Retirement Annuity:

(a) Service retirees who retired after January 1, 2021, and all disability retirees are subject to the forfeiture requirements in §31.4 of this title (relating to Employment Resulting in Forfeiture of Retirement Annuity) for any month in which the retiree is employed by a public educational institution covered by TRS unless the employment qualifies for an exception under this subchapter.

(b) The exceptions to forfeiture of annuities provided in this chapter apply only to retirees who have effectively retired by ending all employment as described in Government Code §§824.002 and §29.15 of this title (relating to Termination of Employment) and who do not revoke retirement by becoming employed in any position by Texas public educational institutions in the month immediately following the retiree's effective date of retirement (or in the two months immediately following the person's effective date of retirement if the effective date of retirement is May 31 under §29.14 of this title (relating to Eligibility for Retirement at the End of May)).


(a) In this section, "substitute" means a retiree employed by a Texas public educational institution and paid no more than the daily rate of pay for substitutes as set by the employer to work:
(1) on a temporary basis in the place of a current employee(s);

(2) in a vacant position for no more than 20 days if the retiree was not the last person to hold the vacant position and the retiree has not previously been employed in that vacant position during the same school year; or

(3) on a temporary basis to monitor an in-person class while the classroom teacher temporarily instructs the class virtually.

(b) A retiree may be employed in a month solely as a substitute in a public educational institution without forfeiting the annuity payment for that month.

(c) A retiree who reports for duty as a daily substitute during any day and works any portion of that day shall be considered to have worked one day.

(d) A disability retiree may not be employed as a substitute under this section for more than 90 days in a school year. A disability retiree who works more than 90 days in a substitute position shall forfeit the disability retiree's annuity for the month during which the disability retiree exceeded 90 days and in each subsequent month during the same school year that the disability retiree is employed by a Texas public educational institution.

§31.13. One-half Time Employment.

(a) A retiree may be employed by a Texas public educational institution in any position, other than as a substitute, on as much as a one-half time basis without forfeiting annuity payments for the applicable months of employment. In this section, one-half time basis means no more than 92 hours in a calendar month. The total number of hours allowed for that month may be worked in any arrangement or schedule.

(b) Paid time-off, including sick leave, vacation leave, administrative leave, and compensatory time for overtime worked, is employment for purposes of this section and must be included in determining the total amount of time worked in a calendar month and reported to TRS as employment for the calendar month in which it is taken.

(c) For the purpose of this section, employment as an instructor for actual course or lab instruction with an institution of higher education (including community and junior colleges and online coursework) in classes taken by students for college credit or classes that are taken to prepare students for college level work shall be counted as a minimum of two clock hours for each clock hour of instruction or time in the classroom or lab in order to reflect instructional time as well as preparation, grading, and other time typically associated with one hour of instruction. If the employer has established a greater amount of preparation time for each hour in the classroom or lab, the employer's established standard will be used to determine the number of courses or labs a retiree may teach under the exception to loss of annuity provided by this section. The equivalent clock hours computed under this subsection must be equal to or less than the number of work hours authorized in subsection (a) of this section for the retiree to be considered as working on a one-half time basis.

(d) Employment as an instructor of continuing education, adult education, or classes offered to employers or businesses for employee training, that is not measured or expressed in terms of the number of courses; semester or course hours/credits; or instructional units or other units of time rather than clock hours and for which the students or participants do not receive college credit, must be counted based on the number of clock hours worked.

(e) A disability retiree may not be employed on as much as a one-half time basis under this section for more than 90 days in a school year. A disability retiree who works more than 90 days on as much as one-half time basis under this section shall forfeit the disability retiree's annuity for the month during which the disability retiree exceeded 90 days and in each subsequent month during the same school year that the disability retiree is employed by a Texas public educational.

(f) For the purposes of calculating the number of days worked by a disability retiree has worked during a school year under this section, working any part of a day counts as working the entire day.


(a) A service retiree may be employed in any capacity in Texas public education, including as much as full-time, if the service retiree has been separated from service with all Texas public educational institutions for at least 12 full, consecutive calendar months after the retiree's effective date of retirement. The 12-month separation period may be any 12 consecutive calendar months following the month of retirement.

(b) During the separation period described by subsection (a) of this section, the service retiree may not be employed in any position or capacity by a public educational institution covered by TRS, including in any position or capacity that would qualify for an exception provided for in this subchapter. Paid time off, including sick leave, vacation leave, administrative leave, and compensatory time for overtime worked, is considered employment for purposes of this subsection.

(c) A service retiree who is employed more than one-half time for a Texas public educational institution will be subject to the forfeiture requirements of §31.4 of this title (relating to Employment Resulting in Forfeiture of Retirement Annuity) if the retiree does not meet the separation requirements of this section and the employment does not otherwise qualify for an exception under this subchapter that permits the retiree to work full-time.

(d) The exception under this section does not apply to disability retirees.

§31.15. Tutors under Education Code §33.913.

(a) Except as provided by §31.18 of this title (relating to Combining EAR Exceptions) and subsection (b) of this section, a retiree may be employed by a Texas public educational institution in a tutoring position that meets the requirements of Section 33.913 of the Education Code for any number of hours or days during a month without being subject to the forfeiture requirements of §31.4 of this title (relating to Employment Resulting in Forfeiture of Retirement Annuity).

(b) A disability retiree may not be employed on as a tutor under this section for more than 90 days in a school year. A disability retiree who works more than 90 days on as a tutor under this section shall forfeit the disability retiree's annuity for the month during which the disability retiree exceeded 90 days and in each subsequent month during the same school year that the disability retiree is employed by a Texas public educational.

(c) For the purposes of calculating the number of days worked by a disability retiree has worked during a school year under this section, working any part of a day counts as working the entire day.


(a) A service retiree is not subject to the warning, payment, and forfeiture requirements of §31.4 of this title (relating to Employment Resulting in the Forfeiture of Retirement Annuity) if the service retiree is employed by a Texas public educational institution, other than an institution of higher education, in a position performing duties related to the mitigation of student learning loss attributable to the coronavirus disease (COVID-19) pandemic, if the position:
(1) is in addition to the normal staffing level at the Texas public educational institution;

(2) is funded wholly by federal funds provided under federal law enacted for the purpose of providing relief related to the coronavirus disease (COVID-19) pandemic, including the Coronavirus Aid, Relief, and Economic Security (CARES) Act (15 U.S.C. Section 9001 et seq.), Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (Div. M, Pub. L. No. 116-260), or American Rescue Plan Act of 2021 (Pub. L. No. 117-2); and

(3) ends on or before December 31, 2024.

(b) A position ends on or before December 31, 2024, if the position no longer exists after that date or if the position is no longer funded with the above-described federal funds after that date.

(c) This exception does not apply to disability retirees.

§31.17. Employment Up to Three Months on a One-time Trial Basis.

(a) A disability retiree may, without forfeiting payment of the retiree's monthly annuity, be employed on a one-time only trial basis on as much as full-time for a period of no more than three consecutive months if the work meets the requirements in subsection (b) of this section and the person complies with the requirements of subsection (c) of this section.

(b) The work must occur:

(1) in a period, designated by the employee, of no more than three consecutive months; and

(2) in a school year that begins after the retiree's effective date of retirement or no earlier than October 1 if the effective date of retirement is August 31.

(c) TRS must receive written notice of the retiree's election to take advantage of the exception described by this section. The notice must be made on a form prescribed by TRS and filed with TRS prior to the end of the three-month trial period.

(d) Working any portion of a month counts as working a full month for purposes of this section.

(e) The three-month exception permitted under this section is in addition to the 90 days of work allowed in §31.12 of this title (relating to Substitute Service) or §31.13 of this title (relating to One-half Time Employment) for a disability retiree.

(f) The trial work period may occur in one school year or may occur in more than one school year provided the total amount of time in the trial period does not exceed three months and the months are consecutive.

(g) A disability retiree may elect to work on a one-time only trial basis for as much as full-time for a period of no more than three consecutive months for each period of disability retirement subject to the requirements of this section.

§31.18. Combining EAR Exceptions.

(a) If, during a calendar month, a retiree works in a position subject to more than one exception under this subchapter or in multiple positions subject to different exceptions under this subchapter and the retiree does not qualify for the twelve-month separation exception under §31.14 of this title (relating to Full-time Employment after 12 Consecutive Month Break in Service), TRS shall use the following standards to determine whether the retiree's employment still meets the requirements of each applicable exception or if the retiree is subject to §31.14 of this title (Employment Resulting in Forfeiture of Retirement Annuity) based on that employment.

(b) If a retiree combines substitute service under §31.12 of this title (relating to Substitute Service) with one-half time employment under §31.13 of this title (relating to One-half Time Employment) in a calendar month and the retiree's employment in either position does not qualify for any other exceptions under this subchapter, then the retiree may not work more than 11 days combined during that month in the two or more positions.

(c) If, during a calendar month, a retiree works in more than one position and each qualifies as one-half time employment under §31.13 of this title and the retiree's employment in either position does not qualify for any other exceptions under this subchapter, then the retiree may not work more than 92 total hours in the combined positions.

(d) If a disability retiree combines substitute service under §31.12 of this title, one-half time employment under §31.13 of this title, or employment as a tutor under §31.15 of this title (relating to Tutors under Education Code §33.913) in a school year, each day worked under any of those three exceptions counts toward the maximum of 90 days that a disability retiree may work under any of the exceptions so that a disability retiree may never work more than a total of 90 days combined under the three exceptions.

(e) If, during a calendar month, a retiree works more than one-half time in a position that qualifies for the tutor exception under §31.15 of this title, then the retiree may not work in any other position for a Texas public educational institution without being subject to the forfeiture requirements of §31.14 of this title unless:

(1) the other position qualifies as substitute service and all the retiree's employment under the tutor exception under §31.15 of this title also qualifies as substitute service; or

(2) the other position qualifies for the tutor exception under §31.15 of this title or the COVID-19 position exception under §31.16 of this title (relating to Federally-funded COVID-19 Personnel).

(f) If, during a calendar month, a retiree works in a position that qualifies as substitute or as one-half time or less employment and that position also qualifies for the tutor exception under §31.15 of this title, then the retiree may combine work in that position with any other work that qualifies under the substitute exception under §31.12 of this title and one-half time employment under §31.13 of this title provided the retiree's combined work during the calendar month does not exceed the limits provided by subsection (b) and (c) of this section, as applicable.

(g) If, during a calendar month, a service retiree combines the federally-funded COVID-19 position exception under §31.16 of this title with employment under any other exception under this subchapter, then the service retiree's employment under the federally-funded COVID-19 position exception shall be accounted for separately from the service retiree's employment under any other exception under this subchapter. Hours or days worked under the federally-funded COVID-19 exception do not count toward or impact a retiree's employment under any other exception under this subchapter.

(h) A service retiree employed under the twelve-month separation exception under §31.14 of this title may be employed up to full-time by one or more Texas public educational institutions in one or more positions without limit under this section.

(i) If, during a calendar month, a retiree's position qualifies for more than one exception under this subchapter other than the federally-funded COVID-19 exception under §31.16 of this title, the retiree's position shall be subject to all monthly limits on that position under all applicable exceptions. If the limit under the applicable exceptions conflict or if one exception is more restrictive than the other, the least restrictive exception on a retiree's employment after retirement shall apply.
ply. If a service retiree’s employment qualifies for the federally-funded COVID-19 exception under §31.16 of this title, it shall only be subject to the requirements of that section.

(j) For the purposes of this section, a retiree who works part of a day is considered to have worked the entire day.


(a) If, during a calendar month, a retiree works in a position subject to more than one exception under this subchapter or in multiple positions subject to different exceptions under this subchapter, TRS shall use the following standards to determine whether the retiree's employment requires an employer to pay the return-to-work pension surcharge under §31.13 of this title (relating to Return-to-Work Employer Pension Surcharges).

(b) If a retiree combines substitute service under §31.12 of this title (relating to Substitutes Service) with one-half time employment under §31.13 of this title (relating to One-half Time Employment) in a calendar month, then the employer employing the retiree must remit the employer surcharge to TRS if the retiree works more than 11 total days in both positions combined.

(c) If, during a calendar month, a retiree combines substitute service under §31.12 of this title with work that qualifies for the tutor exception under §31.15 of this title (relating to Tutors under Education Code §33.913), then the employer must remit the employer surcharge to TRS based on that combined employment unless:

(1) all of the retiree's employment under the tutor exception also qualifies as substitute service; or

(2) the retiree’s non-substitute employment under the tutor exception does not exceed 92 hours in the calendar month when not combined with the retiree's substitute service and the retiree's total employment does not exceed 11 total days worked during both exceptions during the month.

(d) If, during a calendar month, a retiree combines one-half time employment under §31.13 of this title with non-substitute work under the tutor exception under §31.15 of this title, the employer must remit the employer surcharge to TRS if the retiree works more than 92 combined hours in all positions. If the retiree's employment under the tutor exception also qualifies as substitute service, then the employer must remit the employer surcharge if the retiree works more than 11 total days during the month in the combined tutor position and the non-tutor one-half time position.

(e) If, during a calendar month, a service retiree combines the federally-funded COVID-19 position exception under §31.16 of this title (relating to Federally-funded COVID-19 Personnel) solely with employment that qualifies as substitute service under §31.12 of this title, then an employer is not required to remit an employer surcharge to TRS for that retiree.

(f) If, during a calendar month, a service retiree combines the federally-funded COVID-19 position exception under §31.16 of this title with one-half time employment under §31.13 of this title, any hours worked by a retiree under the federally-funded COVID-19 exception will not count toward the 92 hours under the one-half time employment exception that a retiree may work before the employer must remit the employer surcharge.

(g) If, during a calendar month, a service retiree combines the federally-funded COVID-19 position exception under §31.16 of this title with work under the full-time employment after a twelve-month separation exception under §31.14 of this title (relating to Full-time Employment after 12 Consecutive Month Break in Service), any hours or days worked by a retiree under the federally-funded COVID-19 ex-

cept will not count toward the determination of whether the retiree worked more than 92 total hours during that month and the employer surcharge is due for that month.

(b) If, during a calendar month, a service retiree combines non-substitute work under either the tutor exception under §31.15 of this title with work under the federally-funded COVID-19 position exception under §31.16 of this title, any hours or days the retiree works under the federally-funded COVID-19 position exception shall not be counted in determining whether the retiree’s worked more than 92 hours during the month and the employer surcharge is due for that month.

(i) If, during a calendar month, a retiree’s employment in a position qualifies for the federally-funded COVID-19 position exception under §31.16 of this title and another exception under this subchapter that is subject to surcharge, work performed in that position is not subject to surcharge so long as the work continues to qualify for the federally-funded COVID-19 position exception.

(j) If, during a calendar month, a retiree’s employment in a position that qualifies for as substitute service under §31.12 of this title and another exception under this subchapter that is subject to surcharge, work performed in that position is not subject to surcharge so long as the work continues to qualify as substitute service and is not combined with work in another position that is subject to surcharge during the same month.

(k) For the purposes of this section, a retiree who works part of a day is considered to have worked the entire day.

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

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For further information, please call: (512) 542-6560

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SUBCHAPTER C. DISABILITY RETIREE COMPENSATION LIMITS

34 TAC §§31.31 - 31.33

STATUTORY AUTHORITY

The proposed new rules are proposed under the authority of Government Code §824.604, which provides that board of trustees may adopt rules to administer laws under Subchapter G of Chapter 824 of the Government Code; and Government Code §825.102, which authorizes the board of trustees to adopt rules for the transaction of the business of the board.

CROSS-REFERENCE TO STATUTE

The proposed new rules affect the following statutes: Government Code §824.310, relating to purpose of disability benefit; limit on supplemental income; Government Code §824.601, which relates to loss of monthly benefits; and Government Code §824.602, which relates to exceptions.


(a) A disability retiree who applies for disability retirement after August 31, 2007, and whose effective date of retirement is after
August 31, 2007, shall report to TRS compensation earned for work performed during disability retirement in accordance with this section.

(b) A disability retiree is not subject to the reporting requirement for compensation earned in a calendar year in which the disability retiree's annual gross disability retirement annuity payments from TRS total $2,000 or less.

(c) Unless excluded under subsection (a) or (b) of this section, a disability retiree is required to report to TRS compensation earned in a calendar year when the compensation exceeds the greater of the disability retiree's highest salary in any school year before disability retirement or $40,000.

