TITLE 16. ECONOMIC REGULATION
PART 2. PUBLIC UTILITY COMMISSION OF TEXAS
CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS
SUBCHAPTER S. WHOLESALE MARKETS

16 TAC §25.502

The Public Utility Commission of Texas (commission) proposes amendments to §25.502, relating to pricing safeguards in markets operated by the Electric Reliability Council of Texas. The proposed amendments will remove provisions related to commission approval of ERCOT protocol amendments related to non-competitive constraints that are no longer needed, and make stylistic updates.

Public Benefits

Ms. Mueller has also determined that for each year of the first five years the proposed section is in effect, the anticipated public benefits expected as a result of the adoption of the proposed rule will be elimination of regulatory approvals that are no longer needed and removal of obsolete provisions. There will be no probable economic cost to persons required to comply with the rule under Texas Government Code §2001.024(a)(5).

Fiscal Impact on Small and Micro-Businesses and Rural Communities

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

Takings Impact Analysis

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

Fiscal Impact on State and Local Government

Paula Mueller, Rules Director, has determined that for the first five-year period the proposed amendments are 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 enacting or administering the sections.

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 Public Utility Commission is expressly excluded under subsection §2001.0045(c)(7).

Growth Impact Statement

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

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

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

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

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

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

(6) the proposed rule will limit an existing regulation by eliminating a requirement for commission approval of ERCOT protocol revisions related to non-competitive constraints;

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

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

Public Hearing

The commission staff will conduct a public hearing on this rulemaking, if requested in accordance with Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on October 22, 2019 at 9:00 a.m. The request for a public hearing must be received within 15 days after publication.

Public Comments

Comments on the proposed amendments may be filed with the commission's filing clerk at 1701 North Congress Avenue, Austin, Texas or mailed to P.O. Box 13326, Austin, Texas 78711-3326, within 15 days after publication. Sixteen copies...
of comments to the proposed amendment are required to be filed by 16 TAC §22.71(c). Comments should be organized in a manner consistent with the organization of the proposed rule. 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 adopt the rule. All comments should refer to project number 49788.

Statutory Authority

This amendment is proposed under §14.002 of the Public Utility Regulatory Act, Tex. Util. Code Ann. (West 2016 and Supp. 2017) (PUR A), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.151 which grants the commission the authority to adopt rules relating to the reliability of the regional electric network and accounting for the production and delivery of electricity among generators and all other market participants.


§25.502. Pricing Safeguards in Markets Operated by the Electric Reliability Council of Texas.

(a) - (c) (No change.)

(d) Control of resources. Each resource entity must [shall] inform ERCOT as to each resource that it controls, and provide proof that is sufficient for ERCOT to verify control. In addition, the resource entity must [shall] notify ERCOT of any change in control of a resource that it controls no later than 14 calendar days prior to the date that the change in control takes effect, or as soon as possible in a situation where the resource entity cannot meet the 14 calendar day notice requirement. For purposes of this section, control means ultimate decision-making authority over how a resource is dispatched and priced, either by virtue of ownership or agreement, and a substantial financial stake in the resource’s profitable operation. If a resource is jointly controlled, the resource entities must [shall] inform ERCOT of any right to use an identified portion of the capacity of the resource. Resources under common control will [shall] be considered affiliated.

(e) RMR resources. Except for the occurrence of a forced outage, a generation entity must [shall] submit to ERCOT in writing a notice of suspension of operation no later than 150 calendar days prior to the suspension date. If a generation resource is to be mothballed on a seasonal basis in accordance with ERCOT protocols, the generation entity must [shall] submit in writing a notice of suspension of operation no later than 90 calendar days prior to the suspension date. ERCOT must [shall] issue a final determination of the need for RMR service within 60 calendar days of ERCOT’s receipt of the notice. If ERCOT determines that the generation resource is not needed for RMR service, the generation entity may suspend operation of the generation resource before the suspension date, subject to ERCOT approval. Unless ERCOT has determined that a generation entity’s generation resource is not required for ERCOT reliability, determined that the resource is needed for reliability but is not a cost-effective solution to the reliability concern, or entered into an MRA service agreement as an alternative to an RMR service agreement, the generation entity must [shall] not terminate its registration of the generation resource with ERCOT unless it has transferred the generation resource to a generation entity that has a current resource-entity agreement with ERCOT and the transferee registers that generation resource with ERCOT at the time of the transfer.

(1) Complaint with the commission. If, by the suspension date, ERCOT has not notified the generation entity that the continued operation of the generation resource is not required for reliability or is not a cost-effective solution to the reliability need, and has not entered into an RMR service agreement with the generation entity for the generation resource or an MRA service agreement as an alternative to an RMR service agreement, then the generation entity may file a complaint with the commission under §22.251 of this title (relating to Review of Electric Reliability Council of Texas (ERCOT) Conduct).

(A) The generation entity will [shall] have the burden of proof.

(B) As required by §22.251(d) of this title, absent a showing of good cause to the commission to justify a later deadline, the generation entity’s deadline to file the complaint is 35 calendar days after the suspension date.

(C) The dispute underlying the complaint is not subject to ERCOT’s alternative dispute resolution procedures.

(D) In its complaint, the generation entity may request interim relief under §22.125 of this title (relating to Interim Relief), an expedited procedural schedule, and identify any special circumstances pertaining to the generation resource at issue.

(E) As required by §22.251(f) of this title, ERCOT must [shall] file a response to the generation entity’s complaint and must [shall] include as part of the response all existing, non-privileged documents that support ERCOT’s position on the issues identified by the generation entity as required by §22.251(d)(1)(C) of this title.

(F) The scope of the complaint may include the need for the RMR service; the reasonable compensation and other terms for the RMR service; the length of the RMR service, including any appropriate RMR exit options; and any other issue pertaining to the RMR service.

(G) Any compensation ordered by the commission will [shall] be effective the first calendar day after the suspension date. If there is a pre-existing RMR service agreement concerning the generation resource, the compensation ordered by the commission will [shall] not become effective until the termination of the pre-existing agreement, unless the commission finds that the pre-existing RMR service agreement is not in the public interest.

(H) If the generation entity does not file a complaint with the commission, the generation entity will [shall] be deemed to have accepted ERCOT’s most-recent offer as of the suspension date.

(2) Out-of-merit-order dispatch. The generation entity must [shall] maintain the generation resource so that it is available for out-of-merit-order dispatch instruction by ERCOT until:

(A) ERCOT determines that the generation resource is not required for ERCOT reliability;

(B) any RMR service agreement takes effect;

(C) the commission determines that the generation resource is not required for ERCOT reliability; or

(D) a commission order requiring the generation entity to provide RMR service takes effect.

(3) (No change.)

(4) (No change.)

(5) Approval of RMR and MRA service agreements. All recommendations by ERCOT staff to enter into an RMR or MRA service agreement will [shall] be subject to approval by the ERCOT governing board. If ERCOT identifies a reliability need for RMR or MRA service but recommends against entering into an RMR or MRA service agreement, ERCOT staff’s recommendation will [shall] be subject
to approval by the ERCOT governing board. In its request for governing board approval, ERCOT staff must [shall] present information that justifies its recommendation.

(6) Refund of payments for capital expenditures. A resource entity that owns or controls a resource providing RMR or MRA service must [shall] refund payments for capital expenditures made by ERCOT in connection with the RMR or MRA service agreement if the resource participates in the energy or ancillary service markets at any time following the termination of the agreement. ERCOT may require less than the entire original amount of capital expenditures to be refunded to reflect the depreciation of capital over time.

(7) Implementation. ERCOT, through its stakeholder process, must [shall] establish protocols and procedures to implement this subsection.

(f) Noncompetitive constraints. ERCOT, through its stakeholder process, must [shall] develop [and submit for commission oversight and review] protocols to mitigate the price effects of congestion on noncompetitive constraints.

1. The protocols must [shall] specify a method by which noncompetitive constraints may be distinguished from competitive constraints.

2. Competitive constraints and noncompetitive constraints must [shall] be designated annually prior to the corresponding auction of annual congestion revenue rights. A constraint may be redesignated on an interim basis.

3. The protocols must [shall] be designed to ensure that a noncompetitive constraint will not be treated as a competitive constraint.

4. The protocols shall not take effect until after the commission has exercised its oversight and review authority over these protocols as part of the implementation of the requirements of §25.501 of this title, (relating to Wholesale Market Design for the Electric Reliability Council of Texas) so that these protocols shall take effect as part of the wholesale market design required by that section. Any subsequent amendment to these protocols shall also be submitted to the commission for oversight and review, and shall not take effect unless ordered by the commission.

5. ERCOT, through its stakeholder process, may adopt protocols that categorize all constraints as noncompetitive constraints. Protocols adopted pursuant to this paragraph shall terminate no later than the 45th day after ERCOT begins to use nodal energy prices for resources pursuant to §25.501(f) of this title. Protocols adopted pursuant to this paragraph need not be submitted to the commission for oversight and review prior to taking effect.]

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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Theresa Walker
Assistant Rules Coordinator
Public Utility Commission of Texas
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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 65. BOILERS

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 65, Subchapter A, §65.2, Subchapter C, §65.12, and Subchapter I, §65.64, regarding the Boilers Program. These proposed changes are referred to herein as "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC Chapter 65 implement Texas Health and Safety Code, Chapter 755, Boilers.

The proposed rules implement §6.002 of House Bill (HB) 2847, Article 6, 86th Legislature, Regular Session (2019), which amends Health and Safety Code §755.029(c), removing the requirement to post boiler certificates of operation under glass. The proposed rules also add four new definitions and specify conditions under which boiler operators may obtain extensions of the interval between internal boiler inspections. The proposed rules are necessary to implement the statutory change and to provide clarity and certainty to boiler operators to plan the frequency of internal inspections. Health and Safety Code §755.026 provides for the availability of extensions and the proposed rules supply additional specific conditions under which the Department may approve the extensions.

A task group was convened to examine and deliberate the criteria under which the Department may approve extension requests. The task group met on May 22, 2018, and created amendments to the extensions rule and related definitions. The Board of Boiler Rules (Board) discussed the rule and voted to propose it at its July 13 meeting, and it was published for public comment on October 5, 2018. Following the public comment period and the receipt of written and oral comments, the Board at its December 5, 2018, meeting deliberated and recommended that the rule be returned to the task group for further review and revision. The proposed rules are a product of that review and reconsideration by the task group, staff, and stakeholders.

The proposed rules were presented to the Board at its August 18, 2019, meeting. The Board discussed the proposed rules and voted to recommend that the proposed rules without changes be published in the Texas Register for public comment.

SECTION-BY-SECTION SUMMARY

The proposed amendments to §65.2 add definitions for "continuous water treatment," "operation," "out of service," and "standby" and relate to the amendments proposed to §65.64. The section is also renumbered accordingly.

The proposed amendment to §65.12 removes the obligation to post a boiler’s certificate of operation under glass, to implement the HB 2847 statutory change.

The proposed amendments to §65.64 clarify the requirements for extension of the interval between internal inspections, and simplify the language used in the section.

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

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rules will not affect any 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 rules are in effect, the public benefit will be increased safety of boiler operation in Texas. The proposed amendments provide clarification of the conditions under which operating extensions will and will not be approved. An extension request for a boiler that does not meet the stated conditions will result in the need for a comprehensive internal inspection of the boiler before it may resume operating.

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there may be a reduction in costs (savings) to persons who are required to comply with the proposed rules. Boiler operators will benefit from increased certainty as to the conditions under which they may obtain extensions and therefore some operators may succeed in increasing the interval between required, costly inspections by planning to satisfy these criteria. Further, the removal of the requirement to post boiler certificates of operation under glass eliminates a minor cost for operators going forward.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules.

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

There will be no adverse effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. Because 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 rules do 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 rules do not create or eliminate a government program.
2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.
3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.
4. The proposed rules do not require an increase or decrease in fees paid to the agency.
5. The proposed rules do not create a new regulation.
6. The proposed rules expand an existing regulation and limit another existing regulation. The removal of the requirement to post boiler certificates under glass limits §65.12, and the addition of conditions and criteria for extensions in §65.64 expands the rule, but does not expand its scope or applicability.
7. The proposed rules do not increase or decrease the number of individuals subject to the rule’s applicability.
8. The proposed rules do not positively or adversely affect this state’s economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENTS

Comments on the proposed rules may be submitted to Dalma Sotero, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78771, or facsimile (512) 475-3032, or electronically: erule.comments@tdlr.texas.gov. The deadline for comments is 30 days after publication in the Texas Register.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §65.2

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code Chapter 51 and Texas Health and Safety Code Chapter 755, 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 rules are those set forth in Texas Occupations Code Chapter 51 and Texas Health and Safety Code Chapter 755. No other statutes, articles, or codes are affected by the proposed rules.

§65.2. Definitions.

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

(1) - (19) (No change.)

(20) Continuous water treatment--A verifiable program that controls and limits corrosion and deposits in a boiler.
(21) [20] Department--Texas Department of Licensing and Regulation.

(22) [21] Deputy Inspector--An inspector appointed by the executive director.

(23) [22] Disconnected Boiler--A boiler in which all fuel, water, steam and electricity are removed from any connection on the boiler. These connections shall provide an isolated gap and the source shall be safely isolated to prevent potential leaks or electrical hazards.

(24) [23] Electric Boiler--A boiler in which the source of heat is electricity, such as an electrode type boiler and an immersion resistance element type boiler.

(25) [24] Electrode Type Boiler--An electric boiler in which heat is generated by the passage of electric current using water as the conductor.

(26) [25] Executive Director--The executive director of the department.

(27) [26] External Inspection--An inspection of the exterior of a boiler and its appurtenances that is made, if possible, while the boiler is in operation.

(28) [27] Heat Recovery Steam Generator (HRSG)--A boiler which produces steam where its principle source of thermal energy is a hot gas stream having high ramp rates, such as the exhaust of a gas turbine.

(29) [28] Heating Boiler--A steam heating boiler, hot water heating boiler, hot water supply boiler, or portable water heater that is directly fired with oil, gas, solar energy, electricity, coal, or other solid or liquid fuel.

(30) [29] High-Temperature Water Boiler--A water boiler designed for operation at pressures exceeding 160 pounds per square inch gage (1100 kilopascals) or temperatures exceeding 250 degrees Fahrenheit (121 degrees Celsius).

(31) [30] Hot Water Heating Boiler--A boiler designed for operation at a pressure not exceeding 160 pounds per square inch gage (1100 kilopascals) or temperatures not exceeding 250 degrees Fahrenheit (121 degrees Celsius) at or near the boiler outlet.

(32) [31] Hot Water Supply Boiler--A boiler designed for operation at pressures not exceeding 160 pounds per square inch gage (1100 kilopascals) or temperatures not exceeding 250 degrees Fahrenheit (121 degrees Celsius) at or near the boiler outlet if the boiler's heat input exceeds 200,000 British thermal units per hour (58.6 kilowatts); water temperature exceeds 210 degrees Fahrenheit (99 degrees Celsius); or nominal water-containing capacity exceeds 120 gallons (454 Liters).

(33) [32] Immersion Resistance Element Type Boiler--An electric boiler in which heat is generated by the passage of an electric current through a resistance heating element immersed in water.

(34) [33] Inspection Agency--An authorized inspection agency providing inspection services.

(35) [34] Inspector--The chief inspector, a deputy inspector, or an authorized inspector.

(36) [35] Install--To place, position or fit into position and then to connect, change or modify in such a manner as to bring the boiler into service.

(37) [36] Installation--The act of installing a boiler or associated equipment.

(38) [37] Internal inspection--A complete and thorough inspection of the interior waterside and fireside areas of a boiler as construction allows.

(39) [38] Maximum Allowable Working Pressure (MAWP)--The greatest pressure at which a boiler is designed to operate.

(40) [39] Metric (SI)--An international system of measurement.

(41) [40] Metrication--The process of converting between US customary units and metric (SI) units.

(42) [41] Modular Boiler--A steam or hot water heating assembly consisting of a group of individual boilers called modules, intended to be installed as a unit, with a single inlet and single outlet. Modules may be under one jacket or may be individually jacketed.

(43) [42] Multiple Pressure Steam Generator--A boiler consisting of several sections of heat exchange surface designed for different pressure levels.

(44) [43] National Board--The National Board of Boiler and Pressure Vessel Inspectors.

(45) [44] National Board Inspection Code--The manual for boiler and pressure vessel inspectors published by the National Board.

(46) [45] Nominal--The accepted ASME standard used to designate a size or capacity of an item.

(47) [46] Non-Code Boiler--A complete boiler not constructed to the appropriate ASME Code.

(48) [47] Nonstandard Boiler--A boiler that does not qualify as a standard boiler.

(49) [48] Nuclear Boiler--A nuclear power plant system, including its pressure vessels, piping systems, pumps, valves, and storage tanks that produces and controls an output of thermal energy from nuclear fuel and the associated systems essential to the function of the power system.

(50) [49] Operation--A boiler is in operation when the energy source is being applied to the boiler.

(51) [50] Out of Service--A boiler is out of service when it is not in operation and it is not designated as in standby.

(52) [51] Owner or Operator--Any person, firm, or corporation owning or operating boilers within the State of Texas.

(53) [52] Person--An individual, corporation, partnership, association or other legal entity.

(54) [53] Pool Heater--A hot water supply boiler or a portable water heater designed to provide hot water to a pool.

(55) [54] Portable Boiler--A boiler primarily intended for use at a temporary location.

(56) [55] Potable Water Heater--A boiler designed for operation at pressures not exceeding 160 pounds per square inch gage (1100 kilopascals) and water temperatures not exceeding 210 degrees Fahrenheit (99 degrees Celsius) if the boiler's heat input exceeds 200,000 British thermal units per hour (58.6 kilowatts) or nominal water-containing capacity exceeds 120 gallons (454 Liters).

(57) [56] Power Boiler--A high-temperature water boiler or a boiler in which steam is generated at a pressure exceeding 15 pounds per square inch gage (103 kilopascals) for a purpose external to the boiler.
(58) Preliminary order—A written order issued by the chief inspector or any commissioned boiler inspector to require repairs or alterations to render a boiler safe for use or to require that operation of the boiler be discontinued. The Boiler Inspection report which requires repairs to be made or the boiler operation to be ceased which is signed by the chief inspector or a commissioned boiler inspector is a Preliminary Order.

(59) Process Steam Generator--An evaporator, heat exchanger, or vessel in which steam is generated by the use of heat resulting from the operation of a processing system that contains a number of pressure vessels, such as used in the manufacture of chemical and petroleum products.

(60) Reinstalled Boiler--A boiler removed from its original setting and reinstalled at the same location or at a new location without change of ownership.

(61) Repair--The work necessary to restore pressure-retaining items to a safe and satisfactory operating condition.

(62) Rules--The rules promulgated and enforced by the commission in accordance with Texas Health and Safety Code, §755.032 and Texas Occupations Code, Chapter 51.

(63) Safety Appliance--A safety device such as a safety valve or a pressure relief valve for a boiler provided to diminish the danger of accidents.

(64) Secondhand Boiler--A boiler in which the location and ownership have changed.

(65) Serious Accident--An explosion resulting in any degree of distortion to the wall of the boiler or related equipment or damage to the building where the boiler is located. Or, emergency medical services are dispatched to the location of a boiler accident in which one or more persons require on-site medical services, transport to a medical facility or the accident results in a fatality.

(66) Special Inspection--An inspection by the chief inspector or deputy inspector other than those in Texas Health and Safety Code, §§755.025 - 755.027.

(67) Stacked Boiler--A design in which one boiler is placed onto a rack above another boiler, as designed by the boiler manufacturer with a rack nameplate, and as approved by the department.

(68) Standard Boiler--A boiler that bears the stamp of a nationally recognized engineering professional society, or the stamp of any jurisdiction that has adopted a standard of construction equivalent to the standard required by the executive director.

(69) Standby--A boiler is in standby when the owner or operator has designated it as in standby and it is in operation at low fire or it is designated as in standby and can be placed into operation within a maximum of 48 hours' notice.

(70) Steam Heating Boiler--A boiler designed for operation at pressures not exceeding 15 pounds per square inch gage (103 kilopascals).

(71) System Pressure--The pressure of the boiler system, which is governed by the highest safety valve or pressure relief valve set pressure as allowed by ASME Code and this chapter.

(72) Texas Commission--Authorization to inspect boilers and enforce Texas Health and Safety Code, Chapter 755, and 16 Texas Administrative Code, Chapter 65, on behalf of the department.

A. ASME Only Commission--Only authorizes an inspector to conduct ASME new construction activities.

B. In-Service Only Commission--Only authorizes an inspector to conduct boiler in-service activities.

C. ASME and In-Service Commission--Authorizes an inspector to conduct both activities in subparagraphs (A) and (B).

(73) Unfired Steam Boiler--An unfired pressure vessel in which steam is generated. The term does not include: vessels known as evaporators or heat exchangers; or vessels in which steam is generated by using the heat that results from the operation of a processing system that contains a number of pressure vessels, as used in the manufacture of chemical and petroleum products.

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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Brad Bowman
General Counsel
Texas Department of Licensing and Regulation

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For further information, please call: (512) 463-3306

SUBCHAPTER C. BOILER REGISTRATION AND CERTIFICATE OF OPERATION--REQUIREMENTS

16 TAC §65.12

The proposed rules are proposed under Texas Occupations Code Chapter 51 and Texas Health and Safety Code Chapter 755, 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 rules are those set forth in Texas Occupations Code Chapter 51 and Texas Health and Safety Code Chapter 755. No other statutes, articles, or codes are affected by the proposed rules.

§65.12. Boiler Registration and Certificate of Operation Required. Except as provided by this chapter, each boiler operated in this state must:

1. be registered with the department; and

2. have qualified for a current certificate of operation with the current certificate of operation posted [under glass] in a conspicuous place on or near the boiler for which it is issued.

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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Brad Bowman
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SUBCHAPTER I. INSPECTION OF BOILERS

16 TAC §65.64

The proposed rules are proposed under Texas Occupations Code Chapter 51 and Texas Health and Safety Code Chapter 755, 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 rules are those set forth in Texas Occupations Code Chapter 51 and Texas Health and Safety Code Chapter 755. No other statutes, articles, or codes are affected by the proposed rules.

§65.64. Extension of Interval between Internal Inspections.

(a) To extend the interval between internal inspections [for the interval between internal inspection to be extended] as provided for in Texas Health and Safety Code, §755.026, the following procedure must be followed.

(1) Before the expiration date of the current certificate of operation, the owner or operator shall submit to the department a request for extension for each boiler, including the following: [Not less than thirty (30) days and not more than sixty (60) days prior to the expiration date of the current certificate of operation, the owner or operator shall submit to the department a request for each boiler, stating the desired length of extension, which will be no more than one (1) year from the expiration date of the current certificate of operation, the date of the last internal inspection, and a statement certifying that records are available showing compliance with Texas Health and Safety Code, §755.026, and pay the required fees.]

(A) the desired length of extension for a time period no more than one (1) year following the expiration date of the current certificate of operation; and

(B) the date of the last internal inspection.

(2) Records shall be available demonstrating compliance with Texas Health and Safety Code, §755.026 and this section for review by the Authorized Inspector and the department upon request.

(3) [20] The department shall notify the owner or operator and the inspection agency having jurisdiction of the maximum extension period that may be approved.

(4) [30] Before [Prior to] the expiration of the current certificate of operation, the inspection agency shall review all relevant records and make an external inspection. The inspection agency shall submit the inspection report in accordance with Texas Health and Safety Code, §755.027, [and submit the external inspection report to the department.]

(5) [40] Upon completion of the requirements in paragraphs (1) - (4) [30] and payment of all required fees, a new certificate of operation may be issued for the extended period of operation.