(d) The reporting requirement applies to compensation earned in the first full calendar year that begins following the effective date of disability retirement and to compensation earned in each subsequent calendar year of disability retirement.

(e) Compensation that is required to be reported to TRS is payment, earnings, or net income for employment, work, labor, or services, whether performed for a Texas public education institution or another employer or entity. Compensation includes but is not limited to the following:

1. "Wages" as defined under §3121 of the Internal Revenue Code of 1986 that are subject to Federal Insurance Contributions Act ("FICA") Social Security or Medicare taxes;
2. Salary and wages, even if not subject to FICA taxes because of a technical exclusion of a type of employer or type of employment;
3. Self-employment earnings, including net income from a trade or business;
4. Compensation for work performed as an independent contractor;
5. Net income earned as a sole proprietor or partner in a business; and
6. Net income earned as an S corporation shareholder.

(f) A disability retiree shall submit a report required by this section to TRS after the end of the calendar year in which the compensation was earned but no later than May 1 of the calendar year following the year for which the report is due. A disability retiree shall submit all required information in the format designated by TRS.

(g) TRS may audit the compensation report of a disability retiree and require the disability retiree to provide supporting documentation, including copies of tax returns, W-2 forms, 1099 Forms, and employment payroll records as necessary to verify the accuracy of a compensation report.

(h) TRS may obtain information from other sources with regard to the compensation earned by a disability retiree in order to administer applicable requirements.

(i) A report is due under this section for a calendar year in which one or more annuities have been forfeited pursuant to §31.32 of this title (relating to Forfeiture of Disability Retirement Annuity Payments Due to Excess Compensation).

§31.32. Forfeiture of Disability Retirement Annuity Payments Due to Excess Compensation

(a) If a disability retiree earned compensation in excess of the applicable limit in §31.31(c) of this title (relating to Disability Retiree Report of Excess Compensation) in a calendar year for which a report is due, the disability retiree's annuities shall be forfeited in accordance with this section, beginning with the annuity payable for May of the calendar year following the year for which the report is due.

(b) A forfeiture of annuity payments under this section shall continue until the disability retiree submits a new report to TRS showing that the compensation has ceased or decreased sufficiently that it will no longer exceed the applicable limit. TRS will resume annuity payments following the receipt of the retiree's new report. Annuity payments shall be resumed no earlier than the payment for the calendar month following the month in which the compensation ceased or decreased. An annuity payment is not due for a month in which a disability retiree earns compensation that caused the annuity for the month to be forfeited prior to the retiree's new report, even if the total compensation for the calendar year is below the applicable limit in §31.31(c) of this title.

(c) A disability retiree who forfeits one or more annuities from TRS is also required to pay the total monthly cost of TRS-Care coverage as described in §41.5(f) of this title (relating to Payment of Contributions).

(d) Annuity payments are forfeited for a disability retiree who is required to file a report but fails to do so or for a disability retiree who fails to report all compensation required to be reported, beginning with annuity payments for the month following the month in which TRS discovers the failure.

(e) Nothing in this section shall be construed to prevent TRS from collecting the gross amount of ineligible annuity payments if TRS determines that a disability retiree knowingly failed to report compensation as required and the failure resulted in payment of annuities by TRS that the disability retiree was not eligible to receive.

(f) Forfeiture of annuity payments under this section shall not extend the guaranteed period of annuity payments, if the disability retiree elected a payment option described under Government Code §824.308(e)(3) or (4).


A disability retiree who earns compensation for employment by a public educational institution covered by TRS is subject to §31.31 of this title (relating to Disability Retiree Report of Excess Compensation), §31.32 of this title (relating to Forfeiture of Disability Retirement Annuity Payments Due to Excess Compensation), and §41.5 of this title (relating to Payment of Contributions), regardless of whether the employment results in the forfeiture of the annuity in the month in which the employment occurs, as provided for in §31.4 of this title (relating to Employer Resulting in the Forfeiture of Retirement Annuity).

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 July 30, 2021.
TRD-202102985
Don Green
Chief Financial Officer
Teacher Retirement System of Texas
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 542-6560

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CHAPTER 41. HEALTH CARE AND INSURANCE PROGRAMS
SUBCHAPTER A. RETIREE HEALTH CARE BENEFITS (TRS-CARE)

34 TAC §41.4

The Teacher Retirement System of Texas (TRS) proposes to amend §41.4, relating to Employer Health Benefit Surcharges, under Subchapter A (relating to Retiree Health Care Benefits (TRS-CARE)) of Chapter 41 in Part 3 of Title 34 of the Texas Administrative Code. These amendments are proposed in conjunction with the proposed new rules and proposed repealed rules under Chapter 31 (relating to Employment After Retirement) in Part 3 of Title 34 of the Texas Administrative Code. These proposed new rules and proposed repeals are published elsewhere in this issue of the Texas Register.

BACKGROUND AND PURPOSE

TRS proposes to amend §41.4 (relating to Employer Health Benefit Surcharges) to implement new legislation passed by the 87th Texas Legislature. Specifically, the amendments to §41.4 are necessary to implement Senate Bill 202 (SB 202) and Senate Bill 288 (SB 288).

SB 202 amended Government Code §825.4092 and prohibits employers from directly or indirectly passing on the cost of either the pension or health benefit surcharge to retirees through payroll deductions, fees, or any other means designed to recover the cost.

SB 288 created new Government Code §824.6021 and amended Government Code §825.4092. These changes created a new employment after retirement and surcharge exception for certain service retirees who are employed in positions dedicated to mitigating learning loss caused by the COVID-19 pandemic. Importantly, SB 288 amended Section 825.4092 to not only exempt the employment of retirees from pension surcharge under Section 825.4092, but also the health benefit surcharge under that same section.

In addition, TRS proposes to amend §41.4 to conform with TRS's proposed new §31.3 and §31.19 (relating to Return-to-Work Employer Pension Surcharge and Combining EAR Exceptions and Employer Surcharges, respectively) that are published elsewhere in this edition of the Texas Register. In these proposed new rules, TRS established a new standard for determining whether a retiree is employed one-half time or less for the purposes of when the pension surcharge is due and also establishes what combinations of employment after retirement exceptions under Government Code §§824.601, 824.602, and 824.6021 can trigger the pension surcharge requirement for employers of TRS retirees. Because TRS has historically ensured that the employment standards applicable to the pension surcharge also applied to the health benefit surcharge, TRS proposes to amend §41.4 to ensure it remains consistent with the corresponding rules under Chapter 31.

Lastly, TRS has made minor or nonsubstantive changes to §41.4 in order for the language to comply with current TRS practices or nomenclature.

TRS has determined that proposed amended §41.4, if adopted, shall become effective on the same date that the proposed new and proposed repealed Chapter 31 rules become effective. TRS has proposed that the proposed new Chapter 31 rules, published elsewhere in this issue of the Texas Register, shall become effective on November 1, 2021, or on the earliest first day of a calendar month after twenty days after TRS submits the adopted new rules to the Secretary of State.

FISCAL NOTE

Don Green, TRS Chief Financial Officer, has determined that for each year of the first five years the proposed amended §41.4 will be in effect, there will be no foreseeable fiscal implications for state or local governments as a result of administering the proposed repealed rules.

PUBLIC COST/BENEFIT

For each year of the first five years proposed amended §41.4 will be in effect, Mr. Green also has determined that the public benefit anticipated as a result of adopting proposed amended §41.4 will be that the rule will conform with recent statutory changes and TRS's proposed new rules under Chapter 31. In addition, Mr. Green has determined that the public will benefit from increased readability of proposed amended §41.4 if adopted.

Mr. Green has also determined that the public will incur no new costs as a result of proposed amended §41.4.

ECOLOGICAL IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

TRS has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of proposed amended §41.4. Therefore, neither an ecological impact statement nor a regulatory flexibility analysis is required under Government Code §2006.002.

LOCAL EMPLOYMENT IMPACT STATEMENT

TRS has determined that there will be no effect on local employment because of proposed amended §41.4. Therefore, no local employment impact statement is required under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

TRS has determined that for the first five years the proposed repealed rules are in effect, proposed amended §41.4 will not create or eliminate any TRS programs; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to TRS; will not eliminate any fees currently paid to TRS; will not create a new regulation; will not expand, repeal, or limit an existing regulation; will not increase or decrease the number of individuals subject to the rule's applicability; and will not affect the state's economy.

TAKINGS IMPACT ASSESSMENT

TRS has determined that there are no private real property interests affected by proposed amended §41.4; therefore, a takings impact assessment is not required under Government Code §2007.043.

COSTS TO REGULATED PERSONS

TRS has determined that Government Code §2001.0045 does not apply to proposed amended §41.4 because it does not impose a cost on regulated persons.

COMMENTS

Comments may be submitted in writing to Brian Guthrie, TRS Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the Texas Register.

STATUTORY AUTHORITY
Proposed amended §41.4 is proposed under the authority of Government Code §824.604, which provides that the board of trustees may adopt rules to administer laws under Subchapter G of Chapter 824 of the Government Code; Government Code §825.4092, which relates to employer contributions for employed retirees; and Government Code §825.102, which authorizes the board of trustees to adopt rules for the transaction of the business of the board.

CROSS-REFERENCE TO STATUTE

Proposed amended §41.4 affects the following statutes: Government Code §824.6021, relating to temporary exception to mitigate learning loss attributable to COVID-19 pandemic, as enacted by SB 288 to be effective on September 1, 2021; and Government Code §825.4092, relating to employer contributions for employed retirees.

§41.4. Employer Health Benefit Surcharge.
(a) When used in this section, the term "employer" has the meaning given in §821.001(7), Government Code.

(b) For each report month a retiree is enrolled in TRS-Care and working for an employer for more than 92 hours [the equivalent of four clock hours for each work day] in that calendar month, the employer that reports the employment of the retiree on the Employment of Retired Members Report to TRS shall pay monthly to the Retired School Employees Group Insurance Fund (the Fund) a surcharge established by the Board of Trustees of TRS.

(c) The criteria used to determine if the retiree is working more than 92 hours [the equivalent of four clock hours for each work day] in that calendar month are the same as the criteria for determining one-half time employment under §31.13[§31.14] of this title (relating to One-half Time Employment) even if the retiree's employment also qualifies for an exception under §31.14 of this title (relating to Full-time Employment after 12 Consecutive Month Break in Service) or §31.15 of this title (relating to Tutors under Education Code §33.913).

(d) The surcharge is also owed by the employer on any retiree who is enrolled in TRS-Care, is working for a third party entity but is working for more than 92 hours [the equivalent of four clock hours for each work day] in that calendar month and who is considered an employee of that employer under §824.601(d) of the Government Code.

(e) The surcharge under this section is not owed:

1) by an employer for any retiree who retired from TRS before September 1, 2005; or

2) by an employer for a retiree reported as working under the exception for substitute service [Substitute Service] as provided in §31.12[§31.13] of this title (relating to Substitute Service) unless that retiree combines substitute service [Substitute Service] under §31.12[§31.13] of this title with other non-substitute employment with the same or another employer or third party entity in the same calendar month;

3) by an employer for any retiree that is employed in multiple positions during a calendar month and does not exceed the limits for such combined employment under §31.19 of this title (relating to Combining EAR Exceptions and Employer Surcharges); or

4) by an employer for any service retiree that is employed in a position that qualifies as a federally-funded COVID-19 position under §31.16 of this title (relating to Federally-funded COVID-19 Personnel) and Government Code §824.6021.

1) A retiree who is enrolled in TRS-Care, is working for an employer or third party entity for more than the equivalent of four clock hours for each work day in that calendar month, and is reported on the Employment of Retired Members Report to TRS shall inform the employer of all employers of the retiree and all employers of any other retiree enrolled under the same account identification number. An employer who reports to TRS the employment of a retiree who is enrolled in TRS-Care and is working more than the equivalent of four clock hours for each work day in that calendar month shall inform TRS as soon as possible in writing of the name, address, and telephone number of any other employer that employs the retiree or any other retiree who is also enrolled under the same account identification number.

2) If more than one employer reports the employment of a retiree who is enrolled in TRS-Care to TRS during any part of a month, the surcharge under this section required to be paid into the Fund by each reporting employer for that month is the total amount of the surcharge due that month divided by the number of reporting employers. The pro rata share owed by each employer is not based on the number of hours respectively worked by the retiree for each employer, nor is it based on the number of days respectively worked during the month by the retiree for each employer.

3) If a retiree who is enrolled in TRS-Care is employed concurrently by one or more employers in more than one position, the surcharge is owed if the combined employment exceeds the limits for such combined employment under §31.19 of this title for more than the equivalent of four clock hours for each work day in that calendar month. If the employment is with more than one employer, the surcharge will be paid according to subsection (g) of this section by each employer.

(h) [ui] The employer shall maintain the confidentiality of any information provided to the employer under this section and shall use the information only as needed to carry out the purposes stated in this section and related applicable rules or statutes.

(i) Employers shall not directly or indirectly pass the cost of the surcharge under this section on to the retiree through payroll deduction, by imposition of a fee, or by any other means designed to recover the cost.

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 July 30, 2021.
TRD-202102976
Don Green
Chief Financial Officer
Teacher Retirement System of Texas
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 542-6560

34 TAC §41.16

The Board of Trustees of the Teacher Retirement System of Texas (TRS) proposes new §41.16, concerning One-Time Reenrollment Opportunity.

BACKGROUND AND PURPOSE

The purpose of the proposal is to implement House Bill (H.B.) 2022, 87th Legislature, Regular Session, 2021. H.B. 2022 amended Insurance Code, Chapter 1575 (TRS-Care) by amending Section 1575.161, concerning Enrollment Periods, to
add new Subsections (b) and (c). The new subsections mandate the Board of Trustees create rules to provide a one-time opportunity to reenroll in a health benefit plan offered under TRS-Care for an otherwise eligible retiree and provides that the new subsections expire September 1, 2024.

Proposed new §41.16, One-Time Reenrollment Opportunity, restates the eligibility requirements of new Section 1575.161(c); defines "eligible to enroll in Medicare"; addresses dependents; provides reenrollment will take effect on the first day of the month following the month in which TRS receives the written request; and provides that the new rule will expire September 1, 2024, unless extended by legislative action.

FISCAL NOTE

Don Green, TRS Chief Financial Officer, has determined that for each year of the first five years the proposed amended rule will be in effect, there will be no foreseeable fiscal implications for state or local governments as a result of administering the proposed new rule.

PUBLIC COST/BENEFIT

For each year of the first five years the proposed new rule will be in effect, Mr. Green also has determined that the public benefit anticipated as a result of adopting the new rule will be to remedy the adverse effects changes to the plans during the period of January 1, 2017 and December 31, 2019, may have had on member choice to leave the plan during that timeframe by giving the members a one-time opportunity to reenroll in the plan. Mr. Green has also determined that there is no economic cost to entities or persons required to comply with the proposed new rule.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

TRS has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed amendments. Therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under Government Code §2006.002.

LOCAL EMPLOYMENT IMPACT STATEMENT

TRS has determined that there will be no effect on local employment because of the proposed new rule. Therefore, no local employment impact statement is required under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

TRS has determined that for the first five years the proposed new rule is in effect, the proposed new rule will not create or eliminate any TRS programs; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to TRS; will not eliminate any fees currently paid to TRS; will not create a new regulation; will not expand, limit or repeal an existing regulation; will not increase or decrease the number of individuals subject to the rule's applicability; and will not affect the state's economy.

TAKINGS IMPACT ASSESSMENT

TRS has determined that there are no private real property interests affected by the proposed new rule; therefore, a takings impact assessment is not required under Government Code §2007.043.

COSTS TO REGULATED PERSONS

TRS has determined that Government Code §2001.0045 does not apply to the proposed new rule because it does not impose a cost on regulated persons.

COMMENTS

Comments may be submitted in writing to Brian Guthrie, TRS Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the Texas Register.

STATUTORY AUTHORITY

The new rule is proposed under the authority of Chapter 1575, Insurance Code, which establishes the Texas Public School Employees Group Benefits Program (TRS-CARE), §1575.052, which allows the trustee to adopt rules, plans, procedures, and orders reasonably necessary to implement Chapter 1575; Chapter 825, Texas Government Code, which governs the administration of TRS, and §825.102, which authorizes the board of trustees to adopt rules for the transaction of the business of the board.