(6) [50] Violations noted during the external inspection may be cause for denial of the extension request.

(7) [60] If the department denies an extension request, the boiler shall be internally inspected before [prior to] the expiration of the certificate of operation[, unless authorized in writing to continue operation until an internal inspection can be conducted].

(b) The interval between internal inspections may be extended if, at all times since the last internal inspection, continuous water treatment has been maintained and any of the following apply:

(1) the boiler was in operation;

(2) the boiler was in standby;

(A) Continuous water treatment is not required during the time that a boiler is designated as in standby and can be placed into operation within a maximum of 48 hours notice.

(B) Continuous water treatment is required during the time that a boiler is designated as in standby and is in operation at low fire.

(3) the boiler was out of service for repairs for periods not exceeding 10 consecutive days, or

(4) the boiler was out of service for repairs for any periods exceeding 10 consecutive days and the owner or operator had:

(A) notified the department and the authorized inspection agency in a manner prescribed by the department and in accordance with subsection (c) that the period of time out of service was expected to exceed 10 consecutive days; and

(B) requested from the department and obtained written confirmation from the department that eligibility for extension of the interval between internal inspections would be maintained despite the period of time that the boiler was out of service.

(c) The notification required in subsection (b)(4)(A):

(1) shall be made by the owner or the owner's agent.

(2) shall be made on the earlier of:

(A) the date on which the owner or operator becomes aware that the period of time out of service will exceed 10 consecutive days; or

(B) the date on which the boiler has been out of service for 10 consecutive days.

(d) A request for extension of the interval between internal inspections may be denied for failure to comply with any applicable provision of the Texas Health and Safety Code, Chapter 755, or this chapter.

(e) [10] An additional extension for up to one hundred twenty (120) days may be allowed as provided for in Texas Health and Safety Code, §755.026, when it is established an emergency exists.

(1) Before [Prior to] the expiration date of the current certificate of operation, the owner or operator shall submit to the department, in the manner prescribed by the department, a request stating an emergency exists with an explanation of the emergency and the date of the last internal inspection. The request shall be submitted along with the inspection agency's external inspection report, confirming compliance with Texas Health and Safety Code, §755.026.

(2) The department shall notify the owner or operator and the inspection agency having jurisdiction of the maximum extension period that may be approved.

(3) Upon completion of the requirements in paragraphs (1) and (2) and payment of all required fees, a new certificate of operation may be issued for the extended period of operation.
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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Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-3306

TITLE 22. EXAMINING BOARDS
PART 9. TEXAS MEDICAL BOARD
CHAPTER 161. GENERAL PROVISIONS

The Texas Medical Board (Board) proposes amendments to §§161.1 - 161.6. The Board proposes repeal of §§161.8, 161.9, 161.11 - 161.13.

The Board conducted a rule review and determined the rule is still necessary. The Board further determined that the amendments and deletions were necessary to accurately reflect the operations of the board and eliminate obsolete committees and their related functions.

The amendment to §161.1, relating to Introduction, adds language to recognize and include all advisory board and committees under TMB authority. The proposed amendment also deletes unnecessary repetitive statutory language.

The amendment to §161.2, relating to Purpose and Functions, adds language to recognize and include all advisory board and committees under TMB authority, and the role of the board in determining qualifications and eligibility criteria for certain licenses and permits.

The amendment to §161.3, relating to Organization and Structure, deletes unnecessary repetitive statutory language. The proposed amendment simplifies rules relating to standards of eligibility, conduct, and potential grounds for removal of board members.

The amendment to §161.4, relating to Officers of the Board, removes an incorrect word.

The amendment to §161.5, relating to Meetings, deletes reference to certain committees that are disbanded, obsolete or unnecessary.

The amendment to §161.6, relating to Committees of the Board, deletes unnecessary repetitive statutory language.

The repeal of §161.8, relating to Chief of Staff, deletes unnecessary repetitive statutory language.

The repeal of §161.9, relating to Medical Director, deletes unnecessary repetitive statutory language.

The repeal of §161.11, relating to Rule Changes, deletes unnecessary repetitive statutory language.

The repeal of §161.12, relating to Compliance with Non-Discrimination Laws, deletes unnecessary repetitive statutory language.

The repeal of §161.13, relating to General Considerations, deletes unnecessary repetitive statutory language.

The public benefit anticipated as a result of these amendments is to simplify and clarify the functions and operations of the board that are not otherwise clearly set out in statute. This increases public ability to understand the functions and duties of the board.

Scott Freshour, General Counsel for the Texas Medical Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing this proposal will be to simplify and clarify the functions and operations of the board that are not otherwise clearly set out in statute. This increases public ability to understand the functions and duties of the board.

Mr. Freshour has determined that for the first five-year period these rule amendments are in effect, there will be no effect to individuals required to comply with these rules as proposed. There will be no effect on small businesses, micro businesses, or rural communities.

Pursuant to Texas Government Code §2006.002, the agency provides the following economic impact statement for the proposed rule amendments and has determined that for each year of the first five years the proposed 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 rule amendments and found none.

Pursuant to Texas Government Code §2001.024(a)(4), Mr. Freshour certifies that the agency has determined that for each year of the first five years these rule amendments, as proposed, 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 rules;
2. there are no estimated reductions in costs to the state or to local governments as a result of enforcing or administering the rules;
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 rules;
4. there are no foreseeable implications relating to cost or revenues of the state or local governments with regard to enforcing or administering the rules;

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 amendments will be in effect, Mr. Freshour has determined the following:

1. The proposed rules do not create or eliminate a government program.
2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.
3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.
4. The proposed rules do not require an increase or decrease in fees paid to the agency.
§161.1. Introduction.

(a) The Texas Medical Board, referred to as the "Board" or the "Medical Board", is an agency of the executive branch of state government statutorily empowered to regulate the practice of medicine in Texas. [Any reference in these rules to the former Texas State Board of Medical Examiners means the Texas Medical Board. The Medical Board also] The Board also provides oversight and support for several advisory boards and advisory committees. [the Texas Physician Assistant Board, referred to as the "Physician Assistant Board," the Texas State Board of Acupuncture Examiners, referred to as the "Acupuncture Board."]

(b) The Board may adopt rules as necessary to govern its own proceedings, perform its duties, regulate the practice of medicine in Texas, and enforce applicable law.

(c) The Board may act under its statute and rules through the Executive Director, Executive Committee, or another committee of the Board.

§161.2. Purpose and Functions.

(a) The purpose of the Board is to protect the public's safety and welfare through the regulation of the practice of medicine. [The Board fulfilling purposes primarily through the licensure and discipline of physicians and other allied health care providers as mandated by law.]

(b) The Board's functions include but are not limited to the following:

1. Establish standards for the practice of medicine by physicians.

2. Regulate the practice of medicine through the licensure and discipline of physicians.

3. Provide oversight of the several advisory boards and advisory committees. [Texas Physician Assistant Board and the Texas State Board of Acupuncture Examiners as specified by law.]

4. Interpret the Medical Practice Act and applicable sections of the Acts, [Physician Assistant Licensing Act, the Acupuncture Act, the Surgical Assistant Act] and [the Board] Rules [to physicians, physician assistants, acupuncturists, surgical assistants], of the several advisory boards and advisory committees subject to Medical Board oversight. [and the public to ensure informed professionals, allied health professionals, and consumers.]

5. Receive complaints and investigate possible violations of the Medical Practice Act and the Board Rules.

6. Discipline violators through appropriate legal action to enforce the Medical Practice Act and the Board Rules.

7. Provide a mechanism for public comment with regard to the Board Rules and the Medical Practice Act and the Surgical Assistant Act.

7. Review and modify the Board Rules when necessary and appropriate.

§161.3. Organization and Structure.

(a) The board shall consist of 19 members appointed by the Governor with the advice and consent of the Senate.

(b) The board shall consist of the following composition: nine physicians with a degree of doctor of medicine (M.D.) and licensed to practice medicine in Texas for at least three years; three physicians with a degree of doctor of osteopathic medicine (D.O.) and licensed to practice medicine in Texas for three years; and seven members who represent the public.

(c) The terms of board members shall be six years in length and shall be staggered so that the terms of not more than one-third of the members shall expire in a single calendar year. Upon completion of a term, a member shall continue to serve until a successor has been appointed. A member may be reappointed to successive terms as permitted by law at the discretion of the Governor.

(a) [46] Each board member shall meet and maintain the qualifications for board membership and execute their duties as set by law.

(b) A board member should strive to achieve and project the highest standards of professional conduct. Such standards include:

1. A board member should not accept or solicit any benefit that might influence the board member in the discharge of official duties or that the board member knows or should know is being offered with the intent to influence official conduct.

2. A board member should not accept employment or engage in any business or professional activity that would involve the disclosure of confidential information acquired by reason of the official position as a board member.

3. A board member should not accept employment that could impair independence of judgment in the performance of the board member's official duties.

4. A board member should not make personal investments that could reasonably be expected to create a conflict between the board member's private interest and the public interest.

5. A board member should not intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the board member's official powers or performed the board member's official duties in favor of another.
A board member should be fair and impartial in the conduct of the business of the board. A board member should project such fairness and impartiality in any meeting or hearing.

A board member should be diligent in preparing for meetings and hearings.

A board member should avoid conflicts of interests. If a conflict of interest should unintentionally occur, the board member should recuse himself or herself from participating in any matter before the board that could be affected by the conflict.

A board member should avoid the use the board member's official position to imply professional superiority or competence.

A board member should avoid the use of the board member's official position as an endorsement in any health care related matter.

Board member appearances.

(A) A board member should not appear as an expert witness in any case in which a licensee of the board is a party and in which the expert testimony relates to standard of care or professional malpractice. A board member may provide expert testimony if the board member has been called primarily as a fact witness. A board member should disclose any potential employment as an expert witness to and seek prior approval of the board's executive committee. When providing expert testimony in any matter, a board member should state that any opinion of the board member is not on behalf of or approved by the board and should not claim special expertise because of board membership.

(B) A board member shall not appear in any administrative proceeding involving the exercise of the board's licensing or disciplinary authority before the board or the State Office of Administrative Hearings in which proceeding a licensee of the board is a party. A board member may furnish a written statement for a licensee to use in such administrative proceedings only if:

(i) the board member sought and received in writing the prior approval of the board's executive committee;

(ii) the written statement of the board member used by a licensee presents only facts that the board member has personally witnessed and does not offer or provide any statement as to character of the licensee or characterization of the events witnessed; and

(iii) the written statement plainly states that the recitation of the witnessed facts is not an indication of in any manner that the board concurs with, agrees to, or supports those facts or the board member in his or her action.

(1) For purposes of Section 152.006(a)(5), a [A board member is absent from more than half of the regularly scheduled board meetings that the member is eligible to attend during a calendar year without an excuse approved by a majority vote of the board. A] board member shall be considered to have been absent from a regularly scheduled board meeting if the member fails to attend at least a portion of either a full board session or a portion of a regularly scheduled committee meeting to which a member is assigned during such board meeting. Any dispute or controversy as to whether or not an absence has occurred shall be submitted to the full board for resolution by a majority vote after giving the purported absentee the opportunity to present information concerning the alleged absences and after allowing discussion by other members of the board.

(2) A board member who is subject of a non-disciplinary or disciplinary action, including but not limited to any remedial plan, board order, or administrative penalty, regardless of the nature of the violation(s) that led to the remedial plan, board order, or administrative penalty.

[(c) The validity of an action of the board is not affected by the fact that the action is taken when a ground for potential removal of a board member exists.]

(d)(ii) Each member of the board shall receive per diem as provided by law for each day that the member engages in the business of the board and will be reimbursed for travel expenses incurred in accordance with the state of Texas and board's travel policies.

§161.4. Officers of the Board.

(a) The Governor shall designate a member of the board to serve as the president of the board.

(b) The board shall elect officers from among its members to serve as the vice president and the secretary-treasurer for a term not to extend longer than two years. The election of officers shall be held at least every other year at a regular meeting of the board.

(c) All elections and any other issues requiring a vote of the board shall be decided by a simple majority of the members present and voting.

(d) If more than two candidates are nominated for an office, and no candidate receives a majority on the first ballot, a second ballot will be conducted between the two candidates receiving the highest number of votes.

(e) Duties of the officers.

(1) The duties of the president shall include the following:

(A) approve the agenda for each board meeting;

(B) preside at all meetings of the board;

(C) represent the board in legislative matters and in meetings with related groups;

(D) appoint the members to serve on the standing, ad hoc, and advisory committees of the board;

(E) appoint the chair of each board committee;

(F) perform or designate a member or members of the board to coordinate the annual performance review of the executive director; and[—]

(G) perform such other duties as pertain to the office of the president, [and]

(2) The duties of the vice president shall include the fol-
(A) function as president in the absence or incapacity of the president;
(B) serve as president if the office of president becomes vacant until another member is named by the Governor; and
(C) perform such other duties that are from time to time assigned by the board.

3. The duties of the secretary-treasurer shall include the following:
(A) function as president in the absence or incapacity of both the president and vice president;
(B) serve as president if both the offices of president and vice president becomes vacant until another member is elected by the board or named by the Governor; and
(C) perform such other duties as set out by law or such other duties that are from time to time assigned by the board.

(f) In the event of the absence or incapacity of the president, vice president, and secretary-treasurer, the board may elect another person to act as presiding officer of a board meeting or may elect an interim acting president for the duration of the absence or incapacity of the officers.

(g) After the death, resignation, or permanent incapacity of any elected officer, the board shall hold an election to fill the vacant officer position. If any elected officer is elected to another position at these elections, that officer's vacant position shall be filled by election to be held following the creation of the new vacancy.

§161.5. Meetings.
(a) [The board shall meet at least four times a year. It shall consider such matters as may be necessary.]

(a) [lb] Special meetings shall be called by the president or by resolution of the board or upon written request signed by five members of the board.

[c] An agenda for each board meeting and committee meeting shall be posted in accordance with law and copies shall be sent to the board members.

(b) [ld] Board and committee meetings shall be conducted pursuant to the provisions of Robert's Rules of Order Newly Revised unless the board by rule adopts a different procedure.

[e] A quorum for transaction of business by the board shall be one more than half the board's membership at the time of the meeting.

(c) [lf] The board may act only by majority vote of its members present and voting, with each member entitled to one vote. No proxy vote shall be allowed.

[g] Meetings of the board and of the committees are open to the public unless such meetings are conducted in executive session pursuant to state law.

(d) [lh] In order that board and committee meetings may be conducted safely, efficiently, and with decorum, attendees may not engage in disruptive activity that interferes with board proceedings.

(e) [li] Members of the public shall remain within those areas of the board offices and board meeting room designated as open to the public.

(f) [lj] Members of the public shall not address or question board members during meetings unless recognized by the board's presiding officer pursuant to a published agenda item.

(gj) [lk] Journalists have the same right of access to board meetings conducted in open session as other members of the public and are subject to the same requirements.

(h) [lj] The board's presiding officer may exclude from a meeting any person who, after being duly warned, persists in disruptive activity that interferes with board proceedings.

(i) [[mi] Any person may record all or any part of the proceedings of a public board meeting in attendance by means of a tape recorder, video camera, or any other means of sonic or visual reproduction.

1. The executive director shall direct any individual wishing to record or videotape as to equipment location, placement, and the manner in which the recording is conducted.

2. The decision will be made so as not to disrupt the normal order and business of the board.

(n) Executive Session.

[1] The board may meet in executive session pursuant to law.

[2] An executive session of the board shall not be held unless a quorum of the board has first been convened in open meeting. If during such open meeting, a motion is passed by the board to hold an executive session, the presiding officer shall publicly announce that an executive session will be held.

[3] The presiding officer of the board shall announce the date and time at the beginning and end of the executive session.


[o] Committee minutes shall be approved by the full board with a quorum of the committee members present to vote on approval of the minutes.

§161.6. Committees of the Board.

(a) Each board committee shall be composed of board members appointed by the president of the board and shall include at least one physician member who holds the degree of doctor of osteopathic medicine and one public member.

(b) The following are standing and permanent committees of the board. The responsibilities and authority of these committees shall include the following duties and powers, and other responsibilities and charges that the board may from time to time delegate to these committees.

1. Disciplinary Process Review Committee:

(A) oversee the disciplinary process and give guidance to the board and board staff regarding means to improve the disciplinary process and more effectively enforce the Medical Practice Act and board rules;

(B) monitor the effectiveness, appropriateness and timeliness of the disciplinary process and enforcement of the Medical Practice Act and board rules;

(C) make recommendations regarding resolution and disposition of specific cases and approve, adopt, modify, or reject recommendations from board staff or board representatives regarding actions to be taken on pending cases;

(D) approve dismissals of complaints and closure of investigations; and
(E) make recommendations to the board staff and the board regarding policies, priorities, budget, and any other matters related to the disciplinary process and enforcement of the Medical Practice Act and board rules.

(2) Executive Committee:
   (A) ensure records are maintained of all committee actions;
   (B) delegate tasks to other committees;
   (C) take action on matters of urgency that may arise between board meetings;
   (D) assist in the presentation of information concerning the board and the regulation of the practice of medicine to the Legislature and other state officials;
   (E) review staff reports regarding finances and the budget;
   (F) formulate and make recommendations to the board concerning future board goals and objectives and the establishment of priorities and methods for their accomplishment;
   (G) study and make recommendations to the board regarding the roles and responsibilities of the board offices and committees;
   (H) study and make recommendations to the board regarding ways to improve the efficiency and effectiveness of the administration of the board;
   (I) study and make recommendations to the board regarding board rules or any area of a board function that, in the judgment of the committee, needs consideration; and
   (J) make recommendations to the board regarding matters brought to the attention of the executive committee.

(3) Finance Committee:
   (A) review staff reports regarding finances and the budget;
   (B) assist in the presentation of budget needs to the Legislature and other state officials;
   (C) recommend proper fees for the agency to charge; and
   (D) consider and make recommendations to the board regarding any aspect of board finances.

(4) Legislative Committee:
   [(A) review and make recommendations to the board regarding proposed legislative changes concerning the Medical Practice Act and the regulation of medicine;]
   [(B) establish communication with members of the Legislature, trade associations, consumer groups, and related groups;]
   [(C) assist in the organization, preparation, and delivery of information and testimony to members and committees of the Legislature; and]
   [(D) make recommendations to the board regarding matters brought to the attention of the legislative committee;]

(5) Licensure Committee:
   (A) review applications for licensure and permits, make determinations of eligibility and report to the board its recommendations as provided by the Medical Practice Act and board rules;
   (B) review board rules regarding licensure and make recommendations to the board regarding changes or implementation of such rules;
   (C) evaluate each examination accepted by the board and develop each examination administered by the board;
   (D) investigate and report to the board any problems in the administration of examinations and recommend and implement ways of correcting identified problems;
   (E) make recommendations to the board regarding postgraduate training permits and issues concerning physicians in training;
   (F) maintain communication with Texas medical schools;
   (G) develop rules with regard to international medical schools in the areas of curriculum, faculty, facilities, academic resources, and performance of graduates;
   (H) study and make recommendations regarding documentation and verification of records from all applicants for licensure or permits;
   (I) review applications for acudetox specialist certification, surgical assistants, perfusionists and medical physicists, make determinations of eligibility, and report to the board its recommendations as provided by Texas Occupations Code [Annotated, 205.303] and board rules;
   [(J) review applications for acupuncture licensure recommended by the Texas State Board of Acupuncture Examiners and for applicants that hold licenses in other states that have licensure requirements that are substantially equivalent to those of this state, make determinations of eligibility, and report to the board its recommendations;]
   [(J) [(K)] review applications and make initial determinations and recommendations to the board regarding approval, denial, revocation, decertification, or continued approval and certification of non-profit health organizations pursuant to the Medical Practice Act;]
   [(K) [(L)] develop and review board rules regarding all persons and entities subject to the Board’s jurisdiction, and make recommendations to the board regarding changes or implementation of such rules; and]
   [(L) [(M)] review applications for surgical assistant licensure, make determinations, of eligibility, and report to the board its recommendations; and]
   [(M) [(N)] make recommendations to the board regarding matters brought to the attention of the licensure committee.

(6) Public Information/Physician Profile Committee:
   [(A) develop information for distribution to the public;]
   [(B) review and make recommendations to the board in regard to press releases, newsletters, web-sites and other publications;]
   [(C) study and make recommendations to the board regarding all aspects of public information and public relations;]
   [(D) receive information from the public concerning the regulation of medicine pursuant to a published agenda item and board rules;]
   [(E) study and make recommendation to the board regarding all aspects of physician profiles; and]
§161.8. Standing Orders Committee.

[(A) review and make recommendations to the board regarding board rules pertaining to standing orders;]

[(B) study and make recommendations to the board regarding issues concerning or referred by the Texas State Board of Acupuncture Examiners or other acupuncture issues;]

[(C) study and make recommendations to the board regarding issues concerning or referred by the Texas Physician Assistant Board;]

[(D) study and make recommendations to the board concerning ethical issues related to the practice of medicine; and]

[(E) make recommendations to the board regarding matters brought to the attention of the standing orders committee;]

[(F) Telemedicine Committee;]

[(A) review, study, and make recommendations to the board concerning the practice of telemedicine, including but not limited to licensure, regulation, and/or discipline of telemedicine license holders or applicants;]

[(B) review, study, and make recommendations to the board concerning interstate and intrastate telemedicine issues;]

[(C) review, study, and make recommendations to the board concerning board rules regarding or affecting the practice of telemedicine; and]

[(D) review, study, and make recommendations to the board concerning any other issue brought to the attention of the committee;]

(c) With statutory or board authorization, the president may appoint, disband, or reconvene standing, ad hoc, or advisory committees as deemed necessary. Such committees shall have and exercise such authority as may be granted by the board.

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 28, 2019.

TRD-201902962
Scott Freshour
General Counsel
Texas Medical Board

Earliest possible date of adoption: October 13, 2019

For further information, please call: (512) 305-7016

PART 25. HEALTH SERVICES

CHAPTER 131. FREESTANDING EMERGENCY MEDICAL CARE FACILITIES

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes amendments to §131.2, concerning Definitions; and §131.46, concerning Emergency Services.

BACKGROUND AND PURPOSE

The proposal is necessary to comply with House Bill (H.B.) 3152, 85th Legislature, Regular Session, 2017, which amends the Texas Health and Safety Code, Chapter 323. H.B. 3152 requires HHSC to define facilities as sexual assault forensic exam (SAFE)-ready facilities and requires certain health-care facilities to provide sexual assault survivors the option to transfer to a facility that is SAFE-ready. The proposed amendment to §131.46 will also implement H.B. 4531, 86th Legislature, Regular Session, 2019, concerning the rights and treatment of and services provided to certain adult sexual assault survivors.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §131.2 adds definitions of the terms SAFE-ready facility, sexual assault forensic examiner, and sexual assault survivor, and re-numbers the definitions accordingly. This amendment is necessary to comply with H.B. 3152.

The proposed amendment to §131.46(h) updates language for emergency services available to sexual assault survivors and adds a reference to Texas Health and Safety Code, Chapter 323, which outlines the care facilities must provide to sexual assault survivors. This amendment is necessary to comply with H.B. 3152 and H.B. 4531.

FISCAL NOTE

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

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

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

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

Trey Wood has also determined that there may be an adverse economic effect on small businesses or micro-businesses, or rural communities as the rule is proposed. The proposed rules require 217 FEMCs licensed statewide to develop, implement, and enforce policies and procedures that ensure a sexual assault survivor receives the care specified under Health and Safety Code, Chapter 323. HHSC lacks sufficient data to estimate the number of those facilities designated as a small business, micro-business, or rural communities impacted by the proposed rules.

HHSC determined that alternative methods to achieve the purpose of the proposed rules for small businesses, micro-businesses, or rural communities would not be consistent with ensuring the health and safety of survivors of sexual assault.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas and do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

David Kostroun, HHSC Deputy Executive Commissioner of Regulatory Services, has determined that for each year of the first five years the sections are in effect, the public benefit will be higher quality of care provided to sexual assault survivors and greater clarity of information regarding facilities that are best equipped to serve sexual assault survivors.

Trey Wood has determined that for the first five years that the rule is in effect, persons who are required to comply may incur economic costs. The proposed rules require FEMCs to develop, implement, and enforce policies and procedures that ensure a sexual assault survivor receives the care specified under Health and Safety Code, Chapter 323. HHSC assumes those facilities may incur costs for required documentation, staff training, and a possible increase in the number of patients transferred to facilities which are SAFE-ready. HHSC lacks sufficient information to estimate those costs. For these reasons, the costs to persons required to comply cannot be determined at this time.

REGULATORY ANALYSIS

HHSC has determined that this proposal is not a "major environmental rule" as defined by Government Code §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

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 the Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to 19R009comments@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed 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 e-mailed before midnight on the following business day to be accepted. When e-mailing comments, please indicate "Comments on Proposed Rule 19R009" in the subject line.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §131.2

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 agencies, and the Texas Health and Safety Code, Chapter 323.

CROSS REFERENCE TO STATUTE

The rule amendments implement Texas Health and Safety Code, Chapters 254 and 323, and Texas Government Code, Chapter 531.

§131.2. Definitions.

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

(1) - (31) (No change.)

(32) SAFE-ready facility--A facility designated by the Health and Human Services Commission as a sexual assault forensic exam ready facility.

(33) Sexual assault forensic examiner--A certified sexual assault nurse examiner or a physician with specialized training on conducting a forensic medical examination.
(34) Sexual assault survivor—An individual who is a victim of a sexual assault, regardless of whether a report is made or a conviction is obtained in the incident.

(35) [Footnote:] Stabilize—To provide necessary medical treatment of an emergency medical condition to ensure, within reasonable medical probability, that the condition is not likely to deteriorate materially from or during the transfer of the individual from a facility.

(36) [Footnote:] Transfer—The movement (including the discharge) of an individual outside a facility at the direction of and after personal examination and evaluation by the facility physician. Transfer does not include the movement outside a facility of an individual who has been declared dead or who leaves the facility without the permission of the facility physician.

(37) [Footnote:] Transfer agreement—A referral, transmission or admission agreement with a hospital licensed in this state.

(38) [Footnote:] Universal precautions—Procedures for disinfection and sterilization of reusable medical devices and the appropriate use of infection control, including hand washing, the use of protective barriers, and the use and disposal of needles and other sharp instruments as those procedures are defined by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services. This term includes standard precautions as defined by CDC which are designed to reduce the risk of transmission of blood borne and other pathogens in healthcare facilities.

(39) [Footnote:] Violation—Failure to comply with the Act, a rule or standard, special license provision, or an order issued by the commissioner of state health services or the commissioner’s designee, adopted or enforced under the Act.

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 26, 2019.

TRD-201902904
Karen Ray
Chief Counsel
Department of State Health Services
Earliest possible date of adoption: October 13, 2019
For further information, please call: (512) 834-4591

25 TAC §131.45

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §131.45, concerning Facility Staffing and Training.

BACKGROUND AND PURPOSE

The purpose of the proposal is to update the requirements for establishing a nursing peer review committee. The proposal is necessary to comply with House Bill (H.B.) 3296, 85th Legislature, Regular Session, 2017, which amended the Texas Occupations Code, Chapter 303, related to nursing peer review committees.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §131.45 adds new subsection (d) to require the establishment of a nursing peer review committee to conduct nursing peer review, as required by Texas Occupations Code, Chapter 303. This amendment is necessary to comply with H.B. 3296.

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 does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the 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 expand existing rules;

(34) Sexual assault survivor—An individual who is a victim of a sexual assault, regardless of whether a report is made or a conviction is obtained in the incident.

(35) [Footnote:] Stabilize—To provide necessary medical treatment of an emergency medical condition to ensure, within reasonable medical probability, that the condition is not likely to deteriorate materially from or during the transfer of the individual from a facility.

(36) [Footnote:] Transfer—The movement (including the discharge) of an individual outside a facility at the direction of and after personal examination and evaluation by the facility physician. Transfer does not include the movement outside a facility of an individual who has been declared dead or who leaves the facility without the permission of the facility physician.

(37) [Footnote:] Transfer agreement—A referral, transmission or admission agreement with a hospital licensed in this state.

(38) [Footnote:] Universal precautions—Procedures for disinfection and sterilization of reusable medical devices and the appropriate use of infection control, including hand washing, the use of protective barriers, and the use and disposal of needles and other sharp instruments as those procedures are defined by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services. This term includes standard precautions as defined by CDC which are designed to reduce the risk of transmission of blood borne and other pathogens in healthcare facilities.

(39) [Footnote:] Violation—Failure to comply with the Act, a rule or standard, special license provision, or an order issued by the commissioner of state health services or the commissioner’s designee, adopted or enforced under the Act.

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 26, 2019.

TRD-201902904
Karen Ray
Chief Counsel
Department of State Health Services
Earliest possible date of adoption: October 13, 2019
For further information, please call: (512) 834-4591

25 TAC §131.45

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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 does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the 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 expand existing rules;
(7) the proposed rule will increase 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 may be an adverse economic effect on small businesses, micro-businesses, or rural communities as the rule is proposed.

The proposed rules require 217 Freestanding Emergency Medical Care Facilities (FEMCs) licensed statewide to establish a nursing peer review committee as required by Texas Occupations Code, Chapter 303. HHSC lacks sufficient data to estimate the number of those facilities designated as small or micro-businesses, or rural community impacted by the proposed rules.

HHSC has also determined that alternative methods to achieve the purpose of the proposed rules for small businesses, micro-businesses, or rural communities would not be consistent with the health, safety, and environmental and economic welfare of the state in providing adequate oversight to nursing staff or compliance with the Texas Occupations Code.

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 protect the health, safety, and welfare of the residents of Texas.

PUBLIC BENEFIT AND COSTS

David Kostroun, HHSC Deputy Executive Commissioner of Regulatory Services, has determined that for each year of the first five years the rule is in effect, the public benefit will be increased conformity with existing statutes. Another anticipated public benefit is that an increase in nursing peer review committees will positively impact the work of nurses and the medical care their patients receive.

Trey Wood has determined that for the first five years that the rule is in effect, persons who are required to comply may incur economic costs. The proposed rules require FEMCs to establish a nursing peer review committee as required by Texas Occupations Code, Chapter 303. HHSC assumes that some facilities may incur costs establishing a new committee, due to the reduction in minimum nursing staff requirements from 10 to 8, and costs will vary by facility. HHSC lacks sufficient information to estimate those costs. For these reasons, the costs to persons required to comply cannot be determined.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner’s right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to 19R023Comments@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or e-mailed before midnight on the following business day to be accepted. When e-mailing comments, please indicate "Comments on Proposed Rule 19R023" 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 agencies, and the Texas Occupations Code, Chapter 303.

The amendment implements Texas Government Code §531.0055 and Texas Occupations Code, Chapter 303.

§131.45. Facility Staffing and Training.

(a) A facility shall have personnel qualified to operate emergency equipment and to provide emergency care to patients on site and available at all treatment times.

(b) Nursing services.

(1) There shall be an organized nursing service under the direction of a qualified registered nurse (RN). The facility shall be staffed to ensure that the nursing needs of all patients are met.

(2) There shall be a written plan of administrative authority for all nursing services with responsibilities and duties of each category of nursing personnel delineated and a written job description for each category. The scope of nursing services shall be limited to nursing care rendered to patients as authorized by the Nursing Practice Act, Occupations Code Chapter 301.

(A) The responsible individual for nursing services shall be a qualified RN whose responsibility and authority shall be clearly defined and shall include supervision of both personnel performance and patient care.

(B) There shall be a written delineation of functions, qualifications, and patient care responsibilities for all categories of nursing personnel.

(C) Nursing services shall be provided in accordance with current recognized standards or recommended practices.

(3) There shall be an adequate number of RNs on duty to meet minimum staff requirements to include supervisory and staff RNs to ensure the immediate availability of an RN for emergency care or for any patient when needed.

(4) There shall be other nursing personnel in sufficient numbers to provide nursing care not requiring the service of an RN. An RN shall assign the nursing care of each patient to other nursing personnel in accordance with the patient's needs and the preparation and qualifications of the nursing staff available.

(5) An RN qualified, at a minimum, with current certification in advanced cardiac life support and Pediatric Advanced Life Support shall be on duty and on the premises at all times whenever patients are present in the facility.

(6) All direct care staff members shall maintain current certification and competency in Basic Cardiac Life Support.
(c) In addition to meeting the requirements for nursing staff under subsection (b) of this section, facilities shall comply with the following minimum staffing requirements.

(1) Facilities that provide only topical anesthesia, local anesthesia, or minimal sedation are required to have a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility.

(2) Facilities that provide moderate sedation/analgesia are required to have the following additional staff:

   (A) a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility; and

   (B) an individual trained and currently certified in advanced cardiac life support and pediatric advanced life support shall be available until all patients have been discharged.

(3) Facilities that provide deep sedation/analgesia and/or regional anesthesia shall have the following additional staff:

   (A) a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility; and

   (B) an individual who is trained and currently certified in advanced cardiac life support and pediatric advanced life support shall be on duty on the premises sufficiently free of other duties to enable the individual to respond rapidly to emergency situations until all patients have been discharged.

(d) Nursing peer review committees. The facility shall establish a nursing peer review committee to conduct nursing peer review, as required by Texas Occupations Code, Chapter 303.

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 28, 2019.

TRD-201902957

Karen Ray
Chief Counsel
Department of State Health Services
Earliest possible date of adoption: October 13, 2019
For further information, please call: (512) 834-4591

CHAPTER 133. HOSPITAL LICENSING

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes amendments to §133.2, concerning Definitions; and §133.41, concerning Hospital Functions and Services.

BACKGROUND AND PURPOSE

The proposal is necessary to comply with House Bill (H.B.) 3152, 85th Legislature, Regular Session, 2017, which amends the Texas Health and Safety Code, Chapter 323. H.B. 3152 requires HHSC to define facilities as sexual assault forensic exam-ready (SAFE-ready) facilities and requires certain health-care facilities to provide sexual assault survivors the option to transfer to a facility that is SAFE-ready. The proposed amendment to §133.41 will also implement H.B. 4531, 86th Legislature, Regular Session, 2019, concerning the rights and treatment of and services provided to certain adult sexual assault survivors.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §133.2 adds definitions of the terms SAFE-ready facility, sexual assault forensic examiner, and sexual assault survivor and removes references to a community-wide plan, which is no longer being used. This amendment also re-numbers the definitions accordingly. This amendment is necessary to comply with H.B. 3152.

The proposed amendment to §133.41(e)(6) updates language for emergency services available to sexual assault survivors and adds a reference to Texas Health and Safety Code, Chapter 323, which outlines the care facilities must provide to sexual assault survivors. This amendment also removes unnecessary duplicate information regarding these services to improve clarity and consistency. This amendment is necessary to comply with H.B. 3152 and H.B. 4531.

FISCAL NOTE

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

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

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

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

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

(6) the proposed rules will expand existing rules;

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

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

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

Trey Wood has also determined that there may be an adverse economic effect on small businesses or micro-businesses, or rural communities as the rules are proposed.

The proposed rules require 643 hospitals licensed statewide to develop, implement, and enforce policies and procedures that ensure sexual assault survivors receive the care specified under Health and Safety Code, Chapter 323. There are 115 hospitals currently designated as SAFE-ready. HHSC lacks sufficient data to estimate the number of those facilities designated as a small business, micro-business, or rural communities impacted by the proposed rules.

HHSC determined that alternative methods to achieve the purpose of the proposed rules for small businesses, micro-businesses, or rural communities would not be consistent with ensuring the health and safety of survivors of sexual assault.
LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas and do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

David Kostroun, HHSC Deputy Executive Commissioner of Regulatory Services, has determined that for each year of the first five years the sections are in effect, the public benefit will be higher quality of care provided to sexual assault survivors and greater clarity of information regarding facilities that are best equipped to serve sexual assault survivors.

Trey Wood has determined that for the first five years that the rules are in effect, persons who are required to comply may incur economic costs. The proposed rules require hospitals to develop, implement, and enforce policies and procedures that ensure a sexual assault survivor receives the care specified under Health and Safety Code, Chapter 323. HHSC assumes those facilities may incur costs for required documentation, staff training, and a possible increase in the number of patients transferred to facilities which are SAFE-ready. HHSC lacks sufficient information to estimate those costs. For these reasons, the costs to persons required to comply cannot be determined at this time.

REGULATORY ANALYSIS

HHSC has determined that this proposal is not a "major environmental rule" as defined by Government Code §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

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 the Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or emailed to 19R009comments@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 19R009" in the subject line.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §133.2

STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0065, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and the Texas Health and Safety Code, Chapter 323.

The rule amendments implement Texas Health and Safety Code, Chapters 241 and 323, and Texas Government Code, Chapter 531.

§133.2. Definitions.

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


(2) - (9) (No change.)

(10) Community-wide plan--An agreement entered into between one or more health care facilities, entities administering a sexual assault program, district attorney's offices, or law enforcement agencies that designates one or more health care facilities in the community as a primary health care facility to furnish emergency medical services and evidence collection to sexual assault survivors on a community or area-wide basis.

(10) [144] Competent--Possessing the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to a proposed treatment decision.

(11) [149] Comprehensive medical rehabilitation--The provision of rehabilitation services that are designed to improve or minimize a person's physical or cognitive disabilities, maximize a person's functional ability, or restore a person's lost functional capacity through close coordination of services, communication, interaction, and integration among several professions that share responsibility to achieve team treatment goals for the person.

(12) [144] Comprehensive medical rehabilitation hospital--A general hospital that specializes in providing comprehensive medical rehabilitation services, including surgery and related ancillary services.

(13) [144] Comprehensive medical rehabilitation unit--An identifiable part of a hospital which provides comprehensive medical rehabilitation services to patients admitted to the unit.

(14) [145] Cooperative agreement--An agreement among two or more hospitals for the allocation or sharing of health care equipment, facilities, personnel, or services.

(15) [146] Dentist--A person licensed to practice dentistry by the Texas State Board of Dental Examiners. This includes a doctor of dental surgery or a doctor of dental medicine.

(16) [147] Department--The Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3199.

(17) [148] Dietitian--A person who is currently licensed by the Texas State Board of Examiners of Dietitians as a licensed dietitian or provisional licensed dietitian, or who is a registered dietitian with the American Dietetic Association.
(18) [199] Director--The hospital licensing director, Department of State Health Services.

(19) [200] Do Not Resuscitate (DNR) order--An order issued in a hospital under Health and Safety Code, Chapter 166, Subchapter E (relating to Health Care Facility Do-Not-Resuscitate Orders), instructing a health care professional not to attempt cardiopulmonary resuscitation on a patient whose circulatory or respiratory function ceases.

(20) [201] Emergency medical condition--A medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain, psychiatric disturbances or symptoms of substance abuse) such that the absence of immediate medical attention could reasonably be expected to result in one or all of the following:

(A) placing the health of the individual (or with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy;

(B) serious impairment to bodily functions;

(C) serious dysfunction of any bodily organ or part; or

(D) with respect to a pregnant woman who is having contractions:

(i) that there is inadequate time to effect a safe transfer to another hospital before delivery; or

(ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

(21) [202] Freestanding emergency medical care facility--A facility that is structurally separate and distinct from a hospital and receives individuals for the provision of emergency care. The facility is owned and operated by the hospital, and is exempt from the licensing requirements of Texas Health and Safety Code, Chapter 254, under §254.052(7) or (8).

(22) [203] General hospital--An establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals requiring diagnosis, treatment, or care for illness, injury, deformity, abnormality, or pregnancy; and

(B) regularly maintains, at a minimum, clinical laboratory services, diagnostic X-ray services, treatment facilities including surgery or obstetrical care or both, and other definitive medical or surgical treatment of similar extent.

(23) [204] Governing body--The governing authority of a hospital which is responsible for a hospital’s organization, management, control, and operation, including appointment of the medical staff; includes the owner or partners for hospitals owned or operated by an individual or partners.

(24) [205] Governmental unit--A political subdivision of the state, including a hospital district, county, or municipality, and any department, division, board, or other agency of a political subdivision.

(25) [206] Hospital--A general hospital or a special hospital.

(26) [207] Hospital administration--Administrative body of a hospital headed by an individual who has the authority to represent the hospital and who is responsible for the operation of the hospital according to the policies and procedures of the hospital’s governing body.

(27) [208] Incompetent--Lacking the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to a proposed treatment decision.

(28) [209] Inpatient--An individual admitted for an intended length of stay of 24 hours or greater.

(29) [210] Inpatient services--Services provided to an individual admitted to a hospital for an intended length of stay of 24 hours or greater.

(30) [211] Intellectual Disability--Significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.

(31) [212] Licensed vocational nurse (LVN)--A person who is currently licensed under the Nursing Practice Act by the Texas Board of Nursing for the State of Texas as a licensed vocational nurse or who holds a valid vocational nursing license with multi-state licensure privilege from another compact state.

(32) [213] Licensee--The person or governmental unit named in the application for issuance of a hospital license.

(33) [214] Medical staff--A physician or group of physicians and a podiatrist or group of podiatrists who by action of the governing body of a hospital are privileged to work in and use the facilities of a hospital or in connection with the observation, care, diagnosis, or treatment of an individual who is, or may be, suffering from a mental or physical disease or disorder or a physical deformity or injury.

(34) [215] Mental health services--All services concerned with research, prevention, and detection of mental disorders and disabilities and all services necessary to treat, care for, supervise, and rehabilitate persons who have a mental disorder or disability, including persons whose mental disorders or disabilities result from alcoholism or drug addiction.

(35) [216] Niche hospital--A hospital that:

(A) classifies at least two-thirds of the hospital's Medicare patients or, if data is available, all patients:

(i) in not more than two major diagnosis-related groups; or

(ii) in surgical diagnosis-related groups.

(B) specializes in one or more of the following areas:

(i) cardiac;

(ii) orthopedics;

(iii) surgery; or

(iv) women’s health; and

(C) is not:

(i) a public hospital;

(ii) a hospital for which the majority of inpatient claims are for major diagnosis-related groups relating to rehabilitation, psychiatry, alcohol and drug treatment, or children or newborns; or

(iii) a hospital with fewer than 10 claims per bed per year.

(36) [217] Nurse--A registered, vocational, or advanced practice registered nurse licensed by the Texas Board of Nursing or entitled to practice in this state under Occupations Code, Chapters 301, 304, or 305.

(37) [218] Outpatient--An individual who presents for diagnostic or treatment services for an intended length of stay of less than
24 hours; provided, however, that an individual who requires continued observation may be considered as an outpatient for a period of time not to exceed a total of 48 hours.

(38) [449] Outpatient services--Services provided to patients whose medical needs can be met in less than 24 hours and are provided within the hospital; provided, however, that services that require continued observation may be considered as outpatient services for a period of time not to exceed a total of 48 hours.

(39) [450] Owner--One of the following persons or governmental unit which will hold or does hold a license issued under the statute in the person's name or the person's assumed name:

(A) a corporation;
(B) a governmental unit;
(C) a limited liability company;
(D) an individual;
(E) a partnership if a partnership name is stated in a written partnership agreement or an assumed name certificate;
(F) all partners in a partnership if a partnership name is not stated in a written partnership agreement or an assumed name certificate; or
(G) all co-owners under any other business arrangement.

(40) [451] Patient--An individual who presents for diagnosis or treatment.

(41) [452] Pediatric and adolescent hospital--A general hospital that specializes in providing services to children and adolescents, including surgery and related ancillary services.

(42) [453] Person--An individual, firm, partnership, corporation, association, or joint stock company, and includes a receiver, trustee, assignee, or other similar representative of those entities.

(43) [454] Physician--A physician licensed by the Texas Medical Board.

(44) [455] Physician assistant--A person licensed as a physician assistant by the Texas Physician Assistant Board.

(45) [456] Podiatrist--A podiatrist licensed by the Texas State Board of Podiatric Medical Examiners.

(46) [457] Practitioner--A health care professional licensed in the State of Texas, other than a physician, podiatrist, or dentist. A practitioner shall practice in a manner consistent with their underlying practice act.

(47) [458] Premises--A premises may be any of the following:

(A) a single building where inpatients receive hospital services; or
(B) multiple buildings where inpatients receive hospital services provided that the following criteria are met:

(i) all buildings in which inpatients receive hospital services are subject to the control and direction of the same governing body;
(ii) all buildings in which inpatients receive hospital services are within a 30-mile radius of the primary hospital location;

(iii) there is integration of the organized medical staff of each of the hospital locations to be included under the single license;
(iv) there is a single chief executive officer for all of the hospital locations included under the license who reports directly to the governing body and through whom all administrative authority flows and who exercises control and surveillance over all administrative activities of the hospital;
(v) there is a single chief medical officer for all of the hospital locations under the license who reports directly to the governing body and who is responsible for all medical staff activities of the hospital;
(vi) each hospital location to be included under the license that is geographically separate from the other hospital locations contains at least one nursing unit for inpatients which is staffed and maintains an active inpatient census, unless providing only diagnostic or laboratory services, or a combination of diagnostic or laboratory services, in the building for hospital inpatients; and
(vii) each hospital that is to be included in the license complies with the emergency services standards:

(I) for a general hospital, if the hospital provides surgery or obstetrical care or both; or
(II) for a special hospital, if the hospital does not provide surgery or obstetrical care.

(48) [459] Presurvey conference--A conference held with department staff and the applicant or the applicant's representative to review licensure rules and survey documents and provide consultation prior to the on-site licensure inspection.

(49) [460] Psychiatric disorder--A clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is typically associated with either a painful syndrome (distress) or impairment in one or more important areas of behavioral, psychological, or biological function and is more than a disturbance in the relationship between the individual and society.

(50) [461] Quality improvement--A method of evaluating and improving processes of patient care which emphasizes a multidisciplinary approach to problem solving, and focuses on problems, but systems of patient care which might be the cause of variations.

(51) [462] Registered nurse (RN)--A person who is currently licensed by the Texas Board of Nursing for the State of Texas as a registered nurse or who holds a valid registered nursing license with multi-state licensure privilege from another compact state.

(52) SAFE-ready facility--A facility designated by the Health and Human Services Commission as a sexual assault forensic exam-ready facility.

(53) Sexual assault forensic examiner--A certified sexual assault nurse examiner or a physician with specialized training on conducting a forensic medical examination.

(54) Sexual assault survivor--An individual who is a victim of a sexual assault, regardless of whether a report is made or a conviction is obtained in the incident.

(55) [463] Special hospital--An establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals who are regularly admitted, treated, and discharged and who require services more intensive than room, board, personal services, and general nursing care;
(B) has clinical laboratory facilities, diagnostic X-ray facilities, treatment facilities, or other definitive medical treatment;  
(C) has a medical staff in regular attendance; and  
(D) maintains records of the clinical work performed for each patient.

(56) [§54] Stabilize--With respect to an emergency medical condition, to provide such medical treatment of the condition necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or that the woman has delivered the child and the placenta.

(57) [§55] Surgical technologist--A person who practices surgical technology as defined in Health and Safety Code, Chapter 259.