CROSS-REFERENCE TO STATUTE

The proposed new rule affects §1575.161, Insurance Code, concerning Enrollment Periods.

§41.16. One-Time Reenrollment Opportunity.

(a) A retiree who was enrolled in TRS-Care and voluntarily terminated the retiree's enrollment between January 1, 2017, and December 31, 2019, will have a one-time opportunity to reenroll in TRS-Care if the retiree is otherwise eligible and meets the following requirements:

1. The retiree is eligible to enroll in Medicare at the time the retiree applies for reenrollment in TRS-Care; and

2. The retiree applies for reenrollment into TRS-Care no later than December 31, 2023.

(b) A retiree will be considered eligible to enroll in Medicare for purposes of subsection (a)(1) of this section if at the time the retiree applies for reenrollment into TRS-Care, the retiree is eligible to enroll in the Medicare Advantage plan offered under TRS-Care, according to Section 1575.1582(b) of the Insurance Code.

(c) If the retiree's application to reenroll under this section is approved, the retiree will be able to enroll in TRS-Care any eligible dependents.

(d) If the retiree who was enrolled in TRS-Care and voluntarily terminated the retiree's enrollment between January 1, 2017 and December 31, 2019 has since passed away, the retiree's surviving spouse or the retiree's surviving dependent child will be eligible to enroll under this section, as long as:

1. The surviving spouse or surviving dependent child qualifies as such under Section 1575.003 of the Insurance Code;

2. The surviving spouse or surviving dependent child is eligible to enroll in Medicare at the time the person applies for enrollment, according to subsection (b) of this section; and

3. The surviving spouse or surviving dependent child applies for enrollment into TRS-Care no later than December 31, 2023. If a surviving spouse's application for enrollment under this subsection is approved, the surviving spouse will be able to elect to enroll any eligible surviving dependent child as a dependent.
(e) The effective date of coverage in the TRS-Care plan under this section will be the first day of the month after TRS receives the written request from the eligible person to enroll.

(f) This section will expire on September 1, 2024, unless the one-time reenrollment opportunity is extended by legislative action, in which case this section will remain in place until such one-time reenrollment opportunity expires according to such legislative action.

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 July 30, 2021.
TRD-202102972
Don Green
Chief Financial Officer
Teacher Retirement System of Texas
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 542-6292

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SUBCHAPTER C. TEXAS SCHOOL EMPLOYEES GROUP HEALTH (TRS-ACTIVECARE)

34 TAC §§41.30, 41.34, 41.36, 41.37, 41.45

The Board of Trustees of the Teacher Retirement System of Texas (TRS) proposes amendments to §41.30, concerning Participation in the Health Benefit Program under the Texas School Employees Uniform Group Health Coverage Act by School Districts, Other Educational Districts, Charter Schools, and Regional Education Service Centers; §41.34, concerning Eligibility for Coverage under the Texas School Employees Uniform Group Health Coverage Program; §41.36, concerning Enrollment Periods for TRS-ActiveCare; 34 TAC §41.37, concerning Effective Date of Coverage; and §41.45, concerning Required Information from School Districts with More than 1,000 Employees.

BACKGROUND AND PURPOSE

The purpose of the proposed amendments is to implement Senate Bill (S.B.) 1444, 87th Legislature, Regular Session, 2021. S.B. 1444 amended Insurance Code, Chapter 1579 (TRS-ActiveCare) by adding §1579.1045 relating to alternative group health coverage prohibition and §1579.155 relating to program participation: election. New §1579.1045 of the Insurance Code clarifies that participating entities are prohibited from offering alternative group health coverage. New §1579.155 of the Insurance Code allows, effective on September 1, 2022, entities to elect to participate or discontinue participation in TRS-ActiveCare by providing written notice to TRS not later than December 31 of the year preceding the first day of the plan year in which the election will be effective; prohibits a participating entity that elects to discontinue participation in TRS-ActiveCare from electing to participate in the TRS-ActiveCare again until the fifth anniversary after the effective date of the entity's election to discontinue participation; and prohibits an entity that elects to participate in TRS-ActiveCare from discontinuing the entity's participation until the fifth anniversary of the effective date of the entity's election to participate.

Proposed amendments to §41.30 adds a subsection to address whom the section is applicable; clarifies that an entity's mandatory notice of election to join TRS-ActiveCare will not be considered complete without the submission of the information required under §41.45; establishes the timing and process for joining and leaving TRS-ActiveCare; codifies the prohibition on offering alternative group health coverage; and identifies remedies for failure to comply with the statutes and rules.

Proposed amendments to §41.34 provide that individuals receiving COBRA continuation coverage under an alternative group health plan being offered concurrently with TRS-ActiveCare will not receive continuing COBRA coverage under TRS-ActiveCare if the participating entity terminates the alternative plan or is terminated from TRS-ActiveCare for violating Section 1579.1045 of the Insurance Code.

Proposed amendments to §41.36 modify the initial employee enrollment period for employees of a new participating entity in order to be consistent with the new language in §41.30.

Proposed amendments to §41.37 modify the effective date for employee coverage in order to be consistent with the new language in §41.30.

Proposed amendments to §41.45 make the submission of required information applicable to all entities, not just to School Districts with More than 1,000 Employees; clarify that this information is required to be provided at the same time as the notice of election and that failure to provide it will result in an incomplete election; adds additional information requirements.

FISCAL NOTE

Don Green, TRS Chief Financial Officer, has determined that for each year of the first five years the proposed amended rule will be in effect, there will be no foreseeable fiscal implications for state or local governments as a result of administering the proposed amended rule.

PUBLIC COST/BENEFIT

For each year of the first five years the proposed amended rule will be in effect, Mr. Green also has determined that the public benefit anticipated as a result of the adopting the amended rule will be to implement SB 1444 which gives entities the flexibility to join and leave TRS-ActiveCare and provides more stability for TRS-ActiveCare by clarifying that participating entities cannot offer alternative healthcare coverage plans. Mr. Green has also determined that there is no economic cost to entities or persons required to comply with the proposed amended rule.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

TRS has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed amendments. Therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under Government Code §2006.002.

LOCAL EMPLOYMENT IMPACT STATEMENT

TRS has determined that there will be no effect on local employment because of the proposed amended rule. Therefore, no local employment impact statement is required under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

46 TexReg 4990 August 13, 2021 Texas Register
TRS has determined that for the first five years the proposed amended rule is in effect, the proposed amendments will not create or eliminate any TRS programs; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to TRS; will not eliminate any fees currently paid to TRS; will not create a new regulation; will not expand, limit or repeal an existing regulation; will not increase or decrease the number of individuals subject to the rule's applicability; and will not affect the state's economy.

TAKINGS IMPACT ASSESSMENT

TRS has determined that there are no private real property interests affected by the proposed amended rule, therefore, a takings impact assessment is not required under Government Code §2007.043.

COSTS TO REGULATED PERSONS

TRS has determined that Government Code §2001.0045 does not apply to the proposed amended rule because it does not impose a cost on regulated persons.

COMMENTS

Comments may be submitted in writing to Brian Guthrie, TRS Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the Texas Register.

STATUTORY AUTHORITY

The amendments are proposed under the authority of Insurance Code §1579.052, which allows the trustee to adopt rules relating to the program as considered necessary by the trustee and requires the trustee to take the actions it considers necessary to devise, implement, and administer the program; and Chapter 825, Texas Government Code, which governs the administration of TRS, §825.102, which authorizes the board of trustees to adopt rules for the transaction of the business of the board.

CROSS-REFERENCE TO STATUTE

The proposed amendments affect Chapter 1579, Insurance Code, which establishes the Texas School Employees Uniform Group Health Coverage (TRS-ActiveCare), §1579.1045 relating to alternative group health coverage prohibition; and §1579.155 relating to program participation: election.

§41.30. Participation in the Health Benefits Program under the Texas School Employees Uniform Group Health Coverage Act by School Districts, Other Educational Districts, Charter Schools, and Regional Education Service Centers.

(a) Applicability. This section is applicable to the election to participate in TRS-ActiveCare by eligible entities such as school districts, other educational districts, charter schools, and regional education service centers, as these terms are defined in Chapter 1579, Insurance Code.

(b) [a] Manner, form and effect of election.

(1) Form of the notice of election. All elections to participate or discontinue participation in the health benefits program, referred to as "TRS-ActiveCare," under the Texas School Employees Uniform Group Health Coverage Act (the "Act"), Chapter 1579, Insurance Code, shall be in writing, in a form prescribed by the Teacher Retirement System of Texas (TRS), as trustee of TRS-ActiveCare.

(2) Incomplete notice of election. An incomplete or unsigned notice of election will not be deemed received by TRS for purposes of determining whether a valid election has been exercised.

Written notice of election to participate in TRS-ActiveCare under this section submitted without the information required under §41.45 of this title (relating to Required Information from School Districts, Other Educational Districts, Charter Schools, and Regional Education Service Centers Electing to Participate in TRS-ActiveCare) will be considered incomplete and will be denied by TRS. In order to reduce the possibility of submitting an incorrect form, entities should reach out to TRS before the election deadline referenced in this section to ask questions and address issues.

(3) [b] Timing of the receipt of the notice of election. A notice of election to participate or discontinue participation that is otherwise valid must be received by TRS no later than December 31 of the year preceding the first day of the plan year in which the election will be effective [on or prior to the tenth (10th) business day before the first day of the enrollment period established under §41.36 of this title for the entity seeking to join TRS-ActiveCare].

[43] Time of the receipt of a notice of revocation. In order to revoke a valid election to participate in TRS-ActiveCare, a written notice of revocation, signed by the entity that filed the valid election, must be received by TRS no later than the tenth (10th) business day before the first day of the enrollment period established under §41.36 of this title for the entity. There is no particular form required for a written notice of revocation. However, an unsigned notice of revocation will not be deemed received by TRS for purposes of determining whether a valid revocation has been exercised.

(4) Mandatory Participation and Exclusion Timeframes. Each time an entity submits a notice of election to participate in TRS-ActiveCare in accordance with subsection (b)(1) - (3) of this section, the entity is committing to participate for a minimum of five plan years, after which the entity may choose to submit a notice to discontinue participation. In the same manner, each time an entity submits a notice to discontinue participation in TRS-ActiveCare in accordance with subsection (b)(1) - (3) of this section, the entity is committing to leave the program for a minimum of five plan years, after which the entity may choose to submit a notice of election to participate. Mandatory participation and mandatory exclusion periods will be strictly enforced.

[Discontinuance of participation: Entities that participate in TRS-ActiveCare may not discontinue participation unless authorized by Chapter 45, Insurance Code, and by appropriate rule or resolution adopted by the TRS Board of Trustees.]

[(b) School districts with 500 or fewer employees. Pursuant to §41.004 or §41.151(a), Insurance Code, school districts with 500 or fewer employees as of January 1, 2001, were required to participate effective September 1, 2002, in TRS-ActiveCare, except that certain of these school districts were authorized to opt out of participation by specified election deadline dates. With regard to a school district that opted out of participation in TRS-ActiveCare pursuant to either §41.004 or §41.151(a), Insurance Code, as those provisions existed at the time the school district opted out, subsection (b) of this section provides the method for such a school district to change its election.]

[(c) School districts with 501 or more employees but not more than 1000 employees. School districts with 501 or more employees but not more than 1000 employees at any time during the 2001 school year, as reflected in any report received by TRS for a reporting period during that school year may elect to participate in TRS-ActiveCare in the manner prescribed in subsection (b) of this section.]

[(d) School districts with 1001 or more employees. A school district with 1001 or more employees. A school district with 1001 or more employees at any time during the 2001 school year, as reflected in any report received by TRS for a reporting period during that school year may elect to participate in TRS-ActiveCare.]

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Care by filing a notice of election in compliance with subsection (a) of this section, in which event the school district will become a participating entity on the later of the first day of the month following six (6) months from the date on which TRS receives the notice of election or a preferred date specified by the school district in its notice of election. Alternatively, the district will become a participating entity effective on the date approved by the executive director, if applicable, as described in subsection (i) of this section.

(e) Educational districts. Pursuant to §1579.151(c), Insurance Code, educational districts whose employees are members of TRS are required to participate effective September 1, 2002 in TRS-ActiveCare, except that educational districts with 500 or fewer employees on January 1, 2001 were allowed to opt out of participation. September 1, 2001 was the deadline for such an educational district to file its notice of election with TRS to opt out of participation in TRS-ActiveCare. Subsection (b) of this section provides the method for an educational district to change its election.

(c) [Reserved]

(d) [Reserved]

(e) Charter schools. [Pursuant to §1579.154, Insurance Code, an open-enrollment charter school established under Chapter 42, Subchapter D, Education Code, ("charter school") may elect to participate in TRS-ActiveCare by complying with both paragraphs (e) and (f) of this subsection. Only an eligible charter school under the Act may elect to participate.]

(f) Pursuant to §1579.154(a), Insurance Code, to be eligible, a charter school must agree to inspection of all records of the school relating to its participation in TRS-ActiveCare by TRS, by the administering firm as defined in §1579.002(1), Insurance Code, by the commissioner of education, or by a designee of any of those entities, and further must agree to have its accounts relating to participation in TRS-ActiveCare annually audited by a certified public accountant at the school's expense. The agreement of the charter school shall be evidenced in writing and shall constitute a part of a notice of election in a form prescribed by TRS pursuant to subsection (b) (e)(e) of this section.

(g) Eligible charter schools may elect to participate in TRS-ActiveCare by filing a notice of election in compliance with subsection (a) of this section, in which event:

[(A) the charter school will become a participating entity on the later of the first day of the month following six (6) months from the date on which TRS receives the notice of election or a preferred date specified by the charter school in its notice of election; or

[(B) alternatively, the eligible charter school will become a participating entity effective on the date approved by the executive director, if applicable, as described in subsection (i) of this section.

(g) Regional education service centers. Pursuant to §1579.151(a), Insurance Code, each regional education service center established under Chapter 8, Education Code, is required to participate effective September 1, 2002 in TRS-ActiveCare.

(h) School districts that opted out of participation in TRS-ActiveCare as described in subsection (b) or (e) of this section and educational districts that opted out of participation in TRS-ActiveCare as described in subsection (e) of this section may elect to participate in TRS-ActiveCare by filing a notice of election in compliance with subsection (a) of this section, in which event the school district will become a participating entity on the later of the first day of the month following six (6) months from the date on which TRS receives the notice of election or a preferred date specified by the school district in its notice of election. Alternatively, the district will become a participating entity effective on the date approved by the executive director, if applicable, as described in subsection (i) of this section.

(d) [Reserved]

(e) Effective Date of Participation or Discontinuation of Participation. An entity [that] will become a participating entity or discontinue to be a participating entity in TRS-ActiveCare on the first day of the plan year [month] following [six (6) months] after the December 31st date on which TRS receives the entity's notice of election [but desires] to become a participating entity or discontinue being a participating entity referenced in subsection (b) of this section. On an earlier date may include in its notice of election a request that the executive director consider an exception to the notice requirement. The notice of election must include the earlier date on which the entity desires its coverage to begin. The executive director will grant the exception if, in his or her sole discretion, upon considering the following criteria, he or she finds that an exception is in the best interest of TRS-ActiveCare:

[(1) the impact on the requesting entity's employees and dependents;

[(2) the impact on the health plan administrator of TRS-ActiveCare;

[(3) the impact on the provider network of TRS-ActiveCare;

[(4) the number of potential enrollees that would be coming into TRS-ActiveCare for the first time on the same date; and

[(5) the impact on TRS-ActiveCare as a whole, taking into account any recommendations and observations of TRS's health care consultant;]

(e) Alternative group health coverage prohibition. In accordance with Section 1579.1045, Insurance Code, a participating entity is prohibited from offering or making available group health coverage other than that provided under the TRS-ActiveCare program to the entity's employees or their employees' dependents.

(f) Remedies for failure to comply. If, contrary to subsection (e) of this section and Section 1579.1045 of the Insurance Code, a participating entity offers alternative group health coverage, TRS may pursue remedies for noncompliance, including but not limited to removal from or denial of entry into TRS-ActiveCare. TRS may impose or pursue one or more remedies. The pursuit of one remedy does not constitute a waiver of any other remedy that TRS may have at law or equity. If TRS discovers that a participating entity is in violation of subsection (e) after the beginning of a plan year, in addition to any other available remedy, TRS will remove the entity from the program effective at the end of the month in which TRS discovers the situation; and it will be the entity's liability to procure alternative coverage or provide other remedies for the employees and their dependents that lose coverage under these circumstances.