(58) [§56] Transfer--The movement (including the discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital, but does not include such a movement of an individual who has been declared dead, or leaves the facility without the permission of any such person.

(59) [§52] Universal precautions--Procedures for disinfection and sterilization of reusable medical devices and the appropriate use of infection control, including hand washing, the use of protective barriers, and the use and disposal of needles and other sharp instruments as those procedures are defined by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services. This term includes standard precautions as defined by CDC which are designed to reduce the risk of transmission of blood borne and other pathogens in hospitals.

(60) [§58] Violation--Failure to comply with the licensing statute, a rule or standard, special license provision, or an order issued by the executive commissioner of health and human services (executive commissioner) or the executive commissioner's designee, adopted or enforced under the licensing statute. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

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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Karen Ray  
Chief Counsel  
Department of State Health Services  
Earliest possible date of adoption: October 13, 2019  
For further information, please call: (512) 834-4591

SUBCHAPTER C. OPERATIONAL REQUIREMENTS

25 TAC §133.41

STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and the Texas Health and Safety Code, Chapter 323.

§133.41. Hospital Functions and Services.  
(a) - (d) (No change.)

(e) Emergency services. All licensed hospital locations, including multiple-location sites, shall have an emergency suite that complies with §133.161(a)(1)(A) of this title (relating to Requirements for Buildings in Which Existing Licensed Hospitals are Located) or §133.163(f) of this title, and the following.

(1) - (5) (No change.)

(6) Emergency services for sexual assault survivors [survivors of sexual assault]. This section does not affect the duty of a health care facility to comply with the requirements of the federal Emergency Medical Treatment and Active Labor Act of 1986 (42 U.S.C. §1395dd) that are applicable to the facility. The hospital shall develop, implement, and enforce policies and procedures to ensure that after a sexual assault survivor presents to the hospital following a sexual assault, the hospital shall provide the care specified under the Health and Safety Code, Chapter 323.

[(A) The hospital shall develop, implement and enforce policies and procedures to ensure that, except as otherwise provided by subparagraph (C) of this paragraph, after a sexual assault survivor presents to the hospital following a sexual assault, the hospital shall provide the care specified under subparagraph (D) of this paragraph.]

[(B) A facility that is not a health care facility designated in a community-wide plan as the primary health care facility in the community for treating sexual assault survivors shall inform the survivor that:]  

[(i) the facility is the designated facility and provide to the survivor the name and location of the designated facility; and]  

[(ii) the survivor is entitled, at the survivor's option:]  

[(I) to receive the care described by subparagraph (D)(i) of this paragraph at that facility, subject to subparagraph (D)(ii) of this paragraph; or]  

[(II) to be stabilized and to be transferred to and receive the care described by subparagraph (D) of this paragraph at a health care facility designated in a community-wide plan as the primary health care facility in the community for treating sexual assault survivors:]  

[(C) If a sexual assault survivor chooses to be transferred under subparagraph (B)(ii)(I) of this paragraph, after obtaining the survivor's written, signed consent to the transfer, the facility shall stabilize and transfer the survivor to a health care facility in the community designated in a community-wide plan as the health care facility for treating sexual assault survivors, where the survivor will receive the care specified under subparagraph (D) of this paragraph.]  

[(D) A hospital providing care to a sexual assault survivor shall provide the survivor with the following:]  

[(i) subject to subparagraph (G) of this paragraph, a forensic medical examination in accordance with Government Code, Chapter 420, Subchapter B, when the examination has been requested by a law enforcement agency under Code of Criminal Procedure, Article 56.06, or is conducted under Code of Criminal Procedure, Article 56.065. If a sexual assault survivor is age 18 or older and has not reported the assault to a law enforcement agency, a hospital shall provide this forensic medical examination, when the sexual assault survivor has]
arrived at the facility not later than 96 hours after the time the assault occurred and has consented to the examination;]

{(ii) a private area, if available, to wait or speak with the appropriate medical, legal, or sexual assault crisis center staff or volunteer until a physician, nurse, or physician assistant is able to treat the survivor;]

{(iii) access to a sexual assault program advocate, if available, as provided by Code of Criminal Procedure, Article 56.045;]

{(iv) the information form required by Health and Safety Code, §323.005;]

{(v) a private treatment room, if available;]

{(vi) if indicated by the history of contact, access to appropriate prophylaxis for exposure to sexually transmitted infections; and]

{(vii) the name and telephone number of the nearest sexual assault crisis center.]

{(E) The hospital must obtain documented consent before providing the forensic medical examination and treatment.]

{(F) Upon request, the hospital shall submit to the department its plan for the provision of service to sexual assault survivors. The plan must describe how the hospital will ensure that the services required under subparagraph (D) of this paragraph will be provided.]

{(i) The hospital shall submit the plan by the 60th day after the department makes the request.]

{(ii) The department will approve or reject the plan not later than the 120th day following the submission of the plan.]

{(iii) If the department is not able to approve the plan, the department will return the plan to the hospital and will identify the specific provisions of statutes or rules with which the hospital's plan failed to comply.]

{(iv) The hospital shall correct and resubmit the plan to the department for approval not later than the 90th day after the plan is returned to the hospital.]

{(G) A person may not perform a forensic examination on a sexual assault survivor unless the person has the basic training described by Health and Safety Code, §323.0045; or the equivalent education and training.]

{(H) Basic Sexual Assault Forensic Evidence Collection Training.]

{(i) A person who performs a forensic examination on a sexual assault survivor must have at least basic forensic evidence collection training or the equivalent education.]

{(ii) A person who completes a continuing medical or nursing education course in forensic evidence collection that is approved or recognized by the appropriate licensing board is considered to have basic sexual assault forensic evidence training for purposes of this chapter.]

{(iii) Each health care facility that has an emergency department and that is not a health care facility designated in a community-wide plan as the primary health care facility in the community for treating sexual assault survivors shall develop a plan to train personnel on sexual assault forensic evidence collection.]

{(I) Sexual Assault Survivors Who Are Minors. This chapter does not affect participating entities of children's advocacy centers under Family Code, Chapter 264, Subchapter E, or the working protocols set forth by their multidisciplinary teams to ensure access to specialized medical assessments for sexual assault survivors who are minors. To the extent of a conflict with Family Code, Chapter 264, Subchapter E, that subchapter controls.]

(f) - (y) (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.

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Karen Ray
Chief Counsel
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For further information, please call: (512) 834-4591

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CHAPTER 135. AMBULATORY SURGICAL CENTERS

SUBCHAPTER A. OPERATING REQUIREMENTS FOR AMBULATORY SURGICAL CENTERS

25 TAC §135.15

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §135.15, concerning Facility Staffing and Training.

BACKGROUND AND PURPOSE

The purpose of the proposal is to update the requirements for establishing a nursing peer review committee. The proposal is necessary to comply with House Bill (H.B.) 3296, 85th Legislature, Regular Session, 2017, which amended the Texas Occupations Code, Chapter 303, related to nursing peer review committees.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §135.15 adds new subsection (c) to require the establishment of a nursing peer review committee to conduct nursing peer review, as required by Texas Occupations Code, Chapter 303. This amendment is necessary to comply with H.B. 3296.

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 does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the 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 expand existing rules;
(7) the proposed rule will increase 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 may be an adverse economic effect on small businesses, micro-businesses, or rural communities.

The proposed rules require 523 Ambulatory Service Centers (ASCs) licensed statewide to establish a nursing peer review committee as required by Texas Occupations Code, Chapter 303. HHSC lacks sufficient data to estimate the number of those facilities designated as a small business, micro-business, or rural community impacted by the proposed rules.

HHSC has also determined that alternative methods to achieve the purpose of the proposed rules for small businesses, micro-businesses, or rural communities would not be consistent with the health, safety, and environmental and economic welfare of the state in providing adequate oversight to nursing staff or compliance with the Texas Occupations Code.

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 protect the health, safety, and welfare of the residents of Texas.

PUBLIC BENEFIT AND COSTS

David Kostroun, HHSC Deputy Executive Commissioner of Regulatory Services, has determined that for each year of the first five years the rule is in effect, the public benefit will be increased conformity with existing statutes. Another anticipated public benefit is that an increase in nursing peer review committees will positively impact the work of nurses and the medical care their patients receive.

Trey Wood has determined that for the first five years that the rule is in effect, persons who are required to comply may incur economic costs. The proposed rules require ASCs to establish a nursing peer review committee as required by Texas Occupations Code, Chapter 303. HHSC assumes that some facilities may incur costs establishing a new committee and costs will vary by facility. HHSC lacks sufficient information to estimate those costs. For these reasons, the costs to persons required to comply cannot be determined.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or emailed to 19R023Comments@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 19R023" 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 agencies, and the Texas Occupations Code, Chapter 303.

The amendment implements Texas Government Code §531.0055 and Texas Occupations Code, Chapter 303 §135.15. Facility Staffing and Training.

(a) Nursing services.

(1) There shall be an organized nursing service under the direction of a qualified registered nurse (RN). The ambulatory surgical center (ASC) shall be staffed to assure that the nursing needs of all patients are met.

(2) There shall be a written plan of administrative authority for all nursing services with responsibilities and duties of each category of nursing personnel delineated and a written job description for each category. The scope of nursing service shall include, but is not limited to, nursing care rendered to patients preoperatively, intraoperatively, and postoperatively.

(A) The responsible individual for nursing services shall be a qualified registered nurse (RN) whose responsibility and authority for nursing service shall be clearly defined and includes supervision of both personnel performance and patient care.

(B) There shall be a written delineation of functions, qualifications, and patient care responsibilities for all categories of nursing personnel.

(C) Surgical technicians and licensed vocational nurses may be permitted to serve in the scrub nurse role under the direct supervision of an RN; they shall not be permitted to function as circulating nurses in the operating rooms. Licensed vocational nurses and surgical technicians may assist in circulatory duties under the direct supervision of a qualified RN.

(D) Nursing services shall be provided in accordance with current recognized standards or recommended practices.

(E) The facility shall adopt, implement and enforce policies and procedures to comply with Health and Safety Code, Chapter 259 (relating to Surgical Technologists at Health Care Facilities).

(3) There shall be an adequate number of RNs on duty to meet the following minimum staff requirements: director of the department (or designee), and supervisory and staff personnel for each service area to assure the immediate availability of an RN for emergency care or for any patient when needed.
(A) An RN shall assign the nursing care of each patient to other nursing personnel in accordance with the patient's needs and the preparation and qualifications of the nursing staff available.

(B) There shall be other nursing personnel in sufficient numbers to provide nursing care not requiring the service of an RN.

(4) An RN qualified, at a minimum, with current certification in basic cardiac life support shall be on duty and on the premises at all times whenever patients are present in the facility.

(b) Additional staffing requirements. In addition to meeting the requirements for nursing staff under subsection (a) of this section, facilities shall comply with the following minimum staffing requirements.

(1) Facilities that provide only topical anesthesia, local anesthesia and/or minimal sedation are required to have a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility.

(2) Facilities that provide moderate sedation/analgesia are required to have the following additional staff:

(A) a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility; and

(B) an individual trained and currently certified in advanced cardiac life support and, if surgery is performed on pediatric patients, pediatric advanced life support shall be available until all patients have been discharged from the postanesthesia care unit.

(3) Facilities that provide deep sedation/analgesia, general anesthesia, and/or regional anesthesia shall have the following additional staff:

(A) a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility; and

(B) an individual who is trained and currently certified in advanced cardiac life support and, if surgery is performed on pediatric patients, pediatric advanced life support shall be on duty on the premises and sufficiently free of other duties to enable the individual to respond rapidly to emergency situations until all patients have been discharged from the postanesthesia care unit.

(c) Nursing peer review committees. The facility shall establish a nursing peer review committee to conduct nursing peer review, as required by Texas Occupations Code, Chapter 303.

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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Karen Ray
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CHAPTER 200. REPORTING OF HEALTH CARE-ASSOCIATED INFECTIONS AND PREVENTABLE ADVERSE EVENTS

SUBCHAPTER A. CONTROL OF COMMUNICABLE DISEASES

25 TAC §§200.1 - 200.6

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes amendments to §200.1, concerning Definitions; §200.2, concerning General Reporting Guidelines for Health Care-Associated Infection and Preventable Adverse Event Data; §200.3, concerning How to Report; §200.4, concerning Which Events to Report; §200.5, concerning Data to Report; and §200.6, concerning When to Initiate Reporting.

BACKGROUND AND PURPOSE

The proposal is necessary to comply with Senate Bill (S.B.) 384, 86th Legislature, Regular Session, 2019, which amended Texas Health and Safety Code, Chapter 98, Reporting of Health Care-Associated Infections and Preventable Adverse Events. The new law alters the list of health care-associated infections (HAIs) that health care facilities must report to DSHS by removing the language outlining the specific medical procedures required for HAI reporting by facility type, and replacing it with a requirement for all health care facilities to report the list of HAIs that the Centers for Medicare and Medicaid Services (CMS) require facilities participating in the Medicare program to report. These changes have the effect of aligning state reporting requirements with federal CMS reporting requirements. Health care facilities will now have one set of HAI data elements to report, instead of having to report one set of data elements mandated by Texas and another mandated by CMS. This alignment will significantly ease reporting requirements.

SECTION-BY-SECTION SUMMARY

Section 200.1 deletes the definitions of "APGAR Score," "central line," "medical gas," "perinatal," "pediatric and adolescent hospital," "special care setting," "unsafe condition," "urinary catheter," and "urinary tract infection (UTI)." The amendment revises the name of the definition of "inpatient treatment" to "inpatient," and deletes the reference "of greater than 24 hours." The amendment adds a statement "as defined by the NHSN," an acronym for the Centers for Disease Control and Prevention's National Healthcare Safety Network or its successor. The amendment uses the acronym HAI for health care-associated infection and uses "HAI data" for health-care associated infection data.

The amendment to §200.2 deletes the preventable adverse event (PAE) data information since the PAE data are not reported to NHSN and adds the titles of the referenced sections.

The amendment to §200.3(b) adds the titles of the referenced sections. The amendment to §200.3(c) corrects a rule reference for §200.1 that is renumbered due to the deletion of certain definitions. The reference to a hospital and ambulatory surgical center was removed in subsection (c)(2) as those references are listed in subsection (c). The amendment to §200.3(e) deletes the specific reporting requirement for patients identified with a surgical site infection associated with a procedure, since it was removed in §200.4.
The amendment to §200.4 removes specific procedures required for HAI reporting by facility type and replaces it with the requirements for all health care facilities to report the list of HAIs that CMS requires facilities participating in the Medicare program to report. The amendment adds a website for a current list of reportable HAIs and PAEs.

The amendment to §200.5 includes a DSHS website for HAI Texas.org and PAETexas.org for facilities to utilize for data reporting requirements.

The amendment to §200.6 removes specific procedures required for HAI reporting by facility type and replaces it with the requirements for all health care facilities to report the list of HAIs that CMS requires facilities participating in the Medicare program to report.

FISCAL NOTE

Donna Sheppard, Chief Financial Officer, has determined that in the first five years that the rules will be in effect, enforcing or administering the rules do not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

DSHS has determined that during the first five years that the rules will be in effect: (1) the proposed rules will not create or eliminate a government program; (2) implementation of the proposed rules will not affect the number of DSHS employee positions; (3) implementation of the proposed rules will result in no assumed change in future legislative appropriations; (4) the proposed rules will not affect fees paid to DSHS; (5) the proposed rules will not create a new rule; (6) the proposed rules will limit existing rules; (7) the proposed rules will not change the number of individuals subject to the rules; and (8) the proposed rules will not affect the state’s economy.

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

Donna Sheppard, has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rules do not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rules.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas; do not impose a cost on regulated persons; are amended to reduce the burden or responsibilities imposed on regulated persons by the rules; and are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

PUBLIC BENEFIT AND COSTS

Imelda Garcia, Associate Commissioner, Laboratory and Infectious Disease Services Division, has determined that for each year of the first five years the rules are in effect, the public benefit will be more accurate and complete reporting of HAI data in Texas, resulting in better data analysis, better educational regarding HAIs, and enhanced prevention of HAI in Texas. The passage of S.B. 384 aligns state reporting requirements for HAIs with federal CMS reporting requirements for HAIs. This will facilitate ease of reporting for entities required to report, simplify both the list of conditions which are required to be reported to DSHS and the list of facilities required to report, and will allow Texas to more accurately evaluate prevention efforts by comparing standardized HAI data with other states. Donna Sheppard, has also determined that for the first five years the rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules because S.B. 384 removes language outlining the specific procedures required for HAI reporting by facility type, and replaces it with the requirements for all health care facilities to report the list of HAIs that CMS requires facilities participating in the Medicare program to report, thus aligning state and federal reporting requirements. Facilities required to report the data in the proposed rule changes are already reporting this data to CMS and the proposed rules will not result in any additional reporting burden on reporting entities.

REGULATORY ANALYSIS

DSHS has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. "Major environmental rule" is defined to mean a rule the specific impact of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

DSHS has determined that the proposal does not restrict or limit an owner’s right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or emailed to HHSRulesCoordinationOffice@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 19R053" in the subject line.

STATUTORY AUTHORITY

The amendments are authorized by Texas Health and Safety Code, Chapter 98, which authorizes the Executive Commissioner of HHSC to adopt rules as necessary; and 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, including by DSHS. Under Texas Health and Safety Code, Chapter 1001, the DSHS Commissioner is authorized to assist the Executive Commissioner in the development of rules relating to the matters with DSHS jurisdiction.
The amendments implement Texas Government Code, §531.0055 and Texas Health and Safety Code, §98.103.

§2001. Definitions. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) AHRQ--Agency for Healthcare Research and Quality.

(2) Ambulatory surgical center--A facility licensed under Texas Health and Safety Code, Chapter 243.

(3) APGAR Score--A test designed to quickly evaluate a newborn’s physical condition and to determine any immediate need for extra medical or emergency care.

(4) Central line--An intravascular catheter that terminates at or close to the heart in one of the great vessels which is used for infusion, withdrawal of blood or hemodynamic monitoring.

(5) CMS--Centers for Medicare and Medicaid Services under the United States Department of Health and Human Services.

(6) Data summary--Facility level information prepared by the department for each health care facility required to report in this state to facilitate comparisons of risk-adjusted infection rates and preventable adverse events.

(7) Department--Department of State Health Services.

(8) Device days--The number of patients in a special care setting who have one or more central lines for each day of the month, determined at the same time each day of the reporting quarter.

(9) Facility contact--Person identified by the health care facility responsible for coordinating communications related to data submission, verification and approval of data summary.

(10) Facility Identification Number--The unique, distinguishable, uniform number used to identify each health care facility.

(11) Fall--A sudden, unintended, uncontrolled downward displacement of a patient’s body to the ground or other object.

(12) General hospital--A hospital licensed under Texas Health and Safety Code, Chapter 241, or a hospital that provides surgical or obstetrical services and that is maintained or operated by the state.

(13) Great vessels--Primary blood vessels to include aorta, pulmonary artery, superior vena cava, inferior vena cava, brachiocephalic veins, internal jugular veins, subclavian veins, external iliac veins, common femoral veins, and in neonates, the umbilical artery or umbilical vein.

(14) HAI--Health care-associated infection. [HAI--] Localized or symptomatic condition resulting from an adverse reaction to an infectious agent or its toxins to which a patient is exposed in the course of the delivery of health care to the patient.

(15) HAI [Health care-associated infection] data--Patient level information identifying the patient, procedures and events required by this chapter, infections resulting from those procedures or events, and causative pathogens when laboratory confirmed.

(16) Health care facility or facility--A general hospital or ambulatory surgical center.

(17) ICD-CM--The International Classification of Diseases, Clinical Modification that is used to code and classify morbidity data from the inpatient and outpatient records of hospitals, ambulatory surgical centers, and physician offices.

(18) Incident--A patient safety event that reached the patient, whether or not the patient was harmed.

(19) Inpatient[Treatment]--An admission to an acute care hospital of greater than 24 hours for medical treatment as defined by the NHSN.

(20) Medical Gas--A gas used in the medical treatment of a patient such as oxygen, nitrogen or nitrous oxide.

(21) Mild Harm--Bodily or psychological injury results in the minimal symptoms or loss of function, or injury limited to the additional treatment, monitoring and/or increased length of stay.

(22) Moderate Harm--Bodily or psychological injury adversely affecting functional ability or quality of life, but not at the levels of severe harm.

(23) Near Miss--A patient safety event that did not reach the patient.

(24) NHSN--Centers for Disease Control and Prevention's National Healthcare Safety Network or its successor.

(25) NHSN-reported PAE--A preventable adverse event as defined by NQF or CMS which is reported through NHSN or its successor.

(26) No Harm--A patient safety event that reached the patient, but no harm was evident.

(27) PSO--Patient safety organization.

(28) Perinatal--The period from the 20th week of gestation through 4 weeks postpartum.

(29) Pediatric and adolescent hospital--A general hospital that specializes in providing services to children and adolescents, as defined in Texas Health and Safety Code, §241.003.

(30) Pressure Ulcer--Localized injury to the skin and/or underlying tissue that usually occurs over a bony prominence as a result of pressure, or pressure in combination with shear and/or friction.

(31) PAE--Preventable adverse event. Examples of PAEs are given in Texas Health and Safety Code, §98.1045.

(32) Reporting quarters--First quarter: January 1 through March 31; Second quarter: April 1 through June 30; Third quarter: July 1 through September 30; Fourth quarter: October 1 through December 31.

(33) Risk adjustment--A statistical method to account for a patient's severity of illness and the likelihood of development of a health care-associated infection (e.g., duration of procedure in minutes, wound class, and American Society of Anesthesiology (ASA) score).
al MS---Serious Reportable Event. Also known as a "never event."

(a) Facilities shall submit HAI and NHSN-reported PAEs, including whether the HAI or NHSN-reported PAE contributed to a patient's death to NHSN [or its successor]. Health care facilities shall report TxHSN-reported PAEs through the TxHSN portal or its successor.

(b) Facilities shall comply with the process prescribed by this chapter and NHSN [or its successor] to allow the department access to HAI data, including whether the HAI contributed to a patient's death, and/or designated PAE data as specified in §§200.3 - 200.7 of this title (relating to How to Report; Which Events to Report; Data to Report; When to Initiate Reporting; and Schedule for HAI and PAE Reporting).

(c) Facilities shall use their facility identification number to identify their facility in the electronic data and correspondence within the department. Each facility meeting the definition of ambulatory surgical center or general hospital as defined in §200.1(2) and (12) [§440] of this title (relating to Definitions) shall have its own facility identification number.

(1) CMS certified health care facilities shall use the CMS-assigned provider number.

(2) If a facility has multiple campuses [or a hospital and ambulatory surgical center are] associated by ownership, each site shall each use a unique CMS provider number. In the event that a facility is not CMS certified or a facility operates multiple facilities under one CMS number, the facility shall use the identification number assigned by NHSN [or its successor].

(3) The relationship between CMS-assigned and NHSN-assigned facility identifiers and the name and license number of the facility is public information.

(d) The department shall notify the facility contact by email 90 calendar days in advance of any change in requirements for reporting HAI data, including whether the HAI contributed to a patient's death, and designated PAE data.

(e) [Facilities shall report HAI and NHSN-reported PAE data on patients identified with a surgical site infection associated with a procedure listed in section 200.4 of this title (relating to Which Events to Report).] Facilities shall report [TxHSN-reported PAE data as defined in §200.4 and §200.6 of this title.

(1) For HAI reporting, if the facility treating the patient performed the procedure, the facility shall report the infection to NHSN [or its successor] according to the surveillance methods described by NHSN [or its successor] and this chapter. For NHSN-reported PAE reporting, if the event occurred in the facility treating the patient, the facility shall report the event to NHSN [or its successor] according to the surveillance methods described by NHSN [or its successor] and this chapter.

(2) For PAE reporting, TxHSN-reported PAE data submitted by the same facility that the PAE occurred, shall be reported through the TxHSN portal or its successor if it is described in this chapter.

(3) For HAI and NHSN-reported PAE reporting, if the facility treating the patient did not perform the procedure, the treating facility shall notify the facility that performed the procedure, document the notification, and maintain this documentation for audit purposes. The facility that performed the procedure shall verify the data related to the infection. The performing facility shall report the HAI or NHSN-reported PAE to NHSN [or its successor] according to the surveillance methods described by NHSN [or its successor] and this chapter.

(a) ICD-CM codes as designated by the federal NHSN [Centers for Disease Control and Prevention’s National Healthcare Safety Network (NHSN) or its successor] shall constitute the definition of events listed in this rule. Facilities shall adapt to changes in ICD-CM specifications as directed by NHSN and the department.

(b) A health care facility shall report HAI data to the department for any HAI occurring in the facility that CMS requires to be reported through NHSN. The HAI data must include the causative pathogen if the infection is laboratory-confirmed. A current list of reportable HAIs can be found at HAITexas.org.

(c) A health care facility shall report each HAI to the department under this section regardless of the facility’s participation in Medicare.

1. All general hospitals shall report the number of device days and laboratory-confirmed central line-associated primary bloodstream infections in special care settings including the causative pathogen.

2. All general hospitals, including pediatric and adolescent hospitals, shall report the number of urinary catheter device days and laboratory-confirmed catheter-associated urinary tract infections in special care settings.

3. General hospitals, other than pediatric and adolescent hospitals, and ambulatory surgical centers shall report the HAI data related to the following surgical procedures. The surgical procedure is defined by the NHSN operative procedure and the associated ICD-CM codes linked to that operative procedure in NHSN.

   4. Colon surgeries (Colon surgery).
   5. Hip arthroplasties (Hip prosthesis).
   6. Knee arthroplasties (Knee prosthesis).
   7. Abdominal hysterectomies (Abdominal hysterectomy).
   8. Vaginal hysterectomies (Vaginal hysterectomy).
   9. Coronary artery bypass grafts (Coronary artery bypass graft with both chest and donor site incisions and Coronary artery bypass graft with chest incision only).
   11. Pediatric and adolescent hospitals shall report the HAI data relating to the following surgical procedures. The surgical procedure is defined by the NHSN operative procedure and the associated ICD-CM codes linked to that operative procedure in NHSN.

   12. Spinal surgery with instrumentation (Spinal fusion, Laminectomy, and Refusion of spine).
   13. Cardiac procedures, excluding thoracic cardiac procedures (Cardiac surgery and Heart transplant).
   14. Ventriculoventricular shunt procedures (Ventricular shunt operations), including revision and removal of shunt.

   (d) Facilities shall report whether the HAI or the NHSN-reported PAE contributed to a patient’s death either directly or by exacerbating an existing disease condition which then led to death.

   (e) A health care facility [General hospitals and ambulatory surgical centers] shall report any of the following preventable adverse events involving the facility’s patient. A current list of reportable PAEs can be found at PAETexas.org.

1. A health care-associated adverse condition or event for which the Medicare program will not provide additional payment to the facility under a policy adopted by the federal Centers for Medicare and Medicaid Services.

2. An event included in the list of adverse events identified by the National Quality Forum.

3. The executive commissioner may exclude an adverse event from the reporting requirement if the executive commissioner, in consultation with the advisory panel, determines that the adverse event is not an appropriate indicator of a preventable adverse event.

(f) Facilities shall also report denominator data as indicated in TXHSN protocols for TXHSN-reported PAEs. For the HAI events identified in this section for calculation of risk adjusted infection rates as required in Texas Health and Safety Code, §98.106(b), NHSN protocols shall be used for the determination of denominator data for HAI and NHSN-reported PAEs. The following facility information shall be entered by the facility for each reporting period.

   1. Number of beds.
   2. Number of surgeries or invasive procedures performed during the reporting period.
   3. Number of patient days.

(g) If a facility has no HAI and/or PAE during the reporting period, facilities shall report this information through NHSN for HAI and NHSN-reported PAEs. Facilities shall report the absence of TXHSN-reported PAEs through the TXHSN portal or its successor.


Data required to be submitted in §200.4 of this title (relating to Which Events to Report) shall be reported using the training, enrollment, case definitions and protocols required by the department in coordination with NHSN [or its successor]. Specific modules and variables will be identified for facilities prior to the enrollment deadline through training, departmental website (HAITexas.org and PAETexas.org), and notification of the facility contact. Content or data element changes will be communicated in the same manner 90 calendar days in advance of the change.

§200.6. When to Initiate Reporting.

(a) All health care facilities who meet the criteria in §200.4 of this title (relating to Which Events to Report) shall enroll in NHSN within 90 calendar days of the designation of NHSN as the secure electronic interface to report HAI or NHSN-reported PAE data. In addition, all health care facilities shall notify the department to obtain TXHSN user accounts and report TXHSN-reported PAEs through TXHSN or its successor. Facilities will be required to do this within 90 calendar days of when TXHSN-reported PAEs are required to be reported or for newly reporting facilities, within 90 days of becoming eligible to report TXHSN-reported PAEs.

(b) Facilities shall submit HAI and designated PAE data beginning with the entire reporting quarter of the effective date in subsection (a) of this section.

1. All facilities—HAI data relating to central line-associated primary bloodstream infections in special care units.

[3] Pediatric and adolescent hospitals—HAI data relating to ventriculoperitoneal shunts as defined in §200.4(e)(3) of this title.

[(c) In addition to the data listed in subsection (b) of this section, facilities shall submit the following data beginning January 4, 2012.]

[(1) Ambulatory surgical centers and general hospitals, except pediatric and adolescent hospitals—HAI data relating to hip arthroplasties as defined in §200.4(d)(2) of this title and coronary artery bypass grafts as defined in §200.4(d)(6) of this title.]

[(2) Pediatric and adolescent hospitals—HAI data relating to cardiac procedures and as defined in §200.4(e)(2) of this title.]

[(d) In addition to the data listed in subsections (b) and (e) of this section, facilities shall submit the following data beginning January 1, 2013.]

[(1) Ambulatory surgical centers and general hospitals, except pediatric and adolescent hospitals—HAI data relating to abdominal and vaginal hysterectomies as defined in §200.4(d)(4) and (5) of this title, colon surgeries as defined in §200.4(d)(1) of this title, and vascular procedures as defined in §200.4(d)(7) of this title.]

[(2) Pediatric and adolescent hospitals—HAI data relating to spinal surgeries with instrumentation as defined in §200.4(e)(1) of this title.]

[(e) In addition to the data listed in subsections (b), (c), and (d) of this section, all facilities shall submit the following data beginning July 1, 2013. All general hospitals, including pediatric and adolescents hospitals, shall report the number of urinary catheter device days and laboratory-confirmed catheter-associated urinary tract infections as defined by NHSN, from special care settings.]

[(f) Beginning March 1, 2014, in addition to the data listed in subsections (b) - (e) of this section, all facilities, including pediatric and adolescents hospitals, shall report whether an HAI contributed to the death of a patient for those procedures outlined in §200.4 of this title and defined by NHSN.]

(c) [(g)] Facilities that are required to report after this initial enrollment period (e.g., newly licensed, change in provider status, etc.) shall enroll within 90 calendar days of the date the facilities [they] become eligible to report in accordance with §200.2 of this title (relating to General Reporting Guidelines for Health Care-Associated Infection and Preventable Adverse Event Data) and §200.3 of this title (relating to How to Report) and shall submit data beginning with the entire reporting quarter after becoming eligible.

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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Barbara L. Klein

General Counsel

Department of State Health Services

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For further information, please call: (512) 776-7676

CHAPTER 265. GENERAL SANITATION

SUBCHAPTER K. ARTIFICIAL SWIMMING LAGOONS

25 TAC §§265.151 - 265.174

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes new Subchapter K, §§265.151 - 265.174, concerning Artificial Swimming Lagoons.

BACKGROUND AND PURPOSE

The purpose of the new sections is to comply with House Bill (H.B.) 1468, 85th Legislature, Regular Session, 2017, which amended Texas Health and Safety Code, §1.005, relating to Definitions, and §341.064, relating to Swimming Pools, Artificial Swimming Lagoons, and Bathhouses. H.B. 1468 created a new category of a water recreational facility, as an artificial swimming lagoon. The new rules provide construction requirements, sanitation procedures, and operational requirements for artificial swimming lagoons in accordance with good public engineering practices, to protect the health and safety of users, and to reduce to a practical minimum the possibility of drowning or of injury to bathers.

Existing facilities are not subject to the new requirements regarding engineering and construction. However, other requirements, such as water quality and user safety, apply to all facilities upon the effective date of the rules.

SECTION-BY-SECTION SUMMARY

Proposed new §265.151, General Provisions, describes the scope and purpose of the new rules, how the rules will apply to new and pre-existing artificial swimming lagoons, and the role of local regulatory authorities in adopting equivalent or more stringent standards.

Proposed new §265.152, Definitions, defines terms used in the new rules.

Proposed new §265.153, Plans, Permits, and Instructions, contains provisions for the use of licensed engineers to plan and design artificial swimming lagoons, the opportunity for DSHS to review the plans, and the owner to provide operational instructions.

Proposed new §265.154, General Construction and Design, contains design provisions for construction of artificial swimming lagoons, including material use, interior color, user loads, floor surface footing and slopes, and underwater use seats and water lounges.

Proposed new §265.155, Decks, Entrances and Exits, Diving Facilities, Slides, and Other Aquatic Play Features, contains design and construction requirements for entrances and exits, other structures to include decks, steps, and handrails, and play features to include floating platforms, diving facilities, slides and other aquatic play features in an artificial swimming lagoon.

Proposed new §265.156, General Requirements for Circulation Systems, describes the equipment used for circulation systems in artificial swimming lagoons, including gauges, flow meters, and circulation equipment.

Proposed new §265.157, Filters, contains requirements for installing filters that meet national standards.
Proposed new §265.158, General Requirements for Pumps and Motors, contains provisions for the use of pumps and motors that meet national standards.

Proposed new §265.159, Suction Outlets, Gravity Flow Systems, and Return Inlets, contains requirements to design these systems in accordance with the Federal Virginia Graeme Baker Act and applicable national standards.

Proposed new §265.160, Surface Skimming and Perimeter Overflow (Gutter) Systems, contains requirements to design these systems to protect against entrapment and to meet water circulation needs of an artificial swimming lagoon.

Proposed new §265.161, Electrical Requirements, requires electrical equipment and installation to meet applicable national standards and codes.

Proposed new §265.162, Water Supply, requires an artificial swimming lagoon constructed on or after the effective date of this subchapter to use potable water from a public water supply or from a private water supply meeting certain requirements, and to use backflow prevention devices and water supply methods meeting national standards.

Proposed new §265.163, Drinking Water, Food, Beverages, and Containers, contains requirements for supplying users with a source of drinking water and allows the consumption of food and beverages in the artificial swimming lagoon if the lagoon is privately owned and operated.

Proposed new §265.164, Wastewater Disposal, requires the disposal of wastewater in accordance with Texas Commission on Environmental Quality or local regulatory authority standards.

Proposed new §265.165, Disinfectant Equipment, requires the use of a disinfectant for which the residual can be easily measured, the use of monitoring controllers, the proper storage and labeling of disinfectants, and personnel to be properly trained and provided appropriate protective equipment and clothing.

Proposed new §265.166, Water Quality, requires the use of chemicals that are registered with the Environmental Protection Agency or are listed by the NSF International. This new rule defines the types and frequency of water quality testing requirements, and the recordkeeping and retention requirements for water quality.

Proposed new §265.167, Request for Alternate Method of Disinfectant, provides a method to submit to DSHS an application to use an alternate method of disinfectant.

Proposed new §265.168, Enclosures, describes the type of enclosures and the entry gates, doors, and windows required for an artificial swimming lagoon.

Proposed new §265.169, Safety Features, contains provisions for safety equipment, the use of watercraft, safety signs, safety equipment, lighting, and emergency telephones.

Proposed new §265.170, Lifeguard Requirements, contains provisions for the minimum number of lifeguards, safety and personal equipment, training and certification of lifeguards, and on-site records of a lifeguard's certification.

Proposed new §265.171, Operation and Management, contains provisions for the certification of the lagoon operator, off-season water clarity and safety, and proper use of chemicals.

Proposed new §265.172, Dressing and Sanitary Facilities, defines the number, locations, and type of user sanitary facilities required at artificial swimming lagoons.

Proposed new §265.173, Compliance, Inspections, and Investigations, defines DSHS’ or a local regulatory authority's right to inspect at reasonable times.

Proposed new §265.174, Enforcement, describes the enforcement provisions for DSHS or a local regulatory authority and provisions for either voluntary or court-ordered closures and reopenings.

FISCAL NOTE

Donna Sheppard, Chief Financial Officer, has determined that for the first five years that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

GOVERNMENT GROWTH IMPACT STATEMENT

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

(1) the proposed rules will not create or eliminate a government program;
(2) implementation of the proposed rules will not affect the number of DSHS employee positions;
(3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;
(4) the proposed rules will not affect fees paid to DSHS;
(5) the proposed rules will create new rules;
(6) the proposed rules will not expand, limit, or repeal existing rules; and
(7) the proposed rules will not change the number of individuals subject to the rules.

DSHS has insufficient information to determine the proposed rules' effect on the state's economy.

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

Donna Sheppard, Chief Financial Officer, has also determined that the adverse impact on small businesses, micro-businesses or rural communities required to comply with the sections as proposed is unknown. The rules may impose additional costs, but it is unknown the extent of changes required for them to comply.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas and are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

PUBLIC BENEFIT AND COSTS

Stephen Pahl, Associate Commissioner, Consumer Protection Division, has determined that for each year of the first five years that the rules will be in effect, the public will benefit from adoption of the sections. The public benefit anticipated from enforcing
or administering the sections is to better ensure the health and safety of residents of Texas.

Donna Sheppard, Chief Financial Officer, has also determined that for the first five years the rules are in effect persons with pre-existing facilities may incur economic costs, but we are unable to determine the costs as it is unknown the extent of changes required for them to comply. It has also been determined that for future artificial swimming lagoons there is no anticipated economic costs to persons required to comply with the proposed rules because future facilities will have standard construction and operation requirements and safety standards that are consistent for each artificial swimming lagoon.

REGULATORY ANALYSIS

DSHS has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

DSHS has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC HEARING

A public hearing to receive comments on the proposal will be scheduled after publication in the Texas Register and will be held at the DSHS Exchange Building, 8407 Wall Street, Austin, Texas 78754. The meeting date and time will be posted on the DSHS Artificial Swimming Lagoon website at: https://dshs.texas.gov/swimminglagoons/. Please contact Katie Moore by phone at (512) 231-5719 or by email at katie.moore@dshs.texas.gov if you have questions.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Katie Moore, Consumer Protection Division, Texas Department of State Health Services, Mail Code 1987, P.O. Box 149347, Austin, Texas 78714-9347; hand delivered to Katie Moore, Consumer Protection Division, Texas Department of State Health Services, 8407 Wall Street, Austin, Texas 78754; or sent by email to PHSCPS@dshs.texas.gov. When emailing comments, please indicate "Comments on Chapter 265 Artificial Lagoon Rules" in the subject line.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted.

STATUTORY AUTHORITY

The new rules are authorized by Texas Health and Safety Code, §341.002, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and establish standards and procedures for the management and control of sanitation and for health protection measures; and by Texas Government Code, §531.0055 and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001.

The new rules implement Texas Health and Safety Code, Chapters 341 and 1001; and Texas Government Code, Chapter 531.


(a) Scope and purpose. This subchapter addresses minimum standards for the design and construction of artificial swimming lagoons. The rules in this subchapter establish minimum operating standards for artificial swimming lagoons to ensure proper filtration, chemical balance, and maintenance of the water for the safety of users, and to reduce to a practical minimum the possibility of drowning or injury to users. This subchapter implements Texas Health and Safety Code, §341.064(g) authorized by Texas Health and Safety Code, §341.002, and the rules are considered to be good public health engineering practices.

(b) Application of the rules. This subchapter applies to all artificial swimming lagoons, regardless of the date of construction, unless otherwise specified.

(c) Date of construction. The date of construction of the artificial swimming lagoon is the date that a building permit for construction is issued or, if no building permit is required, the date that excavation or electrical service begins, whichever is earlier, in which case the artificial swimming lagoon owner or operator must produce adequate written documentation of that fact.

(d) Local regulatory authority. When a local regulatory authority has jurisdiction for the regulation of the artificial swimming lagoon, it may adopt standards equivalent to or more stringent than this subchapter, with the exception of a department-approved alternate method of disinfectant, that are in accordance with good public health engineering and safety practices.

§265.152. Definitions.

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

(1) AED--Automated External Defibrillator. A device that automatically diagnoses the life-threatening cardiac arrhythmias of ventricular fibrillation and pulseless ventricular tachycardia, and is able to treat those conditions by application of electricity which stops the arrhythmia, allowing the heart to re-establish an effective rhythm.

(2) Alternative communication system--Devices that alert multiple on-site staff when activated, such as pager systems, radios, or walkie-talkie communication systems. Used to notify either on-site emergency medical services (EMS), on-site medical staff, or on-site certified staff such as lifeguards, or a commercial emergency monitoring service.

(3) Alternative method of disinfectant--A method of disinfection required to be approved by the department.

(4) ANSI--American National Standards Institute.

(5) APSP--Association of Pool and Spa Professionals.

(6) ARC--American Red Cross.
(7) Artificial swimming lagoon—lagoon. An artificial body of water used for recreational purposes with more than 20,000 square feet of surface area, an artificial liner, and a method of disinfectant. The term does not include a body of water open to the public that continuously recirculates water from a spring or a pool. The term "lagoon" used in this subchapter means "artificial swimming lagoon."

(8) Artificial swimming lagoon enclosure--A fence, wall, or combination of fences, walls, gates, or doors that completely surround the lagoon.

(9) Artificial swimming lagoon yard--An area that has an enclosure that contains the lagoon.

(10) ASME--American Society of Mechanical Engineers.

(11) ASPSAA--American Swimming Pool and Spa Association.

(12) Australian standard AS 4663-2013--A method to measure the slip resistance of pedestrian surfaces.

(13) Backflow prevention device--A device designed to prevent a physical connection between a potable water system and a non-potable source such as the lagoon, or a physical connection between the lagoon and a sanitary sewer or wastewater disposal system.

(14) Bonded--Permanent joining of metallic parts to form an electrically conductive path that ensures electrical continuity and the capacity to conduct safely any current likely to be imposed in order to minimize the risk of electrocution.

(15) Broken stripe--A horizontal stripe that is at least 1-inch wide with uniform breaks in the stripe, with the breaks totaling not more than 75% of the length of the stripe and stripe breaks.

(16) BVM--Bag-Valve Mask. A handheld device used to provide positive pressure ventilation to persons who are not breathing adequately. Also known by its proprietary name, Ambu bag.

(17) Chemical feeder--A mechanical or electronic device for applying chemicals into the lagoon.

(18) Circulation equipment--Mechanical components that are part of a circulation system on the lagoon. Circulation equipment includes pumps, hair and lint strainers, filters, valves, gauges, meters, heaters, surface skimmers, inlet/outlet fittings, underdrain and dewatering systems, and chemical feeding devices.

(19) Circulation system--An arrangement of mechanical equipment, components, and circulation equipment connected by piping to the lagoon in a closed circuit.

(20) Cross-connection control device--A device that is designed to prevent a physical connection between a potable water system and a non-potable source such as the lagoon, or a physical connection between the lagoon and a sanitary sewer or wastewater disposal system. (See paragraph (13) of this section "Backflow prevention device."

(21) DCOF--Dynamic coefficient of friction. A measurement of frictional resistance of a surface one pushes against when already in motion.

(22) DCOF AcuTest--A test used to evaluate the slip resistance of DCOF of a tile surface under known conditions using a standardized sensor prepared according to a specific protocol.

(23) Deck--An area immediately adjacent to or attached to the lagoon that is specifically constructed or installed for sitting, standing, or walking and may include the coping. The term does not include a sandy beach area adjacent to a zero-entry access area.

(24) Deep area--A water level in the lagoon that is over five feet in depth.

(25) Department--The Texas Department of State Health Services.

(26) Depth--Vertical distance measured at three feet from the lagoon wall or barrier from the bottom of the lagoon to the design water level.

(27) Design water level--

(A) For a skimmer system, the midpoint of the operating range of the skimmers.

(B) For a gutter or overflow system, the top of the overflow rim of the gutter or overflow system.

(28) Disinfectant--Energy, chemicals, or a combination of both used to kill undesirable or pathogenic (disease causing) organisms and having a measurable residual or level adequate to make the desired kill.

(29) Diving board--A recreational mechanism for entering the lagoon, consisting of a semi-rigid board that derives its elasticity through the use of a fulcrum mounted below the board.

(30) DPD--A chemical testing reagent (N, N-Diethyl-P-Phenylenediamine). It is used to measure the levels of free chlorine or bromine in water by yielding a series of colors ranging from light pink to dark red.

(31) Facility--The lagoon, restrooms, dressing rooms, equipment rooms, decks or walkways, beach entries, enclosure and other appurtenances directly serving the lagoon.

(32) Filter--A device that removes undissolved particles from water by recirculating the water through a porous substance (filter media or element).

(33) Filter media--A finely graded material (for example, sand, diatomaceous earth, polyester fabric, or anthracite) that removes filterable particles from the water.

(34) FINA--Fédération de Internationale de Natation. The organization that administers international competition in aquatic sports.

(35) Licensed engineer--A person licensed to engage in the practice of engineering in the State of Texas in accordance with the Texas Engineering Practice Act, Texas Occupations Code, Chapter 1001, and related rules.

(36) Licensed master electrician--An individual, licensed as a master electrician, who on behalf of an electrical contractor, electrical sign contractor, or employing governmental entity, performs electrical work in accordance with the Texas Electrical Safety and Licensing Act, Texas Occupations Code, Chapter 1305, and related rules.

(37) Lifeguard--An expert swimmer who supervises the safety and rescue of swimmers, surfers, and other water sports participants and who has successfully completed and holds a current ARC certificate or the equivalent certification from and an aquatic safety organization, which includes training in cardiopulmonary resuscitation for adults, infants, and children, use of an AED, use of a BVM, and first aid.

(38) Local regulatory authority--A county, municipality, or other political subdivision of the state.

(39) Motorboat--Any vessel propelled or designed to be propelled by machinery, whether or not the machinery is permanently
or temporarily affixed or is the principal source of propulsion. (See paragraph (64) of this section "Vessel.")

(40) Non-swimming area--A section of a lagoon used by vessels or motorboats, or for other aquatic activities such as surfing and wakeboarding.

(41) NSF--NSF International.

(42) NSF 50 or NSF/ANSI Standard 50--Standard establishing minimum requirements for materials, design, construction, and performance of equipment commonly included in the water circulation systems of residential and public swimming pools, spas, or hot tubs.

(43) NSF 60 or NSF/ANSI Standard 60--Standard covering drinking water treatment chemicals and establishing criteria for promoting sanitation and protection of public health in relation to drinking water.

(44) ORP--Oxidation Reduction Potential. The potential level of oxidation-reduction produced by strong oxidizing (sanitizing) agents in a water solution. Oxidation level is measured in millivolts by an ORP meter.

(45) Overflow system--Overflows, surface skimmers, and surface water collection systems of various design and manufacture for removal of surface water from the lagoon.