§41.34. Eligibility for Coverage under the Texas School Employees Uniform Group Health Coverage Program.

The following persons are eligible to be enrolled in TRS-ActiveCare under terms, conditions and limitations established by the trustees unless expelled from the program under provisions of Chapter 1579, Insurance Code:

(1) A full-time employee as defined in §41.33 of this title (relating to Definitions Applicable to the Texas School Employees Uniform Group Health Coverage Program).

(2) A part-time employee as defined in §41.33 of this title.

(3) Dependents, as defined in §41.33 of this title pursuant to §1579.004, Insurance Code. A child defined in §1579.004(3), Insurance Code, who is 26 years of age or older, is eligible for coverage only if, and only for so long as, such child's mental disability or physical incapacity is a medically determinable condition that prevents the child from engaging in self-sustaining employment as determined by TRS.
(4) Individuals employed or formerly employed by a participating entity, and their dependents, who are eligible for, or participating in, continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99-272), through a group health benefit plan sponsored by the individual's employer on the first day that employer first becomes a participating entity if such individuals or their dependents would have met the requirements for eligibility in paragraphs (1), (2), or (3) of this section on the individual’s last day of employment with the participating entity. Notwithstanding the foregoing, the individual is eligible to participate in TRS-ActiveCare only for the rest of the duration of the individual’s eligibility for COBRA continuation coverage. This subsection will not apply to individuals that receive COBRA continuation coverage offered through an alternative group health plan coverage offered by a participating entity at the same time that the entity is offering coverage through TRS-ActiveCare, and the participating entity terminates the alternative group health plan coverage, or the participating entity is terminated from the program by TRS for violating Section 1579.1045, Insurance Code, and §41.30(e) of this title (relating to Participation in the Health Benefits Program under the Texas School Employees Uniform Group Health Coverage Act by School Districts, Other Educational Districts, Charter Schools, and Regional Education Service Centers).

(5) An individual who qualifies for coverage pursuant to §41.38(b) of this title (relating to Termination Date of Coverage), and their dependents.

(6) Full-time or part-time employees as defined in §41.33 of this title and their eligible dependents may participate in an approved HMO if they reside, live, or work in the approved service area of the HMO and are otherwise eligible to participate in the HMO under the terms of the TRS contract with the HMO.

(7) Individuals who become eligible as determined by TRS for continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. No. 99-272), through their participation in TRS-ActiveCare.


(9) Any other individuals who are required to be covered under applicable law.

§41.36. Enrollment Periods for TRS-ActiveCare.

(a) An individual who becomes an eligible full-time or eligible part-time employee has an initial enrollment period, for both himself or herself as well as for his or her eligible dependents, beginning on the first day that the individual becomes an eligible employee and ending at 11:59:59 p.m. Austin Time on the 31st day thereafter.

(b) If a current employee of a participating entity was an eligible part-time employee during an enrollment opportunity for the current plan year, and, later during the current plan year, this employee becomes an eligible full-time employee, then this employee has an enrollment period, for both himself or herself as well as for his or her eligible dependents, beginning on the first day that this individual becomes an eligible full-time employee and ending at 11:59:59 p.m. Austin Time on the 31st day thereafter. This enrollment opportunity exists even if this employee previously declined enrollment in TRS-ActiveCare during the current plan year.

(c) An eligible full-time or part-time employee whose employer becomes a participating entity has an initial enrollment period, for both himself or herself as well as for his or her eligible dependents, beginning at least [no later than] 31 days prior to the date that the annual enrollment period ends for the first plan year in [on] which the employer becomes a participating entity. [and ending on the last calendar day of the month immediately preceding the date on which the employer becomes a participating entity (‘end date’). Notwithstanding the preceding sentence, a large school district, as defined hereafter, that becomes a participating entity after September 1, 2003, may recommend an initial enrollment period of not less than 31 days that closes before the end date. A recommended initial enrollment period that closes before the end date is subject to approval by TRS. As used in this section, a large school district shall mean a school district that had 1001 or more employees at any time during the 2001 school year, as reflected on any report received by TRS from that school district for a reporting period in that school year.]

(d) A full-time or part-time employee's eligible dependents, if covered, must be enrolled in the same coverage plan as the full-time or part-time employee under whom they qualify as a dependent. Except as otherwise provided under applicable state or federal law, an eligible full-time or part-time employee may not change coverage plans or add dependents during a plan year.

(e) The enrollment period for an individual who becomes eligible for coverage due to a special enrollment event, as described in §41.34(8) of this chapter (relating to Eligibility for Coverage under the Texas School Employees Uniform Group Health Coverage Program), shall be the 31 calendar days immediately after the date of the special enrollment event. To make an effective election, a completed enrollment form must be received by a participating entity or the health plan administrator of TRS-ActiveCare within this 31-day period.

(f) Eligible full-time and part-time employees and their eligible dependents who are enrolled in an HMO with a TRS contract that is not renewed for the next plan year may make one of the elections provided under this subsection. To make an effective election, a completed enrollment form must be received by a participating entity or the health plan administrator of TRS-ActiveCare during the plan enrollment period. Coverage under the elected option becomes effective on September 1 of the next plan year. One of the following elections may be made under this subsection:

1. change to another approved HMO for which the full-time or part-time employee is eligible; or

2. enroll in the TRS-ActiveCare preferred provider organization coverage plan, without preexisting condition exclusions.

(g) Eligible full-time or part-time employees and their eligible dependents who are enrolled in an HMO with a TRS contract that is terminated during the plan year may make one of the elections provided under this subsection. To make an effective election, a completed enrollment form must be received by a participating entity or the health plan administrator of TRS-ActiveCare within 31 calendar days after notice of the contract termination is sent to the eligible full-time or part-time employee by TRS or its designee. Coverage under the elected option becomes effective on a date determined by TRS. One of the following elections may be made under this subsection:

1. change to another approved HMO for which the full-time or part-time employees and their eligible dependents are eligible; or

2. enroll in the TRS-ActiveCare preferred provider organization coverage plan, without preexisting condition exclusions.

(h) Eligible full-time or part-time employees and their eligible dependents enrolled in an approved HMO whose eligibility status changes because the eligible full-time or part-time employee no longer resides, lives, or works in the HMO service area may make one of the
elected to enroll in the TRS-ActiveCare preferred provider organization coverage plan, subject to applicable preexisting condition limitations.

(i) On behalf of the trustee, the executive director or a designee may prescribe open-enrollment periods and the conditions under which an eligible full-time or part-time employee and his eligible dependents may enroll during an open-enrollment period.

§41.37. Effective Date of Coverage.

(a) Except as otherwise provided by §41.39 of this title (relating to Coverage for Individuals Changing Employers) coverage shall become effective as described in this subsection for eligible full-time employees and eligible part-time employees whose employer first becomes a participating entity [after September 1, 2002] and who enroll during the annual enrollment period. [no later than the last calendar day of the month] immediately preceding the date their employer first becomes a participating entity [or no later than the last day of an approved initial enrollment period for a large school district as provided by §41.36 of this title (relating to Enrollment Periods for TRS-ActiveCare)]. Coverage shall become effective for such individuals and their eligible dependents on the first day of the plan year [date] the employer first became a participating entity.

(b) Except as otherwise provided by §41.39 of this title (relating to Coverage for Individuals Changing Employers) coverage shall become effective as described in this subsection for eligible full-time employees and eligible part-time employees who begin working for a participating entity in an eligible capacity [after August 31, 2002] and who enroll no later than the 31st day after the first date they become eligible to enroll, ("Individuals"). Coverage shall become effective for such Individuals and their eligible dependents on one of the following dates as specified by the Individual on the application for coverage:

(1) The first day the Individual is employed in an eligible capacity with the participating entity; or

(2) The first day of the calendar month following the month in which the Individual is employed in an eligible capacity with the participating entity.

(c) For eligible full-time employees, eligible part-time employees and their eligible dependents who enroll during an open-enrollment period as prescribed by the trustee, coverage shall become effective on the date specified by resolution of the trustee.

§41.45. Required Information from School Districts, Other Educational Districts, Charter Schools, and Regional Education Service Centers Electing to Participate in TRS-ActiveCare [with More Than 1,000 Employees].

(a) An eligible entity that submits a written election to participate in TRS-ActiveCare under §41.30 must include with the notice of election [No later than 30 calendar days after a large school district, as defined in subsection (b) of this section, submits its notice of election to become a participating entity in TRS-ActiveCare, the large school district must submit to TRS] the information listed below in the following paragraphs for each medical and prescription drug plan that the entity

[large school district] offered to its employees during the designated time period. The entity [large school districts] must include this information for the year to date for the plan year in which the entity [large school district] submits its notice of election (current year) and for the complete plan years immediately preceding the current year. The required information is:

(1) Plan type (PPO, POS, HMO, etc.), including the effective date of each plan;

(2) Average number of employees participating in each plan;

(3) Average number of covered lives in each plan;

(4) Description of all medical and prescription drug benefits, including effective dates of any changes in each plan;

(5) Total premium rates by family tier for each insured plan, including effective dates of any changes;

(6) Total COBRA rates by family tier for each self-funded plan, including effective dates of any changes;

(7) Required employee contribution rates by family tier for each plan, including effective dates of any changes;

(8) Funding arrangement (fully insured, self-funded, etc.) for each plan;

(9) Total premiums paid by year for each plan, if insured;

[and]

(10) Total claims paid by year for each plan;

(11) Total claims paid by year for each plan;

(12) A high cost claimant report; and

(13) Any other summary health information that TRS may require.

(b) Written notices of election to participate in TRS-ActiveCare under §41.30 without the information required under this section will be considered incomplete and will be denied by TRS. Entities should reach out to TRS before the election deadline in §41.30 to ask questions and address issues related to the information that is required under this section. [For purposes of this section, a large school district means a school district that had 1001 or more employees at any time during the 2001 school year, as reflected on any report received by TRS from that school district for a reporting period in that school year.]

(ce) If a large school district cannot obtain the information required under subsection (a) of this section, the large school district must obtain a letter from the insurer or third-party administrator stating that the insurer or third-party administrator cannot legally provide that information to the large school district. The large school district must submit that letter to TRS in lieu of the requested information in subsection (a) of this section.

[cf] TRS will not deny an entity's [a large school district's] request to participate in TRS-ActiveCare based on any information provided to TRS in accordance with the requirements of this section.

[cd] TRS may delay a large school district's effective date of participation in TRS-ActiveCare if the school district does not provide the information required by this section within the time frames prescribed in subsection (a) of this section.

[de] TRS may prescribe the form in which entities [large school districts] must submit the information required by this section.
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 August 2, 2021.
TRD-202103001
Don Green
Chief Financial Officer
Teacher Retirement System of Texas
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 542-6292

34 TAC §41.35
The Board of Trustees of the Teacher Retirement System of Texas (TRS) proposes amendments to §41.35, concerning Coverage Plans.

BACKGROUND AND PURPOSE
The purpose of the proposed amendments is to clarify TRS rate setting procedures. Proposed amendments to §41.35 provide that TRS may determine different rates and premiums applicable to entities or potential entities based on specific risks, regional factors, and other underwriting considerations.

FISCAL NOTE
Don Green, TRS Chief Financial Officer, has determined that for each year of the first five years the proposed amended rule will be in effect, there will be no foreseeable fiscal implications for state or local governments as a result of administering the proposed amended rule.

PUBLIC COST/BENEFIT
For each year of the first five years the proposed amended rule will be in effect, Mr. Green also has determined that the public benefit anticipated as a result of the adopting the amended rule will be to remedy minor issues identified in the most recent election and to ensure the rule is consistent with current TRS election practices. Mr. Green has also determined that there is no economic cost to entities or persons required to comply with the proposed amended rule.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS
TRS has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed amendments. Therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under Government Code §2006.002.

LOCAL EMPLOYMENT IMPACT STATEMENT
TRS has determined that there will be no effect on local employment because of the proposed amended rule. Therefore, no local employment impact statement is required under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT
TRS has determined that for the first five years the proposed amended rule is in effect, the proposed amendments will not create or eliminate any TRS programs; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to TRS; will not eliminate any fees currently paid to TRS; will not create a new regulation; will not expand, limit or repeal an existing regulation; will not increase or decrease the number of individuals subject to the rule’s applicability; and will not affect the state’s economy.

TAKINGS IMPACT ASSESSMENT
TRS has determined that there are no private real property interests affected by the proposed amended rule, therefore, a takings impact assessment is not required under Government Code §2007.043.

COSTS TO REGULATED PERSONS
TRS has determined that Government Code §2001.0045 does not apply to the proposed amended rule because it does not impose a cost on regulated persons.

COMMENTS
Comments may be submitted in writing to Brian Guthrie, TRS Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the Texas Register.

STATUTORY AUTHORITY
The amendments are proposed under the authority of Insurance Code §1579.052, which allows the trustee to adopt rules relating to the program as considered necessary by the trustee and requires the trustee to take the actions it considers necessary to devise, implement, and administer the program; and Chapter 825, Texas Government Code, which governs the administration of TRS, §§825.102, which authorizes the board of trustees to adopt rules for the transaction of the business of the board.

CROSS-REFERENCE TO STATUTE
The proposed amendments affect Chapter 1579, Insurance Code, which establishes the Texas School Employees Uniform Group Health Coverage (TRS-ActiveCare), §1579.101 which requires the trustee to establish plans of group coverage for employees participating in the program and their dependents; provide tiers of coverage; define the requirements of each coverage plan and tier of coverage; and provide comparable coverage plans of each tier of coverage.

§41.35. Coverage Plans.

(a) TRS-ActiveCare shall include at least two coverage plans, including a catastrophic care coverage plan and a primary care coverage plan, in accordance with Chapter 1579, Insurance Code. The coverages provided for eligible persons under the plans offered will include, but are not limited to, basic medical expense coverage and prescription drug coverage, in accordance with terms, conditions, and limitations adopted by resolution of the trustee.

(b) TRS-ActiveCare may also include additional plans for health-care coverage under terms, conditions and limitations adopted by resolution of the trustee.

(c) The coverage plans offered under TRS-ActiveCare will each include at least two of the following tiered:

(1) Employee only;
(2) Employee and spouse;
(3) Employee and children;
(4) Employee and family.

(d) TRS may not offer optional coverages, other than optional permanent life insurance, optional long-term care insurance, and optional disability insurance to employees participating in TRS-Active-
Care in accordance with terms, conditions and limitations adopted by resolution of the trustee.

(e) TRS may determine different rates and premiums applicable to different participating entities or potential participating entities under the TRS-ActiveCare program based on certain risks, regional factors, and other underwriting considerations.

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 July 30, 2021.

TRD-202102973
Don Green
Chief Financial Officer
Teacher Retirement System of Texas

Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 542-6292

CHAPTER 43. CONTESTED CASES
34 TAC §43.1, §43.45
The Teacher Retirement System of Texas (TRS) proposes amendments to 34 TAC §43.1, relating to administrative review of individual requests and 34 TAC §43.45, relating to proposals for decision, exceptions, and appeals to the Board of Trustees.

BACKGROUND AND PURPOSE
Chapter 43 addresses procedures for appeals of administrative decisions and contested cases relating to the TRS pension plan. TRS proposes amendments to §43.1 and §43.45 to implement amendments to Government Code §825.521, by House Bill 1585, enacted by the 87th Texas Legislature, which requires TRS to modify the deadline for members or retirees to appeal a decision or determination by TRS staff to afford the member or retiree at least the same amount of time to file an appeal as TRS had to issue a decision in the appeal.

The amendments to Government Code §825.521 require TRS to make amendments to §43.1 and §43.45 to mirror the amendment to 34 Texas Administrative Code §43.5 necessitated by House Bill 2629 in 2019. House Bill 2629 created Section 825.521 and required the TRS Board of Trustees to adopt rules ensuring that the deadline for filing an appeal of a final administrative decision afford a member or retiree at least the same amount of time as TRS took to issue the final administrative decision. As required by the amendments to Government Code §825.521 made by House Bill 1585, the amendments to §43.1 and §43.45 expand the deadline structure from §43.5 to also apply to appeals of the decision of a department director and appeals of a decision in a contested case hearing rendered by the executive director following the issuance of a proposal for decision by an administrative law judge.