(46) pH--A value expressing the relative acidic or basic tendencies of a substance such as water on a scale from 0 to 14 with 7.0 being neutral, values less than 7.0 being acidic, and values greater than 7.0 being basic.

(47) Pump--A mechanical device that causes hydraulic flow and pressure for filtration, heating, and circulation of the water in the lagoon.

(48) Regulatory authority--A federal or state agency or a local regulatory authority.

(49) Rescue tube--A piece of lifesaving equipment that is an essential part of the equipment that must be carried by lifeguards and that is used to make water rescue easier by helping help support the victim's and rescuer's weight.

(50) Return inlet or inlet--Aperture or fitting through which the water under positive pressure returns into the lagoon.

(51) Ring buoy--A ring-shaped floating buoy capable of supporting a user.

(52) Rope and float line--A continuous line that is not less than 1/4-inch in diameter and that is supported by buoys and attached to sides of the lagoon to separate swimming areas from non-swimming areas of the lagoon.

(53) Secchi disk--An eight-inch diameter disk with alternating black and white quadrants that is lowered in the water column and is used to measure water turbidity and clarity.

(54) Self-closing and self-latching device--A mechanism on a gate that enables a gate to automatically fully close and latch without human or electrical power.

(55) Service animal--A canine that is specially trained or equipped to help a person with a disability and that is used by a person with a disability in accordance with the Texas Human Resources Code, Chapter 121. An animal of any other species, whether wild or domestic, trained or untrained, is not considered a service animal.

(56) Slide--A recreational feature with a flow of water and an inclined flume or channel by which a rider is conveyed downward into the lagoon.

(57) Slip resistant--A surface that has been treated or constructed to significantly reduce the chance of slipping.

(58) Steps, recessed steps, ladders, and recessed treads--A lagoon entry and exit that may be used separately or in conjunction with one another.

(59) Suction outlet--A fitting, fitting assembly, cover or grate, and related components that provide a localized low-pressure area for the transfer of water from the lagoon.

(60) Swimming area--A section of a lagoon used for swimming, wading, or other activities involving contact with or immersion in water.

(61) TCEQ--Texas Commission on Environmental Quality.

(62) UL--An independent testing laboratory (formerly Underwriters Laboratories).

(63) User load--The number of persons in the swimming areas of the lagoon at any given moment or during any stated period of time.

(64) Vessel--Any watercraft, including surfboards, paddleboards, and wakeboards, other than a seaplane on water, used or capable of being used for transportation on water. (See paragraph (39) of this section "Motorboat.")

(65) VGBA--The Virginia Graeme Baker Pool and Spa Safety Act. A federal law that requires all public pools and spas to be fitted with suction outlets that meet the ASME/ANSI A112.19.8 standard.

(66) Wastewater disposal system--A plumbing system used to dispose of backwash or other water from the lagoon or from dressing rooms and other facilities associated with the lagoon.

(67) Water lounge or shelf--A horizontal area of the lagoon that adjoins the lagoon wall at a depth of 2 inches to 10 inches and is used for seating and play.


(a) Licensed Engineer required. The lagoon constructed on or after the effective date of this subchapter shall be planned and designed by a licensed engineer.

(b) Plans and permits. The department may review plans for the lagoon to ensure compliance with the rules in this subchapter. The lagoon shall comply with any regulatory authority permit requirements. Regardless of whether a regulatory authority requires plans or permits, the lagoon shall be designed, constructed, and operated in compliance with this subchapter.

(c) Operational instructions. Upon completion of construction, the owner shall obtain complete written operational instructions for the lagoon that include procedures for filtration, backwash, cleaning, operation of all chemical feed devices, and general maintenance. In addition, the builder shall label all valves and exposed piping, including normal operating pressures and pressure differential that indicate the need for cleaning.

§265.154. General Construction and Design.

(a) Non-toxic and sound materials. Lagoons and all appurtenances shall be constructed of materials that:

1. are nontoxic to humans and the environment;

2. are impervious and enduring;

3. will withstand design stresses; and
(4) will provide a watertight structure with a smooth, easily cleanable surface without cracks or joints that are not watertight and easily cleanable.

(b) NSF 50. For lagoons constructed on or after the effective date of this subchapter, pumps, filters, skimmers, chemical feeders, and other equipment that falls within NSF/ANSI Standard 50 shall meet the standard as confirmed by a testing laboratory. Conformity with the NSF 50 shall be evidenced by the listing or labeling of such equipment by such a laboratory or by separate documentation.

(c) Prohibition of earth material.

(1) Earth shall not be permitted as an interior finish in the lagoon. Clean sand or similar material if used in a beach environment:

A) shall only be used over an impervious surface;

B) shall be designed to perform in such an environment; and

C) shall be controlled so as not to adversely affect the proper circulation, filtration, treatment system, maintenance, safety, sanitation, and operation of the lagoon.

(2) If sand or similar material is used in the lagoon, positive upflow circulation through the sand or other systems shall be provided as necessary to ensure that sanitary conditions are maintained at all times.

(d) Interior color. The color of the interior of the lagoon shall be white or a light enough color so that objects and users in the water shall be easily seen. The finish shall be at least 6.5 on the Munsell color value scale. An eight-inch black disk or a Secchi disk at the deepest point of the floor in a swimming area of the lagoon shall be clearly and immediately seen by an observer.

e) Materials to withstand freezing temperatures. The lagoon liner or shell and appurtenances, piping, filter system, pump and motor, and other components shall be designed and constructed to facilitate protection from damage due to freezing.

(f) Surface water. The lagoon shall be designed such that surface water does not enter the lagoon.

(g) Interior surface footing. The surfaces within the lagoon intended to provide footing for users shall be slip-resistant to help reduce the chance for a fall. The roughness or irregularity of such surfaces shall not cause injury to feet during normal use.

(h) General shape. This subchapter is not intended to regulate the perimeter shape of the lagoon. It is the responsibility of the licensed engineer to take into account the effect a given shape of the lagoon will have on the health and safety of the users.

(i) Entanglement or entrapment avoidance. There shall be no protrusions, extensions, means of entanglement, or other obstructions in the lagoon that are likely to cause entrapment or injury of the user.

(j) Maximum users in swimming areas. Maximum user loading in a swimming area shall comply with the following:

1) In an area of water depth 4 feet or less, the user load shall not exceed one user per 15 square feet of water surface.

2) In an area of water depth greater than 4 feet, the user load shall not exceed one user per 25 square feet of water surface.

3) The owner or operator shall be responsible for restricting usage so that the maximum capacity is not exceeded.

(k) Maximum users in non-swimming areas. The owner or operator shall determine the maximum user loading in a non-swimming area by considering the type of use in the non-swimming area and the presence of motorboats and vessels and shall post signs indicating the maximum number of users.

(l) Floor slopes. For the lagoon constructed on or after the effective date of this subchapter, floor slope in a swimming area shall comply with the following:

1) For depths up to five feet, the slope shall be uniform and not exceed 1:10.

2) For depths over five feet, the slope shall be uniform and not exceed 1:3.

3) The slope may vary in limited areas where access for persons with disabilities has been provided.

(m) Underwater seat benches. An underwater seat bench shall:

1) be constructed with slip-resistant materials;

2) have a maximum seating width of 18 inches projecting from the wall at a depth not to exceed 20 inches below the design water level;

3) be located fully outside of the required minimum diving water envelope if the lagoon is used for diving;

4) be visually set apart and provided with a solid or broken stripe at least 1-inch wide on the top surface along the front leading edge of the bench; and

5) not be used as a required entry or exit access unless used in conjunction with steps.

(n) Water lounges. A water lounge shall:

1) be a minimum of 20 inches wide and provide a minimum of 10 square feet of horizontal surface adjoining on the edge of the lagoon over a distance of not less than 3 feet;

2) be horizontal and at a depth of 2 inches to 10 inches below the water surface;

3) be visually set apart with a horizontal solid or broken stripe at least 1-inch wide on the top surface along the leading edge of horizontal surfaces of all edges not adjoining the lagoon wall; and

4) be located fully outside of the required minimum diving water envelope if the lagoon is intended for use with diving equipment;

5) have a slip-resistant surface; and

6) be located in water depth of 4 feet or less.

(o) Construction tolerances. For lagoons constructed on or after the effective date of this subchapter, construction tolerances in a deep area may vary plus or minus three inches. All other dimensions may vary plus or minus two inches. Construction tolerances for entry or exit step treads and risers may vary plus or minus 1/2-inch.

§265.155. Decks, Entrances and Exits, Diving Facilities, Slides, and Other Aquatic Play Features.
(a) Access. Entrances and exits, including hand and grab rails, walkways, and docks, shall comply with applicable requirements for access to recreation facilities and the elements for persons with disabilities under federal, state, and local fair housing and disability access laws. 

(b) Decks for lagoons. The following is required where decks are provided for lagoons:

(1) Each deck shall be at least five feet wide.

(2) A deck shall be provided at each entry or exit into the swimming areas.

(3) An unobstructed deck area at least four feet wide shall be provided for access around:

(A) diving equipment;
(B) special feature stairways, such as for a waterslide;
(C) lifeguard stands;
(D) diving boards;
(E) similar deck equipment; and
(F) structural columns.

(4) In a swimming area where perimeter deck is non-contiguous and the clearance is not at least four feet, locations for lifeguards to safely access the edge of the lagoon are required.

(5) A deck shall slope away from the lagoon so that water drains into deck drains or to perimeter areas.

(6) A deck drain shall not drain to the lagoon, lagoon gutter, or recirculation systems.

(7) Loose plant material or bedding shall not be permitted within a perimeter deck.

(8) Carpet, wood, and artificial turf are prohibited as perimeter deck materials.

(9) Concrete that is used as a deck material shall be installed in accordance with the American Concrete Institute ACI Standard 302.1R-15, "Guide for Concrete Floor and Slab Construction" and in accordance with local building codes.

(10) All decks shall have slip resistant, textured finishes that have a minimum dynamic coefficient of friction at least equal to the requirements of ANSI A137.1-2012 for that installation as measured by the DCOF AcuTest or by the Australian Standard AS 4663-2013.

(11) Continuous watertight expansion joint material shall be provided between perimeter decks and lagoon coping.

(12) Open joints or gaps larger than 3/16-inch or vertical elevations exceeding 1/4-inch in the deck shall be corrected using appropriate fillers.

(c) Acceptable means of entry or exit. Acceptable means of entry or exit include stairs, recessed steps, ladders, ramps, swimouts, lifts, and beach (zero-depth) entry or exit.

(d) Number of entry or exit. A minimum of two entry or exit points are required in each swimming area. A single set of entry or exit steps or a single beach entry extending a minimum of 75% around the perimeter of the swimming area meets the minimum entry or exit requirements.

(e) Beach entry slope. Beach entry slopes shall not exceed 1:10.

(f) Slip resistant surfaces. Steps, ladders, and recessed treads shall have slip resistant surfaces.

(g) Steps. For a lagoon constructed on or after the effective date of this subchapter, steps shall comply with the following:

(1) Steps shall conform with the most recent edition of the Centers for Disease Control and Prevention Model Aquatic Health Code (MAHC) in MAHC Sections 4.5.4.5, MAHC Table 4.5.4.5, MAHC Figure 4.5.4.5.1, Figure 4.5.4.5.2, and Figure 4.5.4.5.2.

(2) The bottom riser height may be allowed to taper to zero.

(3) Steps shall not be used underwater to transition between different depths.

(4) Underwater steps shall be provided with a horizontal solid or broken stripe at least one-inch wide on the top surface along the front leading edge of each step. This stripe shall be plainly visible to persons standing above the steps. The stripe shall be a contrasting color to the background on which it is applied, and the color shall be permanent in nature and shall be a slip resistant surface.

(h) Handrails. A lagoon shall comply with applicable federal, state, and local requirements for access by persons with disabilities.

(1) Handrails, if removable, shall be installed in such a way that they cannot be removed without the use of tools.

(2) Handrails shall be provided for each set of stairs provided in a lagoon constructed on or after the effective date of this subchapter and shall be constructed of corrosion-resistant materials, bonded in accordance with the National Electrical Code, and anchored securely.

(3) The upper railing surface of handrails shall extend above the deck or at the interface of the water and beach.

(4) Dimensions of handrails not for use by persons with disabilities shall conform to requirements in the most current edition of the Centers for Disease Control and Prevention Model Aquatic Health Code (MAHC) in MAHC Table 4.5.5.7 and MAHC Figure 4.5.5.7.1.

(i) Floating platforms.

(1) A floating swim platform or floating dive platform shall:

(A) be constructed of a non-slip and splinter-resistant material that can be easily cleaned;

(B) have at least one ladder with handles and steps that extend at least 30 inches below water level;

(C) be anchored or secured to keep it in its designated area if a floating platform; and

(D) minimize the risk of entrapment by being be constructed with:

(iii) a visible minimum 12-inch air space under maximum load; or

(ii) a smooth solid bottom that extends at least 2 feet below the water.

(2) A floating platform with a perimeter greater than 75 feet shall have a minimum of two ladders with handles and steps that extend at least 30 inches below the water level.
(3) A floating dive platform less than 20 inches above the water level shall have a minimum of 9 feet of water depth for 16 feet horizontal distance beyond the diving platform.

(4) A floating dive platform greater than 20 inches above the water level shall be designed and constructed according to minimum dimensions specified by the FINA Facilities Rules, 2017-2021.

(1) Slides and other aquatic play features.

(1) A slide or other aquatic play feature, such as a climbing wall, floating amusement island, or zip line, shall be installed according to manufacturer's instructions.

(2) An aquatic play feature that meets the definition of "Amusement Ride" in Texas Occupations Code, Chapter 2151 (the Amusement Ride Safety Inspection and Insurance Act) shall comply with that chapter.


(k) Diving platforms or boards. A diving platform or diving board shall be designed and constructed according to standards specified by the FINA Rules, 2017-2021.

§265.156. General Requirements for Circulation Systems.

(a) Licensed Engineer. The circulation system of a lagoon constructed on or after the effective date of this subchapter shall be designed by a licensed engineer.

(b) Circulation. The circulation system shall provide complete and uniform circulation of the water necessary to maintain the water quality requirements in this subchapter.

(c) Access for inspection or repair. Circulation system components shall be accessible for inspection, servicing, repair, or replacement and shall be installed in accordance with manufacturer's specifications.

(d) Non-toxic materials. The circulation system piping and fittings shall be non-toxic, and shall be of materials able to withstand operating pressures and conditions. Polyvinyl chloride pipe shall bear the NSF seal for potable water and be schedule 40 or stronger.

(e) Operation and maintenance instructions. Circulation system operation and maintenance instructions shall be provided to the operator of the lagoon. A copy of the instructions shall be kept in the building housing the circulation system.

(f) Gauges and meters. For a lagoon constructed on or after the effective date of this subchapter, the circulation system shall be equipped with:

(1) A filter inlet pressure gauge on each filter;

(2) A filter outlet gauge on each filter; and

(3) A flow meter installed according to manufacturer's instructions and located to show the rate of flow through each filter in gallons per minute that is represented by the manufacturer to be accurate within 10% of the true flow rate.

(g) Labeling of exposed piping. Exposed piping shall be labeled to identify the piping function and direction of flow. The name of the liquid or gas and arrows indicating direction of flow shall be permanently indicated on the pipe.

§265.157. Filters.

(a) NSF/ANSI standards. Filters shall be listed and labeled to NSF/ANSI Standard 50 or NSF/ANSI Standard 60, unless the lagoon was constructed before the effective date of this subchapter and it uses filters that are not replaced.

(b) Filters cleanable. For lagoons constructed on or after the effective date of this subchapter, filters shall be designed so that after cleaning according to manufacturer's instructions, the system provides the required water clarity.

(c) Observable waste discharge. For a lagoon constructed on or after the effective date of this subchapter, filters shall have a readily observable free fall or sight glass installed on the waste discharge line in order that the filter washing progress may be observed. Sight glasses shall be readily removable for cleaning.

(d) Filters accessible. Filters shall be installed so that filtration surfaces are accessible for inspection and service in accordance with manufacturer's instructions.

(e) Operation and maintenance instructions. Filters and separation tanks shall have operation and maintenance instructions permanently installed on the filter or separation tank. Maintenance instructions shall be unobstructed and clearly visible.

§265.158. General Requirements for Pumps and Motors.

(a) Safe pump operation. The installation of a pump and component parts shall provide safe operation in accordance with manufacturer's instructions.

(b) UL and NEMA requirements. A pump shall comply with UL or National Electrical Manufacturers Association requirements.

(c) Backflow prevention. A priming device for a pump receiving piped water from a public water supply providing potable water shall be isolated from the potable supply by means of a cross-connection control device (backflow prevention device) approved by the TCEQ or local regulatory authority.

(d) Backflow prevention assembly testing. A backflow prevention assembly shall be tested upon installation and certified to be operating within specifications by a licensed backflow prevention assembly tester. A backflow prevention assembly shall be tested and certified to be operating within specifications at least annually by a licensed backflow prevention assembly tester. Documentation of testing and certification shall be kept for at least three years and shall be provided during an inspection.

(e) Pumps and motors. A pump or motor provided for circulation of water shall meet the filter design range of flow required for filtering and cleaning the filters against the total dynamic head developed by the complete system and to meet required water clarity.

(f) Cleanable strainer or screen. For a lagoon constructed on or after the effective date of this subchapter, a pump, except a pump with a vacuum filter, shall have a cleanable strainer or screen upstream of the circulation pump to remove waste that shall be readily accessible and cleaned as per manufacturer's instructions.

(g) Motors. A motor shall:

(1) Have an open, drip-proof enclosure as defined by the National Electrical Manufacturers Association Standard MG1-2016, or subsequent standard, and be constructed electrically and mechanically to perform satisfactorily and safely under the conditions of load and environment normally encountered in lagoon installations;

(2) Be capable of operating the pump under full load with a voltage variation of plus or minus 10% from the nameplate rating;

(3) Have thermal or current overload protection, either built in or in the line starter, to provide locked rotor and running protection; and
(4) comply with UL requirements.

(h) Emergency shutoff switch. An emergency shutoff switch shall be provided for service personnel to disconnect all power to circulation and jet system pumps. An emergency shut-off switch shall be readily accessible to operators and located within sight of the lagoon and not more than 50 feet from the lagoon.


(a) Skimmer. For the purpose of this section, a skimmer is not considered to be a suction outlet.

(b) Licensed Engineer. A suction outlet system, gravity flow system, or return system constructed on or after the effective date of this subchapter shall be planned and designed by a licensed engineer.

(c) Submerged suction outlets. Fully submerged suction outlets (main drains) are not required.

(d) Entrapment protection. A suction outlet system shall be designed to protect against suction entrapment, evisceration, and hair entanglement/entrapment hazards in accordance with ANSI/APSP-16, American National Standard for Suction Entrapment Avoidance in Swimming Pools, Wading Pools, Spas, Hot Tubs and Catch Basins.

(e) Suction outlets. Suction outlets shall comply with the following:

(1) Covers, grates, and fittings shall be compliant with the VGBA.

(2) At least two hydraulically balanced VGBA-compliant suction outlets shall be provided per pump suction line.

(3) Suction outlets installed in water 4 feet deep or less shall be unblockable such that its perforated (open) area cannot be shadowed by the area of the 18-inch x 23-inch Body Blocking Element as described in ANSI/APSP-16, American National Standard for Suction Entrapment Avoidance in Swimming Pools, Wading Pools, Spas, Hot Tubs and Catch Basins.

(4) The distance between hydraulically balanced VGBA-compliant suction outlets, as measured from center to center of the suction outlet cover or grate shall be no less than three feet and no more than five feet.

(5) The flow rating of each suction outlet cover or grate shall be at least equal to the system's maximum flow rate.

(6) No means of isolating hydraulically balanced suction outlets is permitted that could allow one suction outlet to serve as a sole source of water to a pump.

(7) A single pipe to a pump suction inlet that serves two or more suction outlets may have a valve to shut off the flow to the pump.

(f) Water velocity in pipes. Water velocity in pipes in a pump-suction hydraulic system shall not exceed 6 feet per second (fps) when 100% of the pump flow comes from the suction outlet system and any suction fitting in the suction outlet system is blocked. When one suction fitting in the suction outlet system is blocked the flow rate through fitting, cover, or grate shall not exceed the approved flow rate for that fitting and cover or grate.

(g) Closure when cover broken, missing, or loose. If the cover or grate on a suction outlet including a vacuum outlet that is missing, broken, or loose, the swimming area of the lagoon shall be closed immediately and remain closed until a proper repair is made or replacement is installed.

(h) Return inlets. A return inlet shall be designed so as not to constitute a hazard to the user.

(i) Automatic cleaners. An automatic bottom or side cleaner that can provide a means of entanglement or entrapment shall not be operated in a swimming area of the lagoon when the swimming area is occupied by users.


(a) Licensed engineer. A surface skimming system or perimeter overflow (gutter) system constructed on or after the effective date of this subchapter shall be planned and designed by a licensed engineer.

(b) Surface skimming design. A surface skimming system or perimeter overflow system shall be planned and designed as required in §265.159 of this subchapter (relating to Suction Outlets, Gravity Flow Systems, and Return Inlets) and shall be capable of providing 100% of the design system flow, unless the department has approved an alternate method of disinfectant.

(c) Safe design of surface skimming and perimeter overflow systems. A surface skimmer or perimeter overflow system shall be designed and installed to prevent body and limb entrapment.

(d) Effective skimming action maintained. Surface skimmers shall be located to maintain effective skimming action throughout the lagoon.

(e) Hydraulic capacity of perimeter overflow system. The hydraulic capacity of a perimeter overflow (gutter) surface skimming system shall be capable of handling 100% of the circulation flow, unless the department has approved an alternate method of disinfectant.

§265.161. Electrical Requirements.

(a) Licensed designer. An electrical system installed on or after the effective date of this subchapter shall be planned and designed by a licensed engineer or licensed master electrician.

(b) Compliance with National Electrical Code (NEC). All electrical equipment and lines shall comply with applicable provisions in the current NEC in effect on the date of installation.

(c) Testing laboratory approval. Electrical equipment shall be approved by a nationally recognized electrical testing laboratory, such as UL, at the time of installation as evidenced by the listing or labeling on the equipment.

(d) Grounding and bonding. Equipment, as required, shall be bonded and grounded in accordance with the NEC in effect at the time of installation. Pumps shall be both internally and externally grounded and bonded in accordance with the NEC.

(e) Manufacturer's instructions. Electrical equipment and related electrical components shall comply with manufacturer's installation instructions.

(f) Line clearances. Electrical line clearances shall comply with the National Electrical Safety Code or NEC in effect at the time of construction.

(g) Inspections required. For a lagoon constructed on or after the effective date of this subchapter, a licensed electrician shall conduct at least two inspections, one during construction and one after construction, to ensure that all electrical facilities are constructed in compliance with this section.

(h) Emergency shutoff switch. An emergency shutoff switch shall be provided for service personnel to disconnect all power to circulation and jet system pumps. An emergency shutoff switch shall be readily accessible to operators, located within sight of the lagoon and not more than 50 feet from the lagoon.


PROPOSED RULES  September 13, 2019  44 TexReg 4959
§265.164. Wastewater Disposal.
(a) Discharge or disposal. Filter backwash water and drainage water that is not reused in a lagoon shall be discharged or disposed of in accordance with the requirements of TCEQ or local regulatory authority.
(b) No direct connection. No direct mechanical (hard) connection shall be made between the lagoon, the lagoon drain, the chemical treatment equipment, or the system of piping and the sanitary sewer system, septic system, or other wastewater disposal system.
(c) Backwash water. Backwash water and lagoon draining water shall be discharged through an air gap formed by positioning the discharge pipe opening at least two pipe diameters above the overflow level of any barriers that could cause flooding and submergence of the discharge opening or by other means in accordance with TCEQ requirements. Splash screening barriers are permitted as long as the barriers do not destroy air gap effectiveness.
(d) On-site sewage facility wastewater disposal lines. On-site sewage facility wastewater disposal lines shall be located in compliance with 30 TAC §285.31 (relating to Selection Criteria for Treatment and Disposal Systems) or local regulatory requirements.
(e) Other wastewater or drainage water disposal facilities or lines. The location of other wastewater disposal facilities or lines shall meet applicable standards of 30 TAC, Chapter 307, Texas Surface Water Quality Standards, Chapter 308, Criteria and Standards for the National Pollutant Discharge Elimination System, Chapter 311, Watershed Protection, and Chapter 315, Pretreatment Regulations for Existing and New Sources of Pollution, or local regulatory authority.

§265.165. Disinfectant Equipment.
(a) Design requirement. Disinfectant equipment and systems constructed on or after the effective date of this subchapter shall be planned and designed by a licensed engineer.
(b) Disinfectant agent. Lagoon water shall be continuously disinfected by a disinfectant agent with a residual that can be easily measured by simple and accurate field tests, unless the department has approved an alternate method of disinfectant.
(c) Training and protection. Personnel responsible for the operation of the disinfectant agent and other potentially hazardous chemicals shall be properly trained and provided with appropriate protective equipment and clothing, including rubber gloves and goggles, safety information, and safety data sheets. Safety data sheets covering all chemicals for which personnel are responsible shall be kept on site and readily available.
(d) Monitoring controllers. Automated, manual, or remotely managed controllers shall be installed for monitoring and turning on or off chemical feeders used for pH and disinfectants.
(e) Instructions. Operation manuals or other instructions that give clear directions for cleaning and calibrating automated controller probes and sensors shall be kept in close proximity to the automated controller.
(f) Storage.
(1) Disinfectant agents and other chemicals and feed equipment shall be stored so that users do not have access.
(2) Dry chemicals shall be stored off the floor in a dry, above-ground-level room and protected against flooding or wetting from floors, walls, and ceiling.
(3) Chlorine compounds shall not be stored in the same storage room or storage area as petroleum products.
(g) Labeling. All chemical bulk and day tanks shall be clearly labeled to indicate the tank's contents.

(h) Chlorine gas prohibited. Use of compressed chlorine gas is prohibited.

§265.166. Water Quality.

(a) Environmental Protection Agency (EPA) registration. A sanitizer, disinfectant, or other chemical used to treat the water shall be EPA-registered under the Federal Insecticide, Fungicide, and Rodenticide Act if it is a pesticide as defined by the EPA.

(b) NSF/ANSI listing. A non-pesticide chemical used to treat the water shall be listed and labeled to NSF/ANSI Standard 50 or NSF/ANSI Standard 60.

(c) Manufacturer's instructions. Chemicals shall be used according to the manufacturer's instructions.

(d) Required water quality. Unless the department has approved an alternate form of disinfectant, water quality shall meet the following criteria at all times the lagoon is open:

Figure: 25 TAC §265.166(d)

(e) Water clarity. Water clarity shall be sufficient such that an eight-inch black disk or Secchi Disk on the floor at the deepest part of the swimming areas of the lagoon can be clearly and immediately seen by an observer on the water surface above the disk or by someone standing on the shore closest to the disk.

(f) Swimming area testing frequency.

1. When a swimming area of a lagoon is open, tests for sanitizer levels (free available chlorine or bromine) and pH shall be made in each swimming area at least three times a day. One of the tests for sanitizer levels and pH shall be made before opening.

2. Test samples in a swimming area shall be taken where the water is a minimum of three feet in depth.

3. Alkalinity and calcium hardness testing frequency. Unless the department has approved an alternate method of disinfectant when a lagoon is open, tests for alkalinity shall be performed weekly and tests for calcium hardness shall be performed monthly in all swimming areas of the lagoon.

(g) Non-swimming area testing and frequency.

1. Unless the department has approved an alternate method of disinfectant when a non-swimming area of a lagoon is open, tests for sanitizer levels (free available chlorine, bromine) and pH shall be performed at least three times a day. One of the tests for sanitizer levels and pH shall be performed before opening.

2. Test samples in a non-swimming area of the lagoon shall be taken at a minimum of two locations located on opposite sides of the lagoon.

3. Alkalinity testing frequency. Unless the department has approved an alternate method of disinfectant when a lagoon is open, tests for alkalinity shall be performed weekly and tests for calcium hardness shall be performed monthly.

(h) ORP reading frequency. Readings shall be recorded at the same time sanitizer and pH tests are performed where in-line ORP meters are used.

(i) Reliable testing methods. A reliable means of testing for pH, free available chlorine, combined chlorine, cyanuric acid (if used), bromine, alkalinity, calcium hardness, shall be maintained for the lagoon. The test method shall be capable of measuring chemical ranges as detailed in subsection (d) of this section.

(j) DPD chemical test. Free available chlorine levels shall be determined by the use of the DPD method or its equivalent.

(k) Storage of test kits and reagents. Test kits and reagents shall be stored according to the manufacturer's instructions and protected from extreme heat and cold and from exposure to water, chemicals, petroleum products or any other element or environment that could adversely affect the efficacy of water quality test results.

(l) Testing reagents. Testing reagents shall be changed at frequencies recommended by the manufacturer to ensure accuracy of the tests.

(m) Chemical balance. Water shall be chemically balanced in a lagoon. Testing methods to determine the chemical balance of the water in the lagoon, such as the Langelier Saturation Index, shall be conducted once a week at a minimum.

(n) Operation record retention. Operational records, including results of required chemical testing under this section, shall be kept for at least three years and be made available during an inspection.

(o) Off-season chemical levels. When a lagoon is not in use for at least 30 days (such as off-season), clarity shall be maintained, and algae growth shall be prevented, however, other water quality parameters as required in this section need not be maintained.

§265.167. Request for Alternate Method of Disinfectant.

(a) Application. Pursuant to Texas Health and Safety Code, §341.064(b), an owner or operator may apply to use an alternate method of disinfectant.

(b) Submission. A completed application for use of an alternate method of disinfectant must be submitted to the department, Consumer Safety Section, no later than 180 days before the opening of the lagoon. The application shall include:

1. the type and level of primary disinfectant;

2. the type and level, where applicable, of any supplemental method of water treatment;

3. the method for and equipment used for storing, delivering, and measuring primary disinfectant levels and supplemental water treatment levels;

4. data supporting the effectiveness of the primary disinfectant and supplemental method of water treatment in maintaining required water quality;

5. descriptions of any specialized equipment, application methods, or other water treatment methods that may differ from the requirements in §265.166 of this subchapter (relating to Water Quality);

6. a proposed testing schedule for determining levels of biological and chemical levels as specified by the department to ensure the health and safety of the public;

7. a detailed drawing or map of the lagoon that indicates swimming areas and non-swimming areas; and

8. any additional information the department requires to make its decision.

(c) Decision. The department shall approve or reject a request to use an alternate method of disinfectant no later than 90 days after the completed application is submitted.

(d) Additional information. If the department requires additional information to make its decision, the application is not considered completed for purposes of subsections (b) and (c) of this section until the department receives the additional information as requested.
§265.168. Enclosures.

(a) Enclosure required. The lagoon shall be enclosed by a fence, wall, or barrier that meets the requirements in this section.

(b) Minimum height. The enclosure, including doors and gates, shall have a minimum perpendicular height of least six feet as measured from the ground surface on the outside of the fence.

(c) Openings. The enclosure shall have no openings in, through it, or under it, which would allow a four-inch diameter sphere to pass.

(d) An enclosure constructed with horizontal and vertical members with the distance between the tops of the horizontal members less than 48 inches, shall have openings that may not allow a sphere 1-3/4 inches in diameter to pass through the enclosure.

(e) The enclosure shall be designed and constructed so that it cannot be readily climbed. Structures, light poles, trees, or any other object that could make the enclosure easy to climb shall be a minimum of three horizontal feet from the exterior of the fence.

(f) Entry gates, doors and windows.

(1) Entry doors, gates, and windows in the enclosure shall be directly and continuously supervised by staff during hours of operation or locked to prevent unauthorized entry.

(2) All entry gates and doors shall open outward away from the lagoon and shall:

(A) have hand-activated opening hardware; and
(B) have hardware enabling the doors and gates to be locked by a padlock or built-in lock.

(g) Latching devices. Entry doors and gates shall be equipped with self-closing and self-latching devices that keep the gate or door securely closed and within its range of operation. A gate latch shall be installed on entry gates and doors so that it is at least 60 inches above the ground, except that it may be installed lower if:

(1) the latch is installed on the lagoon side of the gate only; and
(2) the gate or enclosure has no openings greater than 1/2-inch in any direction within 18 inches from the latch, including the space between the gate and the gate post to which the gate latches; or
(3) a gate latch may be located 42 inches or higher above the ground if the gate cannot be opened except by key, card, or combination from either side of the gate.

(h) Building. A building that serves as part of the enclosure shall have doors or gates that access the yard of the lagoon constructed on or after the effective date of this subchapter only if:

(1) any doors or gates between the building and the lagoon yard are for entry into a storage room, restroom, shower room, dressing room, or mechanical room adjacent to the lagoon; and
(2) the room does not have any door or gate openings to the outside of the enclosure.

§265.169. Safety Features.

(a) Safety equipment. Safety equipment shall have its function plainly marked and shall be kept in ready condition at all times a lagoon is open for use.

(b) Boundaries. Boundaries shall be designated as follows.

(1) Boundaries for swimming or wading areas of the lagoon shall be marked by a buoy line with floats.
(2) The buoy line's floats or buoys shall be at regular intervals, no further than 25 feet apart and where lines are joined.
(3) Clearly visible depth marker buoys shall be provided on the boundary float line indicating the following depths below the depth marker buoy:

(A) the maximum depth;
(B) at the point where the depth exceeds three feet, six inches; and
(C) at the five-foot depth if the depth of the swimming area exceeds five feet.

(c) Vessel and motorboat safety.

(1) Ignitable fuel. Motorboats using any ignitable propellant or fuel such as gasoline, kerosene, propane, or alcohol are prohibited in the swimming areas, but may be permitted in other areas for specific events, subject to any safety plan approved by a local regulatory authority.

(2) Personal flotation devices.

(A) Each vessel or motorboat passenger under 13 years of age shall be required to wear a United State Coast Guard (USCG)-approved personal flotation device while the vessel or motorboat is underway. A life belt, floaties, or a ring buoy does not satisfy this requirement.

(B) An adult operator of a vessel or motorboat may not permit a person under 13 years of age to be on board the vessel or motorboat while the vessel or motorboat is under way if the person is not wearing a USCG-approved personal flotation device.

(C) No person shall be prohibited from the use of a USCG-approved personal flotation device.

(d) Safety signs. Lagoon safety signs shall comply with the following:

(1) Signs shall be securely mounted.

(2) Signs shall be easily readable from all areas of the lagoon and have a minimum letter, symbol, and number height of three inches.

(3) All letters, numbers, and symbols on the signs shall be in contrasting color to the background and easily read.

(4) Required signs in the swimming area:

(A) days and hours of operation;
(B) "Non-Service Animals Prohibited;"
(C) "Glass Containers Prohibited;"
(D) "Entering the Lagoon if Ill with Diarrhea is Prohibited;"
(E) "Changing Diapers Within 6 Feet of the Lagoon is Prohibited;"
(F) "In Case of Emergency Dial 911;"
(G) "No Swimmers Allowed Outside the Swimming Area;"
(H) "No Diving" and the international symbol for no diving where water depths are less than nine feet; and
(I) maximum user load.

(5) Required signs in the non-swimming area:
(A) days and hours of operation;
(B) "Non-Service Animals Prohibited;"
(C) "Glass Containers Prohibited;"
(D) "Entering the Lagoon if Ill with Diarrhea is Prohibited;"
(E) "Changing Diapers Within 6 Feet of the Lagoon is Prohibited;"
(F) "In Case of Emergency Dial 911;"
(G) "Motorboats and Vessels Are Prohibited in Swimming Area" at lagoons where vessels or motorboats are allowed;
(H) "No Diving" and the international symbol for no diving where water depths are less than nine feet; and
(I) maximum user load.

(6) If lifeguards are not provided or are not required to be present, the following signs are required:
(A) "Warning - No Lifeguard on Duty;" and
(B) "No Diving" and the international symbol for no diving.

(7) The required notifications may be mounted on individual signs or combined on one sign.

(e) Night swimming prohibited. Night swimming, from one-half hour before sunset to one-half hour after sunrise, shall be prohibited unless lighting is provided as required in subsection (f) of this section.

(f) Lighting Requirements. If the lagoon is open for night swimming or during periods of low illumination, the lagoon surface lighting shall:

(1) Maintain lagoon surface lighting levels at a minimum of 15 horizontal foot candles (161 lux).
(2) Illuminate all parts of the lagoon open for use, including the swimming areas, depth markers, signs, entrances, restrooms, safety equipment, deck areas, walkways, and any area occupied or in use.
(3) Underwater lighting shall not be less than eight-initial rated lumens per linear foot of the lagoon perimeter where underwater lighting is provided. Underwater lighting is not required for lagoon.

(g) Ring buoy, throw rope, and reaching pole. A lagoon shall have at least one ring buoy with throwing rope and a reaching pole at each swimming area and at each area that provides access to motorboats or vessels.

(1) The reaching pole shall be in the immediate vicinity of the water and accessible to users.
(2) The reaching pole shall be light, strong, non-telescoping, and at least 12 feet long. The pole shall be constructed of fiberglass or other material that does not conduct electricity and shall have a body hook or shepherd's crook with blunted ends attached.
(3) The throwing rope shall be 1/4-inch to 3/8-inch diameter, with a length at least two-thirds of the width of the swimming area. An USCG-approved ring buoy with an outside diameter of at least 20 inches shall be attached to the throwing rope.

(h) Safety equipment. Safety equipment, including ring buoys and rope, floating lines with buoys, emergency communication equipment, backboards with tie-downs and head supports, first aid kits, and required signs, shall be maintained in good condition and in good working order.

(i) Emergency telephone. The lagoon shall have a minimum of two emergency telephones, commercial emergency contact devices, or alternative communication systems that are capable of immediately summoning emergency services and that are readily accessible, within 200 feet of the water, and are functioning at all times the lagoon is open. Clear operating instructions for the emergency telephone shall be provided.

(1) A fixed location telephone, commercial emergency contact device, or alternative communication system shall be visible, have no obstruction to access, and have some method of identification that enables the telephone or other device or system to be easily identified by users.

(2) A telephone or emergency contact device may not be answered by an on-site office. The alternative communication system may not be answered by an on-site office unless the alternative communication system complies with paragraph (5) of this subsection.

(3) A telephone shall be capable of making outside calls to 911 dispatch or emergency medical services.

(4) A commercial emergency contact device, when activated, shall directly connect to a 24-hour monitoring service, or directly to 911 dispatch or to emergency medical services.

(5) An alternative communication system that contacts an on-site office may be used if the lagoon is in a remote area with limited or delayed emergency medical services response times, and it has employees on-site that are trained and certified or licensed to perform emergency medical intervention when the lagoon is open.

(6) At least one emergency telephone, commercial emergency contact device, or alternative communication system device shall be located within 200 feet of a swimming area.

§265.170. Lifeguard Requirements.

(a) Waterfront supervision. A waterfront manager or director who holds a current lifeguard certificate or its equivalent shall be required to manage and direct all water-related activities in the non-swimming and swimming areas.

(b) Lifeguards required. A lagoon shall provide lifeguards if:

(1) alcohol is sold, served, or allowed to be brought in;
(2) motorboats are used or allowed;
(3) the lagoon is open to the general public;
(4) unsupervised children under the age of 14 years are allowed; or

(5) users enter the water from any height above the deck or wall, including from diving boards, drop slides, starting platforms, or climbing walls.

(c) Minimum number. A minimum of two lifeguards shall be provided for each swimming area. In the non-swimming area of the lagoon, the owner or operator shall have a lifeguard safety plan in place that defines the number of lifeguards for non-swimming swimming areas when open.

(1) The number of lifeguards shall be sufficient to provide adequate supervision and close observation of all users at all times.

(2) The number of lifeguards shall be sufficient to allow for alternation of tasks such that no lifeguard conducts surveillance activities for more than 60 continuous minutes.
Surveillance. Each lifeguard shall be given an assigned surveillance area commensurate with ability and training.

Other assigned duties shall not distract. Lifeguards conducting surveillance of users shall not be assigned duties that would distract the lifeguard's attention from proper observation of the users, or that would prevent immediate assistance to persons in the water.

(f) In-service training. Lifeguards shall be provided with alertness and response drills and other training, including:

1. a pre-season training program to refresh skills;
2. a continual "in-service" training program totaling a minimum 60 minutes each week for each lifeguard; and
3. performance audits as recommended by the ARC, Young Men's Christian Association, or equivalent aquatic safety organization.

(g) Records kept onsite. A lagoon shall keep records of each lifeguard's certification, including expiration dates and in-service training, for at least three years.

(h) Emergency action plan. An Emergency Action Plan shall be developed for the lifeguard and shall contain at a minimum:

1. a list of emergency telephone numbers;
2. the location of the first-aid kit and other rescue equipment such as the AED, BVM, and the backboard;
3. a response plan for inclement weather such as thunderstorms, lightning, or high winds, including evacuation areas; and
4. a plan following Centers for Disease Control and Prevention standards for responding to formed-stool contamination, diarrheal-stool contamination, vomit contamination, and contamination involving blood.

(i) Safety equipment. Lifeguards shall have access to safety equipment, including:

1. An Occupational Safety and Health Administration (OSHA)-compliant 24-unit first aid kit housed in a durable weather-resistant container and kept filled and ready for use. The kit shall include disease transmission barriers and cleaning kits meeting OSHA standards.
2. A number of backboards equipped with a head immobilizer and sufficient straps to immobilize a person to the backboard, in locations sufficient to affect a two-minute response time to an incident.
3. At least one portable AED and one BVM kept in a secure location that can be easily and quickly accessed by lifeguards or other trained personnel.
4. Platforms or stands are required where water surface area is greater than 2,000 square feet or where the depth of the water is greater than 5 feet and shall include a protective umbrella or sunshade high enough to give lifeguards a complete and unobstructed view of the area of responsibility for the lifeguard.
5. Personal equipment. Each lifeguard shall be provided:
   (1) uniform attire that readily identifies the lifeguard as a staff member and a lifeguard;
   (2) a rescue tube;
   (3) personal protective devices, including a resuscitation mask with one-way valve and non-latex, non-powdered, one-use disposable gloves worn as a hip pack or attached to the rescue tube; and
   (4) a whistle or other signaling device for communicating to users, other lifeguards, or staff.

§265.171  Operation and Management.

(a) Required certification. The lagoon shall be maintained under the supervision and direction of a properly trained and certified operator who is responsible for the sanitation, safety, proper maintenance of the lagoon, and for maintaining all physical and mechanical equipment and records. Training and certification can be obtained by completion of one of the following courses or their equivalent:

1. the National Recreation and Parks Association, "Aquatic Facility Operator;"
2. the National Swimming Pool Foundation, "Certified Pool Operator;"
3. the Association of Pool and Spa Professionals "Professional Pool & Spa Operator;" or
4. the American Swimming Pool and Spa Association, "Licensed Aquatic Facility Technician;"

(b) Water clarity. The lagoon shall be opened for use only when the bottom at the deepest point of the swimming areas of the lagoon are clearly visible. Visual occlusion by sediment or other matter shall be checked before opening and periodically, as necessary, while the lagoon is in use. Clarity shall be observed between one and five minutes after users have exited. Sediment shall be removed as needed before allowing re-entry by users into the lagoon.

(c) Closure signs. When the lagoon is closed for the season or for any other reason other than during normal operating periods, a "Lagoon Closed" sign in letters at least one-inch in height shall be posted on the exterior of each entrance.

(d) Off-season water clarity. When the lagoon is not in use for at least 30 days (such as off-season), clarity shall be maintained, and algae growth shall be prevented, however, other water quality parameters required by §265.166 of this subchapter (relating to Water Quality) need not be maintained.

(e) Off-season safety. When a lagoon is not in use after seasonal operation, while under construction or renovation, or for any other reason, the lagoon shall not be allowed to give off objectionable odors, become a breeding site for pests, or create any other nuisance condition or hazard.

(f) Domestic animals prohibited. Domestic animals and other pets shall not be allowed within the enclosure, except that service animals shall be allowed within the lagoon enclosure, but not in the lagoon.

(g) Flotation devices. No person shall be prohibited from the use of a USCG-approved personal flotation device.

(h) Protection from chemical exposure. Personnel in charge of maintaining the lagoon shall be properly trained in accordance with §265.165 of this subchapter (relating to Disinfectant Equipment).

(i) Use of chemicals. Use of chemicals shall be according to the manufacturer's directions. No chemical shall be used in a way that violates the manufacturer's instructions for the chemical feed system or the NSF/ANSI 50 or NSF/ANSI 60 certification of the chemical feed system.

(j) Use of registered products. Only chemicals registered and labeled for use in pools, spas, drinking water, and other recreational water aquatic facilities shall be used.

§265.172  Dressing and Sanitary Facilities.

(a) Fixture design. Fixtures at dressing and sanitary facilities shall be designed so that the fixtures are readily cleanable.
b) Fixture installation. Fixtures at dressing and sanitary facilities shall be installed in accordance with local plumbing codes and shall be properly protected by backflow connection prevention devices.

c) Cleaning. Dressing and sanitary facilities shall be cleaned as necessary to maintain sanitary conditions at all times.

d) Ventilation. Adequate ventilation shall be provided in dressing and sanitary facilities to prevent objectionable odors.

e) Dressing and sanitary facilities at lagoons open to the general public.

1. Separate men's and women's dressing and sanitary facilities shall be provided. The rooms shall be well lit, drained, ventilated, and of good construction, using impervious materials. The facilities shall be developed and planned so that good sanitation will be maintained throughout the building at all times. An appropriate number of dressing rooms that can accommodate a family are allowed.

2. Partitions between portions of the dressing room area, screen partitions, shower, toilet, and dressing room booths shall be of durable material not subject to damage by water and shall be designed so that a waterway is provided between partitions and floor to permit thorough cleaning of the walls and floor areas with hoses and brooms.

3. Floors shall have slip-resistant surfaces and shall be sufficiently smooth to ensure ease in cleaning. Floor drains shall be provided, and floors shall be sloped a minimum of 1/4-inch per foot toward the drains to ensure positive drainage.

4. An adequate number of hose bibs and a hose of adequate length shall be provided for washing down all areas of the dressing facility interior. Adequate cross-connection control devices, approved by TCEQ or the local regulatory authority, shall be provided. When not in use, hoses shall be stored in such a manner to prevent a trip hazard.

f) Lavatories, showers, and toilets at lagoons open to the general public constructed on or after the effective date of this subchapter shall comply with the following.

1. Lavatory, shower, and toilet facilities shall be located to encourage use of the sanitary facilities by users of the lagoon as follows:

   A) at points of main entry into the enclosure;

   B) within 200 feet of entry or exit into the swimming area; and

   C) no more than 500 feet from entry or exit into the non-swimming area.