In the amended §43.1(c), a member or retiree must file their appeal of a department manager's decision by the later of either 45 days after the decision of a department manager is mailed or the number of days after the date the decision of the department manager is mailed equal to the number of days it took TRS to issue the decision of the department manager. Amended §43.1(d) provides that the number of days it took TRS to issue the decision of the department manager is calculated from the date TRS received a person's appeal to the date the decision of the department manager is mailed.

In amended §43.45(d), the member or retiree must file their appeal of the executive director's decision by the later of either 20 days after the date the decision of the executive director is served or the number of days after the date the decision of the executive director is served equal to the number of days it took the executive director to render the decision. Amended §43.45(f) provides the method for calculating that the number of days it took the executive director to render a decision. Amended §43.45(e) is a structural, nonsubstantive change to the rule required due to the changes to §43.45(d).

FISCAL NOTE
Don Green, TRS Chief Financial Officer, has determined that for each year of the first five years the proposed amended rule will be in effect, there will be no foreseeable fiscal implications for state or local governments as a result of administering the proposed amended rule.

PUBLIC COST/BENEFIT
For each year of the first five years the proposed amended rules will be in effect, Mr. Green also has determined that the public benefit anticipated as a result of adopting the amended rules will be to conform the administrative appeals process with new statutory requirements. Mr. Green has also determined that there is no economic cost to entities or persons required to comply with the proposed amended rules.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS
TRS has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed amendments. Therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under Government Code §2006.002.

LOCAL EMPLOYMENT IMPACT STATEMENT
TRS has determined that there will be no effect on local employment because of the proposed amended rule. Therefore, no local employment impact statement is required under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT
TRS has determined that for the first five years the proposed amended rules will be in effect, the proposed amendments will not create or eliminate any TRS programs; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to TRS; will not eliminate any fees currently paid to TRS; will not create a new regulation; will not expand, limit, or repeal an existing regulation; will not increase or decrease the number of individuals subject to the rule's applicability; and will not affect the state's economy.

TAKINGS IMPACT ASSESSMENT
TRS has determined that there are no private real property interests affected by the proposed amended rule, therefore, a takings impact assessment is not required under Government Code §2007.043.

COST TO REGULATED PERSONS
TRS has determined that Government Code §2001.0045 does not apply to the proposed amended rules because the amended
rules do not impose a cost on regulated persons and the amended rules are necessary to implement legislation and the legislature did not specifically state that §2001.0045 applies to these rules.

COMMENTS

Comments may be submitted in writing to Brian Guthrie, TRS Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the Texas Register.

STATUTORY AUTHORITY

The proposed amended rules are proposed under the authority of Government Code §825.102, which authorizes the Board to adopt rules for eligibility for membership, the administration of the funds of the retirement system, and the transaction of business of the Board; Government Code §825.115(b), which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority; and under Government Code §825.521, which provides that in adopting rules relating to appeals of a determination or decision of the retirement system by the system's staff, the board of trustees shall ensure that rules establishing deadlines for the filing of an appeal afford a member or retiree at least the same amount of time to file an appeal as the retirement system has to issue the retirement system's decision.

CROSS-REFERENCE TO STATUTE

The proposed amended rules implement the following sections or chapters of the Government Code: §825.101, concerning the general administration of the retirement system; §825.115, concerning the applicability of certain laws; and §825.521, concerning the deadline to appeal administrative decisions of the retirement system.

§43.1. Administrative Review of Individual Requests.

(a) Organization. TRS is divided into administrative divisions, which are further divided into departments, for the efficient implementation of its duties. Any person who desires any action from TRS must consult with the proper department within TRS and comply with all proper requirements for completing forms and providing information to that department.

(b) Final administrative decision by chief benefit officer. In the event that a person is adversely affected by a determination, decision, or action of department personnel, the person may appeal the determination, decision, or action to the appropriate manager within the department, and then to the chief benefit officer of TRS. The chief benefit officer shall mail a final written administrative decision, which shall include:

1. the chief benefit officer’s determination regarding the person’s appeal and reasons for denying the appeal, if applicable; and
2. a statement that if the person is adversely affected by the decision, the person may request an adjudicative hearing to appeal the decision and the deadline for doing so.

(c) An appeal to the chief benefit officer as described by subsection (b) of this section must be submitted by the later of:

1. 45 days after the date the decision of the department manager is mailed, or
2. the number of days after the date the decision of the department manager is mailed equal to the number of days it took TRS to issue the decision of the department manager.

(d) The number of days it took TRS to issue the decision of the department manager is calculated from the date TRS received the person’s appeal of the determination, decision, or action of department personnel to the date TRS mailed the decision of the department manager.

(e) [e][A] A person adversely affected by a decision of the chief benefit officer may request an adjudicative hearing to appeal the decision of the chief benefit officer as provided in §43.5 of this chapter (relating to Request for Adjudicative Hearing). The deputy director shall determine whether the appeal should be docketed and set for a contested case hearing pursuant to §43.9 of this chapter (relating to Docketing of Appeal for Adjudicative Hearing and Dismissal for Failure to Obtain Setting).

(f) [d][Y] Final administrative decision by Medical Board. In the event that the Medical Board does not certify disability of a member under Government Code, §824.303(b), or the Medical Board certifies that a disability retiree is no longer mentally or physically incapacitated for the performance of duty under Government Code, §824.307(a), the member or retiree may request reconsideration and submit additional information to the Medical Board. The Medical Board shall consider a request for reconsideration and additional information and make a determination on the disability of the member or retiree. If a request for reconsideration has been denied, a member or retiree may appeal the decision by requesting an adjudicative hearing as provided in §43.5 of this chapter (relating to Request for Adjudicative Hearing). The deputy director shall determine whether the appeal should be docketed and set for a contested case hearing pursuant to §43.9 of this chapter (relating to Docketing of Appeal for Adjudicative Hearing and Dismissal for Failure to Obtain Setting).

(g) [e][W] Applicability. The procedures of this chapter apply only to administrative decisions, appeals, and adjudicative hearings relating to the TRS pension plan, unless rules relating to other programs specifically adopt by reference the provisions of this chapter.

§43.45. Proposals for Decision, Exceptions, and Appeals to the Board of Trustees.

(a) The administrative law judge shall issue a proposal for decision with proposed conclusions of law and findings of fact in accordance with Government Code, Chapter 2001 and other applicable law.

(b) Exceptions to the proposal for decision shall be filed with TRS, directed to the attention of the executive director, within 15 days of the date the proposal for decision was issued. Replies to any exception shall be filed with TRS within 15 days of the date the exception is filed. Exceptions shall state with specificity any error of fact or law alleged to have been made by the administrative law judge, and specific references shall be given to exhibit numbers and pages and to testimony where supporting evidence is found. References to testimony shall include the witness name and transcript page and line, if a transcript was prepared; if no transcript was prepared, testimony shall be identified at least by witness name, as well as any other means that may assist in verifying assertions regarding the testimony.

(c) The executive director shall render a decision in the proceeding except that in a proceeding relating to eligibility for disability retirement, the board of trustees shall render a decision following issuance of a proposal for decision. The executive director or the board of trustees may accept or modify the proposed conclusions of law or proposed findings of fact or may vacate or modify an order issued by an administrative law judge in the manner set forth in subsection (f) of this section. If changes are made, the decision shall state in writing the specific reason and legal basis for each change. A copy of the decision shall be served on the parties.
(d) Any party adversely affected by a decision of the executive director in a docketed appeal may appeal the decision to the board of trustees, unless by statute or other rule the decision of the executive director is the final decision of TRS. Written notice of appeal must be filed with the executive director by the [na] later of: [than]

(1) 20 days after the decision of the executive director is mailed; or [served.]

(2) the number of days after the date the decision of the executive director is mailed equal to the number of days it took the executive director to render the decision in the proceeding.

(e) If notice of appeal is timely filed, the decision of the executive director shall serve as a proposal for decision to the board.

(f) The number of days it took the executive director to render the decision in a proceeding is calculated from:

(1) if exceptions to a proposal for decision are not filed, the date of the deadline to file exceptions to a proposal for decision in the proceeding under subsection (b) of this section to the date the decision of the executive director is mailed; or,

(2) if exceptions to a proposal for decision are filed, the date the administrative law judge takes action on the filed exceptions to the date the decision of the executive director is mailed.

(g) [omega] If a decision of the executive director is appealed, the parties may file additional exceptions or briefs and replies if the executive director modified the administrative law judge's proposed findings of fact or conclusions of law. Additional exceptions or briefs must be filed and served at the same time as notice of appeal. Replies shall be filed and served within 15 days of the filing of the notice of appeal and exceptions or briefs. The executive director may modify the filing deadlines.

(h) [epsilon] The final decision in an appeal shall be based upon the existing record in the case. In its sole discretion, the board of trustees or the executive director, as applicable, may take the following actions:

(1) modify, refuse to accept, or delete any proposed finding of fact or conclusion of law made by the administrative law judge;

(2) make alternative findings of fact and conclusions of law;

(3) vacate or modify an order issued by the administrative law judge; and

(4) make a final decision on a contested case.

(i) [epsilon] In exercising its discretion, the board of trustees or the executive director, as applicable, may consider but is not limited to the following grounds for changing a finding of fact or conclusion of law or for making a final decision in a contested case that is contrary to the recommendation of the administrative law judge:

(1) the administrative law judge did not properly apply or interpret applicable law, retirement system rules, written policies provided to the administrative law judge, or prior administrative decisions;

(2) a prior administrative decision on which the administrative law judge relied is incorrect or should be changed;

(3) a technical error in a finding of fact should be changed;

(4) a finding or conclusion or other action of the administrative law judge would alter the terms of the plan; or

(5) the change is pursuant to a fiduciary responsibility.

(j) [omega] An administrative decision of TRS staff, a decision by the Medical Board, or a decision by the executive director is the final decision of TRS unless a party exhausts any right to appeal a matter to the board of trustees.

(k) [omega] An appeal to the Board of Trustees shall be considered in open meeting to the extent required by law. A party who appeals to the Board of Trustees consents to the public discussion of all relevant facts, including information in the member's file that may otherwise be confidential by law. The board in its sole discretion may determine whether to hear oral argument on an appeal. In making that determination, the board may consider if confidential information of a TRS participant who is not a party to the appeal may be disclosed during oral argument.

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 July 30, 2021.
TRD-202102977
Don Green
Chief Financial Officer
Teacher Retirement System of Texas
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 542-6560

TITLE 37. PUBLIC SAFETY AND CORRECTIONS
PART 13. TEXAS COMMISSION ON FIRE PROTECTION
CHAPTER 421. STANDARDS FOR CERTIFICATION
37 TAC §421.1
The Texas Commission on Fire Protection (commission) proposes amendments to 37 Texas Administrative Code Chapter 421, Standards For Certification, concerning §421.1 Procedures for Meetings.

BACKGROUND AND PURPOSE
The purpose of the proposed amendments to rule §421.1 is to provide information regarding the appointment of advisory committees and ad hoc committees by the commission and procedures for meetings. These amendments will also implement Senate Bill 709, 87th Regular Legislative Session, which amended Texas Government Code §419.008(f), regarding advisory committees, and implement one of the agency's Sunset review recommendations.

FISCAL NOTE IMPACT ON STATE AND LOCAL GOVERNMENT
Michael Wisko, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no significant fiscal impact to state government or local governments as a result of enforcing or administering these amendments as proposed under Texas Government Code §2001.024(a)(4).

PUBLIC BENEFIT AND COST NOTE
Mr. Wisko has also determined under Texas Government Code §2001.024(a)(5) that for each year of the first five years
the amendments are in effect the public benefit will be more accurate, clear, and concise rules regarding the appointment of any advisory committee or ad hoc committee appointed by the commission.

LOCAL ECONOMY IMPACT STATEMENT
There is no anticipated effect on the local economy for the first five years that the proposed amended section is in effect; therefore, no local employment impact statement is required under Texas Government Code §2001.022 and 2001.024(a)(6).

ECONOMIC IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES AND RURAL COMMUNITIES
Mr. Wisko has determined there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments. Therefore, no economic impact statement or regulatory flexibility analysis, as provided by Texas Government Code §2006.002, is required.

GOVERNMENT GROWTH IMPACT STATEMENT
The agency has determined under Texas Government Code §2006.0221 that during the first five years the amendments are in effect:

(1) the rules will not create or eliminate a government program;
(2) the rules will not create or eliminate any existing employee positions;
(3) the rules will not require an increase or decrease in future legislative appropriation;
(4) the rules will not result in a decrease in fees paid to the agency;
(5) the rules will not create a new regulation;
(6) the rules will not expand a regulation;
(7) the rules will not increase the number of individuals subject to the rule; and
(8) the rules are not anticipated to have an adverse impact on the state’s economy.

TAKINGS IMPACT ASSESSMENT
The commission has determined that no private real property interests are affected by this proposal and this proposal does 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 government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Texas Government Code §2007.043.

COSTS TO REGULATED PERSONS
The proposed amendments do not impose a cost on regulated persons, including another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code §2001.0045.

ENVIRONMENTAL IMPACT STATEMENT
The commission has determined that the proposed amendments do not require an environmental impact analysis because the amendments are not major environmental rules under Texas Government Code §2001.0225.

REQUEST FOR PUBLIC COMMENT
Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the Texas Register, to Michael Wisko, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to deborah.cowan@tcfp.texas.gov.

STATUTORY AUTHORITY
The amended rule is proposed under Texas Government Code, §419.008(f), which authorizes the commission to appoint advisory committees to assist it in the performance of its duties.

CROSS REFERENCE TO STATUTE
No other statutes, articles, or codes are affected by these amendments.

§421.1. Procedures for Meetings.
(a) The Commission may maintain advisory committees and ad hoc committees to assist with rulemaking, curriculum development, and the performance of the Commission’s duties. These committee names, make up, term limits, roles and meeting requirements will be outlined within this rule. These committees shall exist for no more than five (5) years and shall be reviewed and evaluated for continuance before the end of the fifth year.
(b) [ai] Time and place. The committees [Fire Fighter Advisory Committee and the Curriculum and Testing Committee] shall meet at such time and place in the State of Texas as they deem proper. [The Fire Fighter Advisory Committee shall meet at least twice each calendar year.]
(c) [ba] Meeting called. Meetings shall be called by the chairman, by the Commission, or upon the written request of a quorum of [five] members.
(d) [aii] Quorum. A majority of members shall constitute a quorum.
(e) [idi] Members. Committee members serve at the will of the Commission and may serve six-year staggered terms but may not serve more than two (2) consecutive terms. [The Fire Fighter Advisory Committee shall consist of nine members appointed by the Commission. The Curriculum and Testing Committee shall consist of members appointed by the Commission upon the recommendation of the Fire Fighter Advisory Committee. Committee members serve at the will of the Commission.]
(f) [ei] Officers. Committee Officers [of the Fire Fighter Advisory Committee and the Curriculum and Testing Committee] shall consist of a chairman[.] and vice-chairman appointed by the Commission, [ and secretary. Each committee shall elect its officers from the appointed members at its first meeting and thereafter at its first meeting following January 1 of each year or upon the vacancy of an officer.]
(g) [idii] Responsibility. Committee responsibilities shall be established by the Commission. [The Fire Fighter Advisory Committee shall review Commission rules relating to fire protection personnel and fire departments and recommend changes in the rules to the Commission.]
(h) [ei] Effective Date. All committees will have designated effective dates not to exceed five years without review and reestablishment by the Commission. [Rules shall become effective no sooner than 20 days after filing with the Texas Register for final adoption. The committee or Commission may recommend a later effective date.]
(i) [idi] Removal. It is a ground for removal from an advisory committee appointed by the Commission if a member is absent from more than half of the regularly scheduled committee meetings that the
member is eligible to attend during a calendar year unless the absence is excused by a majority vote of the committee.

(i) Effective in 2021, the Commission established three (3) advisory committees, the Curriculum and Testing, Firefighter Advisory, and Health and Wellness. These committees will expire in 2026 unless reviewed and reestablished by the Commission. The Commission has established two (2) ad hoc committees, 427 and 435, which will exist for the period of time needed, not to exceed two years.

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 July 28, 2021.
TRD-202102902
Michael Wisko
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 936-3812

CHAPTER 441. CONTINUING EDUCATION

37 TAC §441.5

The Texas Commission on Fire Protection (commission) proposes amendments to 37 Texas Administrative Code Chapter 441, Continuing Education, concerning §441.5 Requirements.

BACKGROUND AND PURPOSE

The purpose of the proposed amendments to rule §441.5 is to add a requirement to review the most recent copy of the injury report as part of the continuing education requirements for renewal of fire protection personnel certifications. The intent of this requirement is to draw attention to the top injuries to fire protection personnel contained in the report to prevent future injuries.

FISCAL NOTE IMPACT ON STATE AND LOCAL GOVERNMENT

Michael Wisko, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no significant fiscal impact to state government or local governments as a result of enforcing or administering these amendments as proposed under Texas Government Code §2001.024(a)(4).

PUBLIC BENEFIT AND COST NOTE

Mr. Wisko has also determined under Texas Government Code §2001.024(a)(5) that for each year of the first five years the amendments are in effect the public benefit will be the result in fewer firefighter injuries and fatalities across the state resulting in savings to the cities.

LOCAL ECONOMY IMPACT STATEMENT

There is no anticipated effect on the local economy for the first five years that the proposed amendments are in effect; therefore, no local employment impact statement is required under Texas Government Code §2001.022 and 2001.024(a)(6).

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

Mr. Wisko has determined there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments. Therefore, no economic impact statement or regulatory flexibility analysis, as provided by Texas Government Code §2006.002, is required.

GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined under Texas Government Code §2006.0221 that during the first five years the amendments are in effect:

(1) the rules will not create or eliminate a government program;
(2) the rules will not create or eliminate any existing employee positions;
(3) the rules will not require an increase or decrease in future legislative appropriation;
(4) the rules will not result in a decrease in fees paid to the agency;
(5) the rules will not create a new regulation;
(6) the rules will not expand a regulation;
(7) the rules will not increase the number of individuals subject to the rule; and
(8) the rules are not anticipated to have an adverse impact on the state's economy.

TAKINGS IMPACT ASSESSMENT

The commission has determined that no private real property interests are affected by this proposal and this proposal does 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 government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Texas Government Code §2007.043.

COSTS TO REGULATED PERSONS

The proposed amendments do not impose a cost on regulated persons, including another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code §2001.0045.

ENVIRONMENTAL IMPACT STATEMENT

The commission has determined that the proposed amendments do not require an environmental impact analysis because the amendments are not major environmental rules under Texas Government Code §2001.0225.

REQUEST FOR PUBLIC COMMENT

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the Texas Register, to Michael Wisko, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to deborah.cowan@tcfp.texas.gov.

STATUTORY AUTHORITY

The amended rule is proposed under Texas Government Code, §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission. The rule is also proposed under Texas Government Code §419.034, which authorizes the commission to adopt rules establishing the requirements for certification renewal.

CROSS REFERENCE TO STATUTE
No other statutes, articles, or codes are affected by these amendments.

§441.5. Requirements.

(a) Continuing education shall be required in order to renew certification.

(b) The continuing education requirement for renewal shall consist of a minimum of 18 hours of training to be conducted during the certification period. Of the 18 hours, two hours shall be a review of the most recent TCFP injury report, with a focus on the top three leading causes of injuries during the reporting period. All documentation of training used to satisfy the continuing education requirements must be maintained for a period of three years from the date of the training. Continuing education records shall be maintained by the department in accordance with the Texas State Library and Archives Commission, State and Local Records Management Division, Records Schedule, or Local Schedule (GR 1050-28), whichever is greater.

(c) Level 1 training must be conducted by a certified instructor. Interactive computer-based continuing education training that is supervised and verified by a certified instructor is acceptable.

(d) The continuing education program of a regulated entity must be administered and maintained in accordance with commission rule by a certified instructor.

(e) No more than four hours per year in any one subject of Level 1 training may be counted toward the continuing education requirement for a particular certification.

(f) There shall be no "hour per subject limit" placed on Level 2 courses, except that emergency medical courses shall be limited to four hours per year.

(g) The head of a fire department may select subject matter for continuing education appropriate for a particular discipline.

(h) The head of a fire department must certify whether or not the individuals whose certificates are being renewed have complied with the continuing education requirements of this chapter on the certification renewal document. Unless exempted from the continuing education requirements, an individual who fails to comply with the continuing education requirements in this chapter shall be notified by the commission of the failure to comply.

(i) After notification from the commission of a failure to comply with continuing education requirements, an individual who holds a certificate is prohibited from performing any duties authorized by a required certificate until such time as the deficiency has been resolved and written documentation is furnished by the department head for approval by the commission. Continuing education hours obtained to resolve a deficiency may not be applied to the continuing education requirements for the current certification period.

(j) Any person who is a member of a paid or volunteer fire department who is on extended leave for a cumulative period of six months or longer due to a documented illness, injury, or activation to military service may be exempted from the continuing education requirement for the applicable renewal period(s). Such exemptions shall be reported by the head of the department to the commission at renewal time, and a copy kept with the department continuing education records for three years.

(k) Any individual who is not a member of a paid or volunteer fire department who is unable to perform work, substantially similar in nature as would be performed by fire protection personnel appointed to that discipline, may be exempted from the continuing education requirement for the applicable renewal period(s). Commission staff shall determine the exemption using documentation provided by the individual and the individual's treating physician of the illness or injury that cumulatively lasts six months or longer, or by documentation of military service or activation to military service.

(l) In order to renew certification for any discipline which has a continuing education requirement stated in this chapter, an individual holder of a certificate not employed by a regulated entity must comply with the continuing education requirements for that discipline. Only 20 total hours of continuing education for each certification period in Level 1 or Level 2 subjects relating to the certification being renewed shall be required to renew all certificates the individual holds, except as provided in §441.17 of this title (relating to Continuing Education for Hazardous Materials Technician).

(m) An individual certificate holder, not employed by a regulated entity, shall submit documentation of continuing education training upon notification by the commission. An example of documentation of continuing education training may include, but not be limited to, a Certificate of Completion, a college or training facility transcript, a fire department training roster, etc. Commission staff will review and may approve or disapprove such documentation of training in accordance with applicable commission rules and/or procedures. The training for a resident of Texas at the time the continuing education training is conducted shall be administered by a commission instructor, commission certified training facility, an accredited institution of higher education, or a military or nationally recognized provider of training. The training the for a nonresident of Texas[.] shall be delivered by a state fire academy, a fire department training facility, an accredited institution of higher education, or a military or nationally recognized provider of training. The individual must submit training documentation to the commission for evaluation of the equivalency of the training required by this chapter. The individual certificate holder is responsible for maintaining all of his or her training records for a period of three years from the date of the training.

(n) If an individual has completed a commission approved academy in the 12 months prior to his or her certification expiration date, a copy of that certificate of completion will be acceptable documentation of continuing education for that certification renewal period.

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 July 28, 2021.
TRD-202102903
Michael Wisko
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 936-3812

TITLE 43. TRANSPORTATION
PART 1. TEXAS DEPARTMENT OF TRANSPORTATION
CHAPTER 9. CONTRACT AND GRANT MANAGEMENT
SUBCHAPTER A. GENERAL
43 TAC §9.8
The Texas Department of Transportation (department) proposes amendments to 43 TAC §9.8, concerning Enhanced Contract and Performance Monitoring.

EXPLANATION OF PROPOSED AMENDMENTS

Section 9.8, Enhanced Contract and Performance Monitoring, requires the department to monitor and report to the Texas Transportation Commission (commission), on a quarterly basis, the performance and status of each contract, other than a low-bid construction and maintenance contract, that is valued at $5 million or more or that the department determines constitutes a high-risk to the department. The department has determined that due to the high volume of department contracts that are valued at $5 million or more, the dollar threshold that identifies contracts that must be monitored and reported to the commission should be increased to an amount that will meaningfully capture the department’s highest dollar contracts. Accordingly, amended §9.8, Enhanced Contract and Performance Monitoring, is revised to increase the dollar threshold that identifies contracts that must be reported to the Commission from $5 million to $50 million. The department will continue to monitor and report on contracts with a lesser value that it determines constitute high-risks to the department.

FISCAL NOTE

Stephen Stewart, Chief Financial Officer, has determined, in accordance with Government Code, §2001.024(a)(5), that as a result of enforcing or administering the rules for each of the first five years in which the proposed rules are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Kenneth Stewart, Director of Contract Services Division, has determined that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed rules and therefore, a local employment impact statement is not required under Government Code, §2001.022.

PUBLIC BENEFIT

Mr. Stewart has also determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in which the proposed rules are in effect, the public benefit anticipated as a result of enforcing or administering the rules will be improvements to the department’s management of contracts through the identification and mitigation of risk. There are no anticipated economic costs for persons required to comply with the proposed rules.

COSTS ON REGULATED PERSONS

Mr. Stewart has also determined, as required by Government Code, §2001.024(a)(5), that for each year of that period there are no anticipated economic costs for persons, including a state agency, special district, or local government, required to comply with the proposed rules and therefore, Government Code, §2001.0045, does not apply to this rulemaking.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities, as defined by Government 3 Code, §2006.001, and therefore, an economic impact statement and regulatory flexibility analysis are not required under Government Code, §2006.002.

GOVERNMENT GROWTH IMPACT STATEMENT

Mr. Stewart has considered the requirements of Government Code, §2001.0221 and anticipates that the proposed rules will have no effect on government growth. He expects that during the first five years that the rule would be in effect:

1. it would not create or eliminate a government program;
2. its implementation would not require the creation of new employee positions or the elimination of existing employee positions;
3. its implementation would not require an increase or decrease in future legislative appropriations to the agency;
4. it would not require an increase or decrease in fees paid to the agency;
5. it would not create a new regulation;
6. it would not expand, limit, or repeal an existing regulation;
7. it would not increase or decrease the number of individuals subject to its applicability; and
8. it would not positively or adversely affect this state’s economy.

TAKINGS IMPACT ASSESSMENT

Mr. Stewart has determined that a written takings impact assessment is not required under Government Code, §2007.043.

SUBMITTAL OF COMMENTS

Written comments on the amendments to §9.8 may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line “Contract Risk Reporting.” The deadline for receipt of comments is 5:00 p.m. on September 13, 2021. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

STATUTORY AUTHORITY

The rule is proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Government Code, §2261.253, which requires a state agency to adopt rules to establish a procedure to identify each contract requiring enhanced contract or performance monitoring and submit information on the contract to its governing body.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING


(a) The department shall monitor and report to the Texas Transportation Commission, on a quarterly basis, the performance and status of each contract, other than a low-bid construction and maintenance contract, that is valued at $50 [§5] million or more or that the department determines constitutes a high-risk to the department.
(b) The department immediately shall notify the commission of any serious issue or risk that is identified in a contract and that has not been reported in a quarterly report provided under subsection (a) of this section.

(c) This section does not apply to a memorandum of understanding, interagency contract, interlocal agreement, or contract for which there is not a cost.

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 July 29, 2021.
TRD-202102927
Becky Blewett
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 463-8630

SUBCHAPTER C. CONTRACTING FOR ARCHITECTURAL, ENGINEERING, AND SURVEYING SERVICES


EXPLANATION OF PROPOSED AMENDMENTS AND REPEAL

This rulemaking streamlines the selection process for architectural, engineering, and surveying service contracts in several ways, including by eliminating the Request for Qualifications (RFQ) and using only the Request for Proposals (RFP) as the solicitation method for professional services contracts. The response requiring a Statement of Qualifications (SOQ) is eliminated, with the Proposal being the only response format used by the department. This change will align the non-federal selection process, which is sometimes referred to as the state process, with the federal selection process and will reduce the risk of confusion by utilizing only one process for procurements. Under the federal requirements in 23 United States Code of Federal Regulations (CFR) 172, the RFQ is optional; however, the RFP is required.

Amendments allow a non-federal indefinite deliverable contract to be extended beyond five years and increase the period to issue work to four years instead of three. These changes provide flexibility by allowing the department to keep the design provider under contract to provide construction phase services.

Amendments to §9.31, Definitions, remove or amend definitions to align with the elimination of the SOQ and RFP and other amendments. The definitions are amended to remove the terms "statements of qualifications" or "qualification" and replace with "proposal" or "proposals." The definitions for RFQ and SOQ are removed because the department is streamlining the process and is no longer using the RFQ and SOQ process. The definition for "Request for Proposal (RFP)" is clarified to identify the RFP as the advertisement for an architectural, engineering, or surveying contract. This amendment will streamline the selection processes. The definition of "solicitation" is removed since the RFP is the only advertisement format.

Amendments to §9.32, Selection Processes, Contract Types, Selection Types, and Projected Contracts, to streamline the selection processes and align the non-federal selection process with the federal selection process. Section 9.32(a) is amended to add the non-federal (state) process as a selection process and delete the comprehensive, streamlined, and accelerated selection processes. Both the non-federal and federal processes will have options for selection to be made with or without interviews. Section 9.32 is also amended to replace the term "solicitation" with "RFP" to align with a single advertisement format. Subsection (b)(1)(B) is amended to change the three-year limit on issuing work authorizations to four years after the date of contract execution. This provides flexibility by allowing the department to continue to issue work authorizations for projects that can be completed before the termination date in the contract. Subsection (b)(1)(C) adds text to maintain the limit on contracts procured using the federal selection process to a contract period of no more than five years. This addition is consistent with federal guidelines for contracts procured with the federal selection process and adds flexibility to contracts procured using the non-federal process. By allowing indefinite deliverable contracts procured using a non-federal selection process to be extended beyond five years, the department may be able to keep the design provider under contract to provide construction phase services.

Amendments to §9.33, Precertification, replace the term "solicitation" with "RFP" to align with a single advertisement format.

Amendments to §9.34, Comprehensive Process, rename the comprehensive process to the non-federal (state) process and align the section with the federal selection process. The amendments streamline the selection processes. Section 9.34 is also amended to replace the term "solicitation" with "RFP" to align with a single advertisement format. Subsection (a) is amended to delete the reference to specific deliverable contracts $1 million or more in value and allows the non-federal (state) process to be used for any contract that is not subject to the federal process. This deletion will align the non-federal selection process with the federal selection process. Subsection (b)(6)(B) is amended to add Group 17, Facilities Engineering, to the work groups that are exempted from administrative qualifications. This change aligns this type of work with the architectural exemption for contracts procured using the non-federal process.

Subsections (d), (e), (g), and (h) are amended to replace the Request for Qualifications (RFQ) and the Statement of Qualifications (SOQ) with the Request for Proposals (RFP) and proposal, respectively. These changes will streamline the selection process since the department is no longer using the RFQ and SOQ process. Subsection (g)(3) is amended to add a statement to include the prime provider's past performance scores in the evaluation of the responsive proposals. This amendment streamlines the process by incorporating the provider's past performance score early in the selection process.

Subsection (i) is amended to clarify that the department will determine whether interviews are required in the non-federal selection process. This amendment aligns the non-federal process with the federal process. New subsection (i)(1) adds the requirement for an interview for specific deliverable contracts of $5 million or more in value or any indefinite deliverable contract for higher-risk services based on complexity, anticipated project costs, number of contracts, or type of services. This amendment
aligns the non-federal process with the federal process and increases the dollar value threshold for interviews on specific deliverable contracts to streamline the interview process. Subsection (i)(3) is amended to delete the use of the prime provider's past performance scores during the interview stage of the non-federal selection process. This amendment aligns this subsection with subsection (g)(3).

Subsection (j)(1) is amended to clarify the basis for final selection dependent on whether an interview is required. These additions align the non-federal process with the federal process. Subsection (j)(2) is amended to clarify that the process for breaking ties will be using scores from either the interview or the proposal, if no interviews are required. This clarification aligns the non-federal with the federal process. The title of the section is changed to "Non-federal Process."

Amendments to §9.35, Federal Process, delete references to the "comprehensive" process and replace them with the "non-federal" process. Each paragraph is amended to reference back to the applicable paragraph in §9.34 to align the federal and non-federal selection processes. Section 9.35 is also amended to replace the term "solicitation" with "RFP" to align with a single advertisement format. The text in subsections (d), (e), and (g) is deleted and a reference to §9.34(d), §9.34(e), §9.34(h)-(j), respectively, is added. Subsections (f) and (h) are deleted. The amendments to §9.35 align the federal selection process and the non-federal selection process, but do not alter the federal selection process.

Sections 9.36 and 9.37 are repealed. The three non-federal processes (comprehensive, streamlined, and accelerated) have been replaced with a single non-federal selection process in §9.34, which has an option for including interviews. These amendments streamline the non-federal process and align it with the federal process.

Amendments to §9.38, Emergency Contract Process, and §9.39, Urgent and Critical Process, change the reference to the heading of §9.34 in accordance with the amendment of that heading made in this rulemaking.

Amendments to §9.40, Negotiations, replace the term "solicitation" with "RFP" to align with a single advertisement format and the references to the comprehensive, streamlined, or accelerated processes are replaced with references to the non-federal process to align with changes made to §9.34.

Amendments to §9.41, Contract Administration, make changes to provisions relating to performance evaluations. Amendments to subsection (d)(1) allow the evaluation of a provider employee who is involved with managing a work authorization and replace the text that requires a performance evaluation of the provider project manager and firm during the contract activity with a requirement for evaluations to be conducted at least once every 12 months. These amendments allow a department project manager to evaluate both the prime provider's project manager and a member of the prime provider's staff assigned to represent the prime provider on a work authorization, providing more flexibility to the department project manager to give feedback to the provider, and provide clarity to the department project manager for completing an annual evaluation for the provider.

FISCAL NOTE

Stephen Stewart, Chief Financial Officer, has determined, in accordance with Government Code, §2001.024(a)(4), that as a result of enforcing or administering the rules for each of the first five years in which the proposed rules are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Martin L. Rodin, P.E., Professional Engineering Procurement Services Division Director, has determined that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed rules, and, therefore, a local employment impact statement is not required under Government Code, §2001.022.

PUBLIC BENEFIT

Mr. Rodin has determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in which the proposed rules are in effect, the public benefit anticipated as a result of enforcing or administering the rules will be a streamlined selection processes for contracts for architectural, engineering, and surveying services, increased flexibility in using indefinite deliverable contracts, and clarification of the prime provider performance evaluation process.

COSTS ON REGULATED PERSONS

Mr. Rodin has also determined, as required by Government Code, §2001.024(a)(5), that for each year of that period there are no anticipated economic costs for persons, including a state agency, special district, or local government, required to comply with the proposed rules, and, therefore, Government Code, §2001.0045, does not apply to this rulemaking.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities, as defined by Government Code, §2006.001, and, therefore, an economic impact statement and regulatory flexibility analysis are not required under Government Code, §2006.002.

GOVERNMENT GROWTH IMPACT STATEMENT

Mr. Rodin has considered the requirements of Government Code, §2001.0221 and anticipates that the proposed rules will have no effect on government growth. He expects that during the first five years that the rule would be in effect:

(1) it would not create or eliminate a government program;
(2) its implementation would not require the creation of new employee positions or the elimination of existing employee positions;
(3) its implementation would not require an increase or decrease in future legislative appropriations to the agency;
(4) it would not require an increase or decrease in fees paid to the agency;
(5) it would not create a new regulation;
(6) it would not expand, limit, or repeal an existing regulation;
(7) it would not increase or decrease the number of individuals subject to its applicability; and
(8) it would not positively or adversely affect this state’s economy.

TAKINGS IMPACT ASSESSMENT

Mr. Rodin has determined that a written takings impact assessment is not required under Government Code, §2007.043.
DIVISION, RULE
GENERAL

Comments, 9.41
9.35
- §§9.38
§9.36
of repeal the proposed comments on to SUBMITT AL certification providers. related of (CCIS)--A system computer store meanings, the indicates used in following terms, this Services §223.041. Code, A RULEMAKING ST TOTES work for conduct rules with transportation provides which the §201.101, exas proposed are amendments AUTHORITY TUT person department, the with comments, comments submits transportation a amendments on 13, accordance management, management, construction and provider project and oversight the of including through and contracting a qualifications. the selects demonstrated types services and provider qualification, and in- (2) Certification (5) Engineering T transportation. exas Department--The Department exas Department--The Department's division responsible for overseeing procurement planning, provider selection, leading the contract negotiations, administering the contract, and processing invoices. (14) Professional Engineering Procurement Services (PEPS) Division--The head of the PEPS Division. (16) Proposal--A response to a request for proposal that provides details on a provider's specific technical approach and qualifications. (17) Provider--A prime provider or subprovider. (18) Relative importance factor (RIF)--The numerical weight assigned to an evaluation criterion, used by the consultant selection team to score [statements of qualification] proposals[,] and interviews. (19) Request for proposal (RFP)--A public announcement that advertises the department's intent to enter into an architectural, engineering, or surveying contract [A document provided by the department to short-listed providers that provides instructions for submitting a proposal and may include instructions to prepare for the interview]. (20) Request for qualification (RFQ)--A public announcement that advertises the department's intent to enter into an architectural, engineering, or surveying contract and provides instructions for the preparation and submittal of a statement of qualification generally referred to as a solicitation.] [(20)] Short list--The list of prime providers most qualified to perform the services specified in an RFP [RFQ], as demonstrated by the proposal [statement of qualification] scores. [(22)] Solicitation--A request for qualification.] [(22)] Specific deliverable contract--A contract containing a specific scope of services that identifies deliverables, locations, and timing in sufficient detail to define the provider's responsibilities under the contract, although additional requirements may later be specified in work authorizations. [(22)] Standard work category--A formal classification, developed by the department, used to define a specific sub-group of work and provide the minimum technical qualifications for performing the work.

(23) [26] Subprovider—A firm that provides or supports, or proposes to provide or support, architectural, engineering, or surveying services under contract with a prime provider.


(a) Selection processes. The department will issue RFPs [solicitations] and select providers under the following selection processes: non-federal under §9.34 of this subchapter (relating to Non-federal Process) [comprehensive], federal under §9.35 of this subchapter (relating to Federal Process), [streamlined, accelerated,] emergency under §9.38 of this subchapter (relating to Emergency Contract Process), and urgent and critical under §9.39 of this subchapter (relating to Urgent and Critical Process).

(b) Contract types. The department will offer three types of contracts: indefinite deliverable, specific deliverable, and multiphase.

(1) An indefinite deliverable contract may be used for a single project or for multiple projects. The RFP [solicitation] will describe the typical work types to be performed under the contract.

(A) Categorical limitations on contract dollar value may be established by the executive director or the executive director's designee.

(B) The contract period in which work authorizations may be issued may not be longer than four [times] years after the date of contract execution, unless approved by the Texas Transportation Commission.

(C) Supplemental agreements may be issued to extend the contract period, but only as necessary to complete work on an existing work authorization. The contract period for contracts procured using the process provided by §9.35 of this subchapter may not extend more than five years beyond the execution date.

(2) A specific deliverable contract may be used for a single project or for multiple projects. The RFP [solicitation] will specify the specific deliverables to be provided under the contract.

(3) A multiphase contract may be used for a single project or for multiple projects. The RFP [solicitation] will describe the services to be provided under the contract and will divide the services into phases. The specific scope of work may be established and the associated costs negotiated and authorized by phase as the project progresses.

(c) Selection types.

(1) Single contract selection. One contract will result from the RFP [solicitation].

(2) Multiple contract selection. More than one contract of similar work types will result from the RFP [solicitation]. The RFP [solicitation] will indicate the number and type of contracts.

(d) Projected contracts list. Quarterly, the department will publish on the department's website a list of projected contracts for architectural, engineering, and surveying services.

§9.33. Precertification.

(a) Standard work categories. Precertification establishes the minimum technical qualifications to perform work under a standard work category. The department may add, revise, or delete a standard work category.

(b) Contract eligibility.

(1) To be eligible to perform work under a standard work category, a firm providing a task leader must have active precertification status in that work category by the closing date of the RFP [solicitation].

(2) The department will not delay the selection process or the contract execution to accommodate a provider that is not in active precertification status.

(c) Precertification status of firms and employees.

(1) A firm is precertified in a standard work category only if it employs an individual precertified in that category.

(2) A firm that employs an individual who is precertified in multiple standard work categories is, by extension, precertified in each of those categories.

(3) A firm's precertification status is only applicable to the incorporated business entity that employs the individual upon whom the firm's precertification status is based and does not extend to a subsidiary, affiliate, or parent of the incorporated entity.

(4) An employee's precertification status is based solely on the individual's qualifications. A firm's qualifications may not serve as a basis for precertifying an employee.

(5) Precertification status shall transfer with the employee, should the employee leave the firm.

(d) Precertification website. The department will maintain a precertification website that will include:

(1) the definitions of the standard work categories;

(2) the minimum technical qualifications to perform work under the standard work categories; and

(3) the precertification application form, with instructions.

(e) Application and review process.

(1) To apply for precertification in a standard work category, a firm must employ an individual qualified to become precertified in that category and present the individual's qualifications in a precertification application.

(2) The department will consider the following factors in reviewing an application:

(A) the minimum technical qualifications as applicable;

(B) the individual's professional license or registration;

(C) the individual's experience and training; and

(D) any record that shows that the individual or the firm is the subject of a final administrative or judicial determination that the employee or firm has violated a statute or rule of a state licensing entity related to occupational or professional conduct.

(3) If a submitted application is incomplete or inaccurate, the firm will be given an opportunity to correct the application and provide additional information. The firm must provide the information within 30 days after the day that it receives the department's notice that the application is incomplete or inaccurate.

(4) If the information is not provided under paragraph (3) of this subsection within the 30-day period prescribed by that paragraph, the application will be processed at the end of that 30-day period with the information available.

(5) The department will make a good faith effort to make a precertification determination within 60 days after the day that the
department receives a complete and accurate application or if paragraph (4) of this subsection applies, within 60 days after the day that the 30-day period prescribed by that paragraph ends.

(f) Appeal. A firm may appeal a precertification denial to the department by submitting additional information within 30 days after the day that it receives written notification of the denial. The information must justify why precertification should be granted. The department will review the information and make a second precertification determination. A firm may file a written complaint regarding a second precertification denial to the executive director or the executive director's designee.

(g) Updates. A firm must report any change in its application information no later than 45 days after the day that the change occurs.

(h) Data management. A firm's application information will be maintained in the Consultant Certification Information System (CCIS).

(i) Annual renewal. To maintain contract eligibility, a firm must renew its precertification status no later than March 31 of each year. The firm must submit its annual renewal through the CCIS.

1. A firm that has renewed its precertification status by the annual deadline will maintain an active precertification status in the standard work categories in which it is precertified.

2. A firm that has not renewed its precertification by the annual deadline will be placed in inactive status.


(a) Applicability. The non-federal [comprehensive] process, also referred to as the state process, described under this section may be used for contracts that are [must be used for any specific deliverable contract that is $1 million or more in value and is] not subject to §9.35 of this subchapter (relating to Federal Process).

(b) Administrative qualification.

1. Administrative qualification is a process used by the department to verify that a provider performing engineering and design related services has an indirect cost rate that meets department requirements. Except as provided by paragraph (8) of this subsection, to compete for a contract under this section a provider performing engineering and design related services either must be administratively qualified or must accept an indirect cost rate under paragraph (7) of this subsection.

2. Factors in determining administrative qualification.

(A) A provider may demonstrate administrative qualification by an audit or by self-certification.

(i) An audit may be performed by an independent certified public accountant (CPA), an agency of the federal government, another state transportation agency, or a local transit agency. An audit performed by an independent CPA must be conducted in accordance with the current versions of 48 C.F.R. Part 31, the Generally Accepted Government Auditing Standards (GAGAS), and the American Association of State Highway and Transportation Officials (AASHTO) Uniform Audit and Accounting Guide. The provider must provide the department with unrestricted access to the audit work papers, records, and other information as requested by the department.

(ii) Self-certification may be conducted by the provider and must include a cost report and an internal controls report. The self-certified cost report must comply with the current versions of 48 C.F.R. Part 31, the GAGAS, and the AASHTO Uniform Audit and Accounting Guide. The self-certified internal control report must certify the provider has internal controls in place within its organization. Both the cost report and the internal control report must be signed by a company officer and notarized.

(B) The audit or self-certification shall be based on the provider's fiscal year. The indirect cost rate, as approved by the department, shall become effective six months after the end of the provider's fiscal year, or immediately if filed more than six months after the end of the provider's fiscal year. It shall be effective no more than twelve months and shall expire eighteen months after the end of the fiscal year upon which it is based, except that, for the purpose of competition referred to in paragraph (1) of this subsection, negotiations referred to in subsection (b)(5) of this section, or administratively qualified under §9.35(b) of this subchapter, the department may extend an approved indirect cost rate for 90 days if the department has received the provider's annual administrative qualifications information submittal before the rate's expiration date.

(C) A provider must submit on an annual basis:

(i) a cognizant letter of concurrence issued by a state transportation agency in accordance with the AASHTO Uniform Audit and Accounting Guide;

(ii) a compensation analysis for all executives and employees in accordance with the AASHTO Uniform Audit and Accounting Guide for which the provider may use either the National Compensation Matrix or surveys as prescribed in the AASHTO Uniform Audit and Accounting Guide.

(D) A provider's payment of a bonus or incentive compensation to an employee is allowable only if the bonus or compensation is paid under a written bonus plan that:

(i) is consistent with the AASHTO Uniform Audit and Accounting Guide that identifies eligibility requirements and provides details regarding how bonus payments are determined; and

(ii) includes an adequate description of the performance measures used to determine bonus amounts, such as employee performance evaluation ratings, contributions toward the firm's revenue growth, and responsibilities for cost containment.

(E) A provider must submit on an annual basis the salary rates for employees that it anticipates using on contracts that may be executed during the next 12-month period. The department will review the salary rates for reasonableness and consistency with industry norms and, when approved, will apply the rates to contracts negotiated within the next 12-month period. During the 12-month period, the provider must submit the salary rate for any employee who is used on a contract and whose salary rate has not been provided under this subparagraph. The department will continue to negotiate contracts on an individual basis during the initial 12-month implementation period.

(F) The department may audit the indirect cost rate of a provider under contract with, or seeking to do business with, the department. These audits will be conducted in accordance with the criteria outlined in this subsection.

(G) A provider must submit a signed Certification of Final Indirect Costs with the audit report or self-certification. The certification must follow the requirements of the Federal Highway Administration.

(H) The department will treat the cost data as confidential pursuant to 23 U.S.C. Section 112 and 23 C.F.R. Part 172.


(A) A provider must submit its administrative qualification information to the department in accordance with the instructions on the department's website.
(B) Upon review of an audit report or self-certification received from a provider, the department may request additional information from the provider. If the submittal is not complete and accurate, the department will return it to the provider for correction. The provider shall submit the additional information or the corrected administrative qualification submittal within 30 days after the day that it receives the department's request. If the information is not received within the 30-day period, the department will reject and not process the administrative qualification submittal.

(C) If an administrative qualification submittal is rejected under subparagraph (B) of this paragraph, the provider may refile a corrected audit report or self-certification and shall include any previously requested information. The provider may not refile earlier than 90 days after the day that the department sends the notice rejecting the submittal.

(D) The department will make a good faith effort to complete the administrative qualification review process within 60 days after the day that it receives a complete and accurate audit report or self-certification.

(4) Administrative qualification is applicable only to the incorporated business entity upon which the indirect cost rate is based and does not extend to a subsidiary, affiliate, or parent of the incorporated entity, except as provided by this paragraph. A corporation may administratively qualify a business segment of the corporation if the business segment is not limited to a geographical area that is less than the entire state of Texas and if the corporation is able to demonstrate and justify the allocation of costs between the business segment and other corporate operations. If a corporate business segment is administratively qualified, the resulting indirect cost rate is not applicable to staff not employed by the business segment.

(5) In negotiations under §9.38 [9.40] of this subchapter (relating to Emergency Contract Process [Negotiations]), the department will use the selected firm's indirect cost rate information that is in effect at that time the negotiations begin.

(6) The department will not provide a firm's administrative qualification information, including salary information, to the department's staff conducting negotiations or the consultant selection team before the selection of that firm.

(7) Providers not administratively qualified. The department may contract with a prime provider or allow the use of a subprovider that is not administratively qualified if:

(A) the provider has been in operation, as currently organized, for less than one fiscal year and the provider accepts an indirect cost rate developed by the department; or

(B) on request by the department during the selection process, the prime provider provides written certification that the prime provider or subprovider, as applicable, does not have an indirect cost rate audit and will accept an indirect cost rate developed by the department.

(8) Exemptions to administrative qualification.

(A) A non-engineering firm is exempt from the administrative qualification requirement of this section.

(B) A provider performing a service under standard work category 18.2.1, subsurface utilities engineering, or any of the following work groups, as listed on the department's precertification website, is exempted from administrative qualification, to the extent of the service being performed:

(i) Group 6, bridge inspection;

(ii) Group 12, materials inspection and testing;

(iii) Group 14, geotechnical services;

(iv) Group 15, surveying and mapping; [and]

(v) Group 16, architecture; and [ ]

(vi) Group 17, facilities engineering.

(C) The department may exempt services other than those indicated in subparagraph (B) of this paragraph on a case-by-case basis. Any request for an exemption must be received by the department at the closing date of the RFP solicitation.

(c) Consultant selection team (CST).

(1) The department shall use a CST in selecting providers under this section.

(2) The CST shall be composed of at least three department employees.

(3) At least one CST member must be a professional engineer, for engineering contracts; a registered architect, for architectural contracts; and either a professional engineer or registered professional land surveyor, for surveying contracts.

(4) If a CST member leaves the CST during the selection process, the process may continue with the remaining members, subject to paragraph (3) of this subsection.

(d) Request for proposals [qualifications (RFQ)]. Not fewer than 14 calendar days before the RFP solicitation closing date, the department will post on a web-based bulletin board an RFP [REQ] providing the contract information and specifying the requirements for preparing and submitting a proposal [statement of qualification].

(e) Proposal [Statement of qualification (SOQ)]. To be considered, a proposal [an SOQ] must comply with the requirements specified in the RFP [REQ].

(f) Replacements.

(1) An individual may be proposed as a replacement for the prime provider project manager prior to the department's notification of firms short-listed for an interview or, if an interview is not required, prior to selection.

(2) An individual may be proposed as a replacement for a task leader prior to contract execution.

(3) A proposed replacement for the prime provider project manager must be an employee of the prime provider. A proposed replacement for a task leader must be an employee of the prime provider or its subprovider. A proposed replacement for either position must satisfy the applicable precertification and non-listed category requirements.

(g) Proposal [SOQ] screening and evaluation.

(1) The department may disqualify a proposal [an SOQ] if the department has knowledge that a firm on the project team or an employee of a firm on the project team is the subject of a final administrative or judicial determination that the firm or employee has violated a statute or rule of a state licensing entity related to occupational or professional conduct.

(2) If a proposal [an SOQ] is not disqualified under paragraph (1) of this subsection, the CST will screen the proposal [SOQ] to determine whether it complies with the requirements specified in the RFP [REQ]. Each proposal [SOQ] that meets these requirements will be considered responsive to the RFP [REQ] and evaluated.
(3) The CST will evaluate the responsive proposal [SOQ] according to the evaluation criteria detailed in the RFP [REQ] based on factors the department has identified as most likely to result in the selection of the most qualified provider, including the prime provider's past performance scores, as contained in the department's database, that reflect less than satisfactory performance.

(h) Short list. The short list will consist of the most qualified providers, as indicated by the proposal [SOQ] scores.

(1) For single contract selections, the minimum number of short-listed prime providers is three, unless fewer than three prime providers submitted a responsive proposal [SOQ].

(2) For multiple contract selections, the minimum number of short-listed prime providers is the number of desired contracts plus three, unless fewer than the desired number of prime providers submitted a responsive proposal [SOQ].

(3) Notification.

(A) The department will notify each prime provider that submitted a proposal [an SOQ] whether it was short-listed.

(B) The department will notify each short-listed prime provider whether a short list meeting will be held.

(i) Short list evaluation.

(1) An interview is required for any specific deliverable contract that is $5 million or more in value or any indefinite deliverable contract for higher-risk services as determined by the department based on project complexity, anticipated project costs, number of contracts, or type of services.

(2) [44] The RFP will state whether an interview will be required as part of the short list evaluation. [Interviews. The department will evaluate the short-listed providers through interviews.] The department will issue an Interview and Contract Guide (ICG) to each short-listed prime provider. The ICG will provide contract information and specify the requirements for the interview.

(3) [42] Short list evaluation criteria. The CST will evaluate the interviews according to the criteria specified in the ICG, including the prime provider's past performance scores in the Consultant Certification Information System database reflecting less than satisfactory performance.

(j) Selection.

(1) Basis of final selection.

(A) If interviews are required, the [The] CST will select the best qualified provider, as indicated by the interview [short list] scores.

(B) If interviews are not required, the CST will select the best qualified provider, as indicated by the proposal scores.

(2) Tie scores. The PEPS Division Director will break a tie using the following method.

(A) The first tie breaker will be the scores for:

(i) the interview criterion with the highest RIF; or [.]

(ii) if interviews are not required, the proposal criterion with the highest RIF.

(B) The remaining [interview] criteria shall be compared in the order of decreasing RIF until the tie is broken.

(C) If the providers have identical scores on all of the [interview] criteria, the provider will be chosen by random selection.

(3) Notification. The department will:

(A) provide written notification to the prime provider selected for contract negotiation and arrange a meeting to begin contract negotiations;

(B) provide written notification to each short-listed prime provider that was not selected, notifying the provider of the non-selection; and

(C) publish the short list and the selected provider on a web-based bulletin board.

(4) Appeal. A provider may file a written appeal concerning the selection process with the executive director or the executive director's designee as provided under §9.7 of this chapter (relating to Protest of Contract Practices or Procedures).


(a) Applicability. This section applies to engineering or design related service contract directly related to a highway construction project and reimbursed with federal-aid highway program (FAHP) funding.

(b) Administrative qualification. A firm providing engineering and design related services must be administratively qualified under §9.34(b)(2) - (6) of this subchapter (relating to Non-federal [Comprehensive] Process), or use an indirect cost rate applicable under Federal Highway Administration regulations or guidelines, by the closing date of the RFP [Request For Proposal] to compete for contracts under this section. Section 9.34(b)(7) and (8) of this subchapter do not apply to a contract under this section.

(c) Consultant selection team (CST); replacements. Section 9.34(c) and (f) of this subchapter apply to contract procurement under this section.

(d) Request for proposal (RFP). Section 9.34(d) of this subchapter applies to contract procurement under this section. [Not fewer than 14 calendar days before the solicitation closing date, the department will post on a web-based bulletin board an RFP providing the contract information and specifying the requirements for preparing and submitting a proposal.]

(e) Proposal; screening and evaluation. Section 9.34(e) and (g) of this subchapter apply to the contract procurement under this section. [To be considered, a proposal must comply with the requirements specified in the RFP.]

(f) [Proposal screening and evaluation.]

[44] The department may disqualify a proposal if the department has knowledge that a firm on the project team or an employee of a firm on the project team is the subject of a final administrative or judicial determination that the firm or employee has violated a statute or rule of a state licensing entity related to occupational or professional conduct.

[42] If a proposal is not disqualified under paragraph (1) of this subsection, the CST will screen the proposal to determine whether it complies with the requirements specified in the RFP. Each proposal that meets these requirements will be considered responsive to the RFP and evaluated.

[43] The CST will evaluate the responsive proposal according to the evaluation criteria detailed in the RFP based on factors the department has identified as most likely to result in the selection of the most qualified provider.

[44] Short list; evaluation; selection. Section §9.34(h) - (j) of this subchapter apply to the contract procurement under this section.
[The short list will consist of the most qualified providers, as indicated by the proposal scores.]

(1) For single contract selections, the minimum number of short-listed prime providers is three, unless fewer than three prime providers submitted a responsive proposal.

(2) For multiple contract selections, the minimum number of short-listed prime providers is the number of desired contracts plus three, unless fewer than the desired number of prime providers submitted a responsive proposal.

(3) Notification.

(A) The department will notify each prime provider that submitted a proposal whether it was short-listed.

(B) The department will notify each short-listed prime provider whether a short list meeting will be held.

(4) Selection process.

(A) The department will determine whether interviews are required for each solicitation and notify providers of the RFP.

(B) If interviews are required, §9.34 (i) and (j) of this subchapter are applicable for this process.

(C) If no interviews are required, the CST will select the best qualified provider, as indicated by the proposal scores, which will include evaluation of the prime provider’s past performance scores in the department’s evaluation database reflecting less than satisfactory performance. Also, §9.34(j)(2)–(4) of this subchapter are applicable for this process.

(D) An interview is required for any specific deliverable contract that is $1 million or more in value or any indefinite deliverable contract for higher-risk services as determined by the department based on anticipated project costs, number of contracts, or type of services.


(a) Applicability. The emergency contract process described in this section may be used when the executive director certifies in writing that an emergency situation, including a safety hazard, a substantial disruption of the orderly flow of traffic and commerce, or a risk of substantial financial loss to the department, exists, and that an architectural, engineering, or surveying services contract is needed to address the situation.

(b) Administrative qualification. If the emergency contract is an engineering or design related services contract directly related to a highway construction project and reimbursed with federal-aid highway program (FAHP) funding, a provider must be administratively qualified to compete for the contract, and §9.34(b)(2)–(6) of this subchapter (relating to Non-federal [Comprehensive] Process) applies to this section. If the contract is not such a contract, a provider need not be administratively qualified to compete for the contract, and §9.34(b) of this subchapter applies to this section.

(c) Notification.

(1) After an emergency is certified, the department will review its list of precertified firms. If there are a sufficient number of firms, the department will notify at least three of these firms.

(2) The department will inform the firms of the nature of the emergency and will provide the firms with the specifications for the remedy.

(d) Evaluation and selection. The department will evaluate each firm’s qualifications and select the best qualified firm to perform the services.


(a) Applicability. The urgent and critical process described in this section may be used when the executive director certifies in writing that an urgent and critical need exists that cannot otherwise be met, that there is sufficient objective reason to believe that a specific provider is the most qualified to perform these architectural, engineering or survey services based on that provider’s demonstrated competence and qualifications, and that federal funds will not be involved in the contract. An urgent and critical need, is a circumstance that does not rise to the level of an emergency situation as described in §9.38 of this subchapter (relating to Emergency Contract Process), but does expose the department to an undue additional cost, unless promptly addressed could escalate to an emergency situation.

(b) Administrative qualification. Providers under this section are subject to §9.34(b) of this subchapter (relating to Non-federal [Comprehensive] Process).

(c) Process.

(1) After an urgent and critical need has been identified the department will review its list of pre-certified firms and survey available information to identify firms that are most qualified to perform the work needed to resolve the urgent and critical need.

(2) The executive director will determine whether there is sufficient information to determine that one provider is objectively the most qualified to perform this work.

(3) If information is not sufficiently available for the executive director to make this determination, the department may follow the process described in §9.38(c) and (d) of this subchapter to identify the most qualified firm.


(a) Contract negotiations.

(1) A contract that is subject to §9.34 of this subchapter (relating to Non-federal Process) or §9.35 of this subchapter (relating to Federal Process) [§§9.34, 9.35, 9.36, or 9.37 of this subchapter (relating to Comprehensive Process, Federal Process, Streamlined Process, or Accelerated Process, respectively)] will be negotiated in accordance with this subsection.

(2) The department will enter negotiations with a selected prime provider to establish a satisfactory contract containing a fair and reasonable price for the services.

(3) A selected prime provider shall submit to the department the actual salary rates for the proposed team members and the non-salary costs, generated internally, to be billed directly. The department will reference this information in the negotiations.

(4) The department anticipates that a satisfactory contract containing a fair and reasonable price for the services may be negotiated within 30 days after the date that a selected prime provider is notified of the selection. If an RFP [solicitation] specifies that more than one contract will be awarded, the time for negotiating the contracts is automatically extended by a period equal to the number of additional contracts to be awarded under that RFP [solicitation] multiplied by five days. The department may grant additional extensions as required. The RFP [solicitation] may specify a shorter or longer time for the negotiations.

(5) If the department determines that a fair and reasonable price cannot be negotiated, the department will terminate negotiations with the selected prime provider and proceed under this paragraph.

(A) Single contract selection. The department will begin negotiations with the next highest-ranked prime provider. This
process will continue as necessary through the three highest-ranked prime providers. If a fair and reasonable price cannot be negotiated with any of the three highest-ranked prime providers, the proposed contract shall be canceled. If the proposed contract is canceled, it may be re-advertised.

(B) Multiple contract selection. The department will begin negotiations with the next highest-ranked prime provider not selected for a contract. This process will continue as necessary through the short-listed prime providers. If a fair and reasonable price cannot be negotiated with any of the short-listed prime providers, the proposed contract shall be canceled. If the proposed contract is canceled, it may be re-advertised.

(b) Emergency contract negotiations.

(1) Contracts subject to §9.38 of this subchapter (relating to Emergency Contract Process) will be negotiated in accordance with this subsection.

(2) The department will enter negotiations with the selected provider to establish a satisfactory contract containing a fair and reasonable price for the services.

(3) If the department determines that a fair and reasonable price cannot be negotiated, the department will terminate negotiations with the provider and begin negotiations with the next highest-ranked provider. This process will continue as necessary through the notified firms.

(4) If a fair and reasonable price cannot be negotiated with any of the notified firms, the department may take any measure necessary to identify and solicit a firm that is able to perform the services.

(c) Urgent and critical negotiations. The department will negotiate with the selected firm to establish a fair and reasonable price and the executive director will execute any agreement.

(d) Indefinite deliverable work authorization negotiations.

(1) Indefinite deliverable work authorizations will be negotiated in accordance with this subsection.

(2) The department will enter negotiations with a selected prime provider to establish a satisfactory work authorization containing a fair and reasonable price for the services.

(3) If the department determines that a fair and reasonable price cannot be negotiated, the department will terminate negotiations with the prime provider and begin negotiations with another prime provider with an indefinite deliverable contract.


(a) Prime provider's percentage of work. A prime provider shall perform at least 30 percent of the contracted work with its own work force, unless otherwise approved by the department.

(b) Project manager replacement. The prime provider project manager may not be replaced without the prior written consent of the department.

(c) Department audits. The department may perform interim and final audits.

(d) Performance evaluations.

(1) The department project manager will document the prime provider's performance on the contract by evaluating the prime provider project manager and the firm and may include evaluation of the prime provider's employee who is assisting with the management of a work authorization. Evaluations will be conducted at least once every 12 months [during the ongoing contract activity] and at the completion of the contract.

(2) Further evaluations pertaining to project constructability may be conducted during project construction and at the completion of the construction contract.

(3) The department will give a copy of each completed performance evaluation to the prime provider for review and comment. The prime provider's comments will be entered into the department's evaluation database.

(4) Performance evaluation scores will be entered into the department's evaluation database and may be used for the purpose of provider selection.

(e) Negotiated resolution of disputes. To every extent possible, disputes between a prime provider and the department's project manager should be resolved during the course of the contract.

(f) Prime provider performance evaluation dispute review.

(1) If a resolution is not reached with the department's project manager and district engineer or division director, the prime provider may request a review by the PEPS Division Director by submitting a written request for review to the PEPS Division Director not later than 10 days after the date of receipt of a final signed performance evaluation. In the written request, the prime provider must identify the issue or error and provide supporting information.

(2) The PEPS Division Director will gather information, study relevant issues, and meet informally with the prime provider and relevant department staff. The PEPS Division Director may void the performance evaluation, request a re-evaluation or adjustment, or affirm the original performance evaluation. The PEPS Division Director will provide the decision to the prime provider in writing. The PEPS Division Director's decision is final.

(g) Resolution of contracting or compensation disputes. If resolution of a contracting or compensation dispute between the prime provider and department's project manager or district engineer is not reached, the PEPS Division Director may in the director's discretion participate in the resolution of the dispute. The prime provider may file a written claim under §9.2 of this chapter (related to Contract Claim Procedure).

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 July 29, 2021.

TRD-202102929
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Earliest possible date of adoption: September 12, 2021

For further information, please call: (512) 463-8630

43 TAC §9.36, §9.37

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department.
CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

Government Code, Chapter 2254, Subchapter A (Professional Services Procurement Act) and Transportation Code, §223.041.


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 July 29, 2021.
TRD-202102928
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Earliest possible date of adoption: September 12, 2021
For further information, please call: (512) 463-8630