2. The required fixture schedule for lagoons open to the general public is contained in the following table:

   Figure: 25 TAC §265.172(f)(2)

3. Cleaning showers and lavatories shall be provided with hot and cold running water.

4. The number of total fixtures required at the lagoon can be distributed between required sanitary facilities within the enclosure of the lagoon.

   g) Lavatories, showers, and toilets at lagoons serving apartments, Home Owners Associations (HOAs), condominiums, hotels or motels, or other mixed-use, privately owned developments shall be located to encourage use of the sanitary facilities by users of the lagoon as follows:

   A) within 200 feet of entry or exit into the swimming areas of the lagoon; and

   B) no more than 500 feet from entry or exit into the non-swimming areas of the lagoon.

2. The required fixture schedule for lagoons at apartments, HOAs, condominiums, hotels or motels, or other mixed used privately owned developments are contained in the following table:

   Figure: 25 TAC §265.172(g)(2)

3. Lavatories, showers, and toilets at apartments, HOAs, condominiums, hotels or motels, or other mixed use privately owned developments sharing use or ownership of the lagoon may count their public-use sanitary facilities toward the required number of fixtures if in compliance with paragraph (2) of this subsection.

4. When sanitary facilities are located within an apartment, HOA, condominium, hotel or motel, or other mixed-use privately owned development sharing use or ownership of the lagoon, a sign shall be posted at each entry or exit in letters at least three inches in height stating the location of the nearest available restroom facility.

   h) Additional requirements for all sanitary facilities:

   1. Soap dispensers with liquid or powdered soap shall be provided at each lavatory. The dispenser shall be metal or plastic, with no glass permitted.

   2. When provided, mirrors shall be shatter resistant.

   3. Toilet paper holders and toilet paper shall be provided at each toilet.

   4. Covered waste receptacles shall be provided in toilet or dressing room areas.

5. Single-use hand drying towels or hand drying devices shall be provided near the lavatory.


(a) A department or local regulatory authority shall have the right to enter at all reasonable times any area or environment, including the lagoon facility, building, storage, equipment room, bathhouse, or office to inspect and investigate for compliance with this subchapter to review records, to question any person, or to locate, identify, and assess the condition of the lagoon.

   b) Advance notice or permission for entry is not required.

   c) A department or local regulatory authority shall not be impeded or refused entry during his official duties by reason of any company policy.

   d) It is a violation of this subchapter for a person to interfere, deny, or delay an inspection or investigation conducted by a department or a local regulatory authority.


(a) If a person has caused, suffered, allowed, or permitted a violation of Texas Health and Safety Code, §341.064, or this subchapter, the department or local regulatory authority may, in accordance with Texas Health and Safety Code, §341.092, assess civil penalties, seek injunctive relief in district court, or both.

(b) A person who has caused, suffered, allowed, or permitted a violation of Texas Health and Safety Code, §341.064, or this subchapter may also be subject to a criminal penalty under Texas Health and Safety Code, §341.091.
(c) The department or local regulatory authority may take any appropriate legal remedy, including immediately closing the lagoon through voluntary compliance or an injunction.

(d) If the lagoon closes, either voluntarily or by court order, public access to the lagoon shall be restricted and a notice posted notifying the public that the lagoon is closed until further notice.

(e) In case of voluntary closure and upon presentation of evidence that the deficiencies that caused the closure have been corrected, operation may be resumed if explicitly authorized by the department or local regulatory authority in writing. Such evidence may be in the form of a reinspection by the regulatory authority, or by other evidence acceptable to the regulatory authority.

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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General Counsel
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TITLE 31. NATURAL RESOURCES AND CONSERVATION
PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT
CHAPTER 51. EXECUTIVE
SUBCHAPTER D. EDUCATION

31 TAC §51.81
The Texas Parks and Wildlife Department (the department) proposes an amendment to §51.81, concerning Mandatory Boater Education. The proposed amendment would eliminate provisions regarding classroom elements of boater education, provide for exceptions to mandatory boater education requirements, and effect nonsubstantive housekeeping changes.

The Texas Water Safety Act (Parks and Wildlife Code, Chapter 31) requires persons born after September 1, 1993 to complete an approved boater education course before legally being able to operate a vessel of more than 15 horsepower, a windblown vessel of more than 14 feet in length, or a personal watercraft alone in public water. Almost all boater education is now provided via online and distance education modalities, making classroom components obsolete. Therefore, the proposed amendment would eliminate the requirement that a student attend at least six hours of training and be evaluated by an instructor. The proposed amendment also would eliminate the home study program, which the department has determined is not utilized enough to justify continuance and reword a provision governing the waiting period between examinations to make it clear that the provision applies to the equivalency examination and not a course examination.

Additionally, the proposed amendment would require a background check to be conducted for persons seeking to become certified boating education instructors, which the department deems prudent in order to ensure that persons delivering boater education instruction under the aegis of the department are of sufficient character. The proposed amendment would also eliminate subsection (g), which is unnecessary because the provision applies only to persons who are exempt from mandatory boater education requirements by age.

Finally, the proposed amendment would exempt certain members of the armed services and Merchant Marine from boater education requirements, as well as persons who possess a Canadian Pleasure Craft Operator's Card. The department recognizes that there are personnel of the military branches and the Merchant Marine who by virtue of their training and or military occupation specialty have already met or exceeded any requirement of state law in terms of boating safety and that requiring such personnel to obtain boater education certification would be redundant and ineffective. Similarly, there is a Canadian equivalent to the boater education standards developed for the United States. The department sees no need to require persons who have obtained a Canadian Pleasure Craft Operator's Card to also obtain boater education certification in Texas.

Tim Spice, Boating Safety Education Manager, has determined that for each of the first five years that the rule as proposed is in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the rule.

Mr. Spice also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the continued availability of convenient boater education certification and the continued public safety benefits associated with reduced accident rates, insurance costs, and enforcement costs that are proven to result from boater education courses.

There will be no adverse economic effect on persons required to comply with the rule as proposed.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose record-keeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. The department has determined that there will be no direct economic impacts on small businesses, microbusinesses, or rural communities. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.
The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rule as proposed, if adopted, will neither create nor eliminate a government program; not result in an increase or decrease in the number of full-time equivalent employee needs; not result in a need for additional General Revenue funding; not affect the amount of any fee; will not create a new regulation; will limit an existing regulation (by eliminating classroom components of boater education) but will not expand or repeal an existing regulation; neither increase nor decrease the number of individuals subject to regulation; and not positively or adversely affect the state’s economy.

Comments on the proposed rule may be submitted to Tim Spice, Texas Parks and Wildlife Department 4200 Smith School Road, Austin, Texas, 78744; (512) 389-8141 (e-mail: tim.spice@tpwd.texas.gov).

The amendment is proposed under the authority of Parks and Wildlife Code, §31.108, which requires the commission to adopt rules to administer a boating education program.

The proposed amendment affects Parks and Wildlife Code, Chapter 31.

§51.81. Mandatory Boater Education.

(a) - (b) (No change.)

c) The course is successfully completed when the student:

[4] attends at least six hours of training;]

[2] is evaluated by the instructor as acceptable in attitude, knowledge and skill; and]

[2] scores a minimum of 70% on a course exam prescribed by the department.

d) In lieu of a course, a person may complete an equivalency exam process consisting of a multiple-choice exam proctored by an agent appointed by the department or accessed through a department-sponsored web site.

(1) Equivalency [Home study and equivalency] exam passage shall be set at a minimum 80 percent passing score.

(2) A person who fails the equivalency exam must wait at least 24 hours to [may] retake it [one time at least 24 hours after the time of first completion].

(e) (No change.)

(f) The department shall:

(1) train and certify boater education instructors upon completion of an application, background check, game warden interview and proof of student and instructor course completion;

(2) - (3) (No change.)

[4] In addition to those exemptions established in Parks and Wildlife Code, §31.110, and authorized in §31.108(b), persons who have successfully completed a "voluntary boater education course" pro-

viously administered or approved by the department are exempt from the requirements established in this subchapter.)

(g) [4a] A person 18 years of age or older may obtain a one-time deferral from the boater-education requirements of Parks and Wildlife Code, §31.109, after paying the fee established in §53.50 of this title (relating to Training and Certification Fees) to the department.

(1) A deferral under this subsection does not authorize any person to supervise the operation of a vessel by any other person.

(2) A boater education deferral is valid for 15 consecutive days beginning on the date of purchase and ending at midnight of the 15th day following purchase.

(h) The following are exempt from the boater education requirements of Parks and Wildlife Code, §31.109:

(1) a member of the Armed Forces of the United States on active or reserve duty who is qualified as an officer of the deck duty, boat coxswain, boat officer, watercraft operator, or marine deck officer;

(2) a member of the United States Merchant Marine; and

(3) a person who possesses a valid Canadian Pleasure Craft Operator's Card issued in the person’s name.

(i) A person engaged in showing, testing, or demonstrating boats under Parks and Wildlife Code, §31.041(d), is exempt from the boater education course requirement while showing, testing, or demonstrating a boat.

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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Robert D. Sweeney, Jr.
General Counsel
Texas Parks and Wildlife Department
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CHAPTER 53. FINANCE
SUBCHAPTER A. FEES
DIVISION 3. TRAINING AND CERTIFICATION FEES

31 TAC §53.50

The Texas Parks and Wildlife Department (the department) proposes an amendment to §53.50, concerning Training and Certification Fees. The proposed amendment would eliminate the current provision requiring a service fee schedule to be established by the executive director, a provision exempting an online provider of boater education from collecting and forwarding a $10 fee to the department, and a provision establishing that the fees required by the section do not affect enhanced content offered by a boating education provider.

The Texas Water Safety Act (Parks and Wildlife Code, Chapter 31), requires persons born after September 1, 1993, to complete an approved boater education course before legally being able to operate a vessel of more than 15 horsepower, a windblown
vessel of more than 14 feet in length, or a personal watercraft alone in public water.

Parks and Wildlife Code, §31.108 allows the department to appoint agents to administer a boater education course or course equivalency examination. Section 31.108 requires agents to collect and forward to the department a $10 course or examination fee and allows agents to collect and retain a service fee. The department has determined that the statutory provisions of Parks and Wildlife Code, §31.108(b) do not apply to the provision in current rule exempting agents from the requirement to collect and forward to the department a $10 course or examination fee. The department has also determined that because there are a number of easy, and in some cases free, options for persons to obtain boater education, it is unnecessary to cap the amount of a service fee that a provider may charge a customer for a boater education course; therefore, the proposed amendment would eliminate the service fee cap and the provision requiring the executive director to establish a fee schedule for that purpose. The proposed rule would have the effect of defaulting to the requirements imposed by statute.

Mr. Tim Spice, Boating Safety Education Manager, has determined that for each of the first five years that the rule as proposed is in effect, there will be fiscal implications to the department as a result of enforcing or administering the rule. The department estimates that there will be a revenue increase of approximately $225,000 in Fiscal Year 2020, increasing by approximately 10 percent per year thereafter, as a result of internet providers collecting and forwarding to the department a fee of $10 per boater education participant.

There will be no fiscal implications for other units of state or local government.

Mr. Spice also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the continued availability of convenient boater education certification and the continued public safety benefits associated with reduced accident rates, insurance costs, and enforcement costs that are proven to result from boater education courses.

There will be no adverse economic effect on persons required to comply with the rule as proposed.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule’s “direct adverse economic impacts” to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. The department has determined that there will be no direct economic impacts on small businesses, microbusinesses, or rural communities. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rule as proposed, if adopted, will neither create nor eliminate a government program; not result in an increase or decrease in the number of full-time equivalent employee needs; not result in a need for additional General Revenue funding; not affect the amount of any fee; will not create a new regulation; will expand an existing regulation (by eliminating the exemption for the requirement to collect and forward a fee to the department for online boater education) but will not limit or repeal an existing regulation; neither increase nor decrease the number of individuals subject to regulation; and not positively or adversely affect the state’s economy.

Comments on the proposed rule may be submitted to Tim Spice, Texas Parks and Wildlife Department 4200 Smith School Road, Austin, Texas, 78744; (512) 389-8141 (e-mail: tim.spice@tpwd.texas.gov).

The amendment is proposed under the authority of Parks and Wildlife Code, §31.108, which requires the commission to adopt rules to administer a boating education program.

The proposed amendment affects Parks and Wildlife Code, Chapter 31.

§53.50. Training and Certification Fees.  

(a) - (b) (No change.)

(c) Boater education fees.

(1) (No change.)

(2) An agent shall collect a $10 per person examination or course fee and forward that fee to the department within 30 days after the examination or course is administered.

(3) In addition to the examination or course fee described in paragraph (2) of this subsection, an agent may charge and keep a service fee in an amount established in a fee schedule approved by the director, which shall not exceed $25.

(4) An agent providing an Internet-based boater education course and examination is exempt from the requirement to collect and forward to the department the $10 examination or course fee.

(5) The fees established in this subsection apply only to course content necessary to satisfy the minimum requirements for boater education certification in Texas. Nothing in this subsection shall be construed to prohibit an agent from providing and charging a fee for enhanced content.

(4) [66] The fee for obtaining a boater education deferral is $10.

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 30, 2019.
TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 403. CRIMINAL CONVICTIONS AND ELIGIBILITY FOR CERTIFICATION

37 TAC §§403.3, 403.11, 403.15

The Texas Commission on Fire Protection (commission) proposes amendments to Chapter 403, Criminal Convictions and Eligibility for Certification, concerning §403.3, Scope, §403.11, Procedures for Suspension, Revocation or Denial of a Certificate to Persons with Criminal Backgrounds, and §403.15, Report of Convictions by an Individual or a Department.

BACKGROUND AND PURPOSE

The purpose of the amendments is to remove language regarding an individual’s conduct prior to court action. Senate Bill 1217 passed during the 86th legislative session forbids an agency from considering an arrest that did not result in an individual’s conviction. The amendment to §403.15(e) corrects the number of the commission form.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tim Rutland, 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. Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022.

PUBLIC BENEFIT

Mr. Rutland has also determined that for each year of the first five years the amendments are in effect the public benefit from the passage of the proposal will be to ensure compliance with Senate Bill 1217.

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

There will be no effect on persons required to comply with the amendments as proposed. There will be no impact on micro or small businesses or rural communities. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, is not required.

GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined 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 may increase in fees paid to the agency, to the extent that there may be more applicants who are eligible for licensure by the commission, if arrests can no longer be considered as a basis for ineligibility.
5. the rules will not create a new regulation;
6. the rules will limit an existing regulation because the commission can no longer consider arrests when assessing the eligibility of applicants and certificate holders;
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 had 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 Government Code §2007.043.

REQUIREMENT FOR RULE INCREASING COSTS TO REGULATED PERSONS

Texas Government Code Section 2001.0045 does not apply to the proposed rule because §2001.0045(c)(6) exempts the agency because agency rules are necessary to protect the health, safety and welfare of the residents of this state because this rule may increase the number of fire protection personnel serving communities.

ENVIRONMENTAL RULE ANALYSIS

The commission has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure. It is not a "major environmental rule," as defined by Government Code §2001.0225. As a result, the commission asserts that the preparation of an environmental impact analysis, as provided by Government Code §2001.0225, is not required.

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 Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to deborah.cowan@tcfp.texas.gov. Comments will be reviewed and discussed at a future commission meeting.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.032 which allows the commission to appoint fire protection personnel and §419.036, which authorizes the commission to take disciplinary actions against certificate holders.
The proposal implements Texas Government Code, Chapter 419, §§419.008, §419.032, and §419.036.

§403.3. Scope.

(a) The policy and procedures established in this chapter apply to a person who holds or applies for any certificate issued under the commission's regulatory authority contained in Government Code, Chapter 419.

(b) When a person is [charged with or] convicted of a crime of a sexual nature, the conviction of which would require the individual to be registered as a sex offender under Chapter 62 of the Code of Criminal Procedure; or

(c) When a person is convicted of a crime [engages in conduct] that is an offense under Title 7 of the Texas Penal Code, or a similar offense under the laws of the United States of America, another state, or other jurisdiction, the person's conduct directly relates to the competency and reliability of the person to assume and discharge the responsibilities of fire protection personnel. Such conduct includes, but is not limited to, intentional or knowing conduct, without a legal privilege, that causes or is intended to cause a fire or explosion with the intent to injure or kill any person or animal or to destroy or damage any property. The commission may [consider the person's conduct even though a final conviction has not occurred and may]:

(1) deny [to] a person the opportunity to be examined for a certificate;

(2) deny the application for a certificate;

(3) grant the application for a new certificate with the condition that a probated suspension be placed on the newly granted certificate;

(4) refuse to renew a certificate;

(5) suspend, revoke or probate the suspension or revocation of an existing certificate;

(6) limit the terms or practice of a certificate holder to areas prescribed by the commission.

(d) When a person's criminal conviction of a felony or misdemeanor directly relates to the duties and responsibilities of the holder of a certificate issued by the commission, the commission may:

(1) deny [to] a person the opportunity to be examined for a certificate;

(2) deny the application for a certificate;

(3) grant the application for a new certificate with the condition that a probated suspension be placed on the newly granted certificate;

(4) refuse to renew a certificate;

(5) suspend, revoke or probate the suspension or revocation of an existing certificate;

(6) limit the terms or practice of a certificate holder to areas prescribed by the commission.

§403.11. Procedures for Suspension, Revocation, or Denial of a Certificate to Persons with Criminal Backgrounds.

(a) If the commission [Standards Division (the division)] proposes to suspend, revoke, limit, or deny a certificate based on the criteria in this chapter, the division shall notify the individual per Government Code, Chapter 2001. The notice of intended action shall specify the facts or conduct alleged to warrant the intended action.

(b) If the proposed action is to limit, suspend, revoke, or refuse to renew a current certificate, or deny an application for a new certificate, a written notice of intended action shall comply with the preliminary notice requirements of Government Code §2001.054(c). The individual may request, in writing, an informal conference with the commission staff in order to show compliance with all requirements of law for the retention of the certificate, pursuant to Government Code §2001.054(c). A written request for an informal staff conference must be submitted to the division director no later than 15 days after the date of the notice of intended action. If the informal staff conference does not result in an agreed consent order, a formal hearing shall be conducted in accordance with the Administrative Procedure Act, Government Code, Chapter 2001.

(c) If the individual does not request an informal staff conference or a formal hearing in writing within the time specified in this section, the individual is deemed to have waived the opportunity for a hearing, and the proposed action will be taken.

(d) If the commission limits, suspends, revokes, or denies a certificate under this chapter, a written notice shall be provided to the person that includes [the executive director shall give the person written notice]:

(1) [of] the reasons for the decision;

(2) that the person may appeal the decision [of the executive director] to the commission in accordance with §401.63 of this title (relating to Final Decision and Orders [Appeals to the Commission]) within 30 days from the date the decision [of the executive director] is final and appealable;

(3) that the person, after exhausting administrative appeals, may file an action in a district court of Travis County, Texas, for judicial review of the evidence presented to the commission and its decision; and that such petition must be filed with the court no later than 30 days after the commission action is final and appealable.

§403.15. Report of Convictions by an Individual or a Department.

(a) A certificate holder must report to the commission, any conviction, other than a minor traffic offense (Class C misdemeanor) under the laws of this state, another state, the United States, or foreign country, within 14 days of the conviction date.

(b) A fire department or local government entity shall report to the commission, any conviction of a certificate holder other than a minor traffic offense (class C misdemeanor) under the laws of this state, another state, the United States, or foreign country, that it has knowledge of, within 14 days of the conviction date.

(c) A certificate holder is subject to suspension, revocation or denial of any or all certifications for violation of the requirements of subsection (a) of this section. Each day may be considered a separate offense.

(d) A fire department or government entity regulated by the commission violating subsection (b) of this section may be subject to administrative penalties of up to $500. Each day may be considered a separate offense.

(e) Notification may be made by mail, e-mail, or in person to the Texas Commission on Fire Protection (TCFP) Austin office. TCFP Form 2014 [20014] shall be used.

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 27, 2019.
CHAPTER 421. STANDARDS FOR CERTIFICATION

37 TAC §421.11

The Texas Commission on Fire Protection (commission) proposes amendments to Chapter 421, Standards for Certification, concerning §421.11, Requirement To Be Certified Within One Year.

BACKGROUND AND PURPOSE

The purpose of the amendments is to add language addressing the process for military spouses to be appointed to fire protection duties and to ensure compliance with SB 1200 as passed by the 86th Legislature. Also, in subsections (a) and (b) of this rule, the word "commission" is no longer capitalized in order to be consistent with the use of the term in other commission rules.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tim Rutland, 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. Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022.

PUBLIC BENEFIT

Mr. Rutland has also determined that for each year of the first five years the amendments are in effect the public benefit from the passage of the proposal will be the allowance of military spouses to be temporarily appointed to fire protection duties without being required to hold commission certification, provided certain requirements are met; approved by commission staff and to ensure compliance with SB 1200 as passed by the 86th Legislature.

ECONOMIC IMPACT ON SMALL BUSINESSES, MICRO-BUSINESS AND RURAL COMMUNITIES

There will be no effect on persons required to comply with the amendments as proposed. There will be no impact on micro or small businesses or rural communities. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, is not required.

GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined that during the first five years the amendments are in effect:

1. the rule will not create or eliminate a government program;
2. the rule will not create or eliminate any existing employee positions;
3. the rule will not require an increase or decrease in future legislative appropriation;
4. the rule may result in a slight decrease in fees paid to the agency because military spouses are not required to pay fees for certification;
5. the rule will not create a new regulation;
6. the rule will expand a regulation by including military spouses as a new category of licensee;
7. the rule may slightly increase the number of individuals subject to the rule because it expands the opportunity for previously non-qualified individuals to serve; and
8. the rule is 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 Government Code §2007.043

REQUIREMENT FOR RULE INCREASING COSTS TO REGULATED PERSONS

Texas Government Code Section 2001.0045 does not apply to the proposed rule because it does not impose a cost on regulated persons, another state agency, a special district, or a local government.

ENVIRONMENTAL RULE ANALYSIS

The commission has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure. It is not a "major environmental rule," as defined by Government Code §2001.0225. As a result, the commission asserts that the preparation of an environmental impact analysis, as provided by Government Code §2001.0225, is not required.

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 Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to deborah.cowan@tcfp.texas.gov. Comments will be reviewed and discussed at a future commission meeting.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.032 which allows the commission to appoint fire protection personnel.

The proposal implements Texas Government Code, Chapter 419, §419.008 and §419.032.

§421.11. Requirement To Be Certified Within One Year.

(a) Except for subsection (c) and (d) of this section, fire [Fire] protection personnel or part-time fire protection employees of a fire department who are appointed duties identified as fire protection personnel duties must be certified by the commission [Commission] in the discipline(s) to which they are assigned within one year of their appointment to the duties or within two years of successfully passing the...
applicable commission [Commission] examination, whichever is less. The commission [Commission] shall not approve an initial certification for a regulated discipline until it has reviewed and approved a person's fingerprint-based criminal history record. An individual who accepts appointment(s) in violation of this section shall be removed from the appointment(s) and will be subject to administrative penalties. A department or local government that appoints an individual in violation of this section will also be subject to administrative penalties.

(b) An individual who has been removed from appointment to duties identified as fire protection personnel duties for violation of this section must petition the commission [Commission] in writing for permission to be reappointed to the duties from which they were removed. The petition will be considered only if the individual has obtained all appropriate certification(s) applicable to the duties to which the individual seeks reappointment.

(c) A military spouse may be appointed to fire protection personnel duties with a regulated fire department without being required to obtain the applicable certification, provided the military spouse submits the following to the commission prior to appointment and has received confirmation of approval from the commission:

1. notification to the commission of intent to perform regulated fire protection duties;
2. documentation of equivalent certification from another jurisdiction;
3. a fingerprint-based criminal history record using the commission approved system;
4. proof of residency in Texas; and
5. a copy of the individual's military identification card.

(d) A military spouse appointed to fire protection duties under this section may engage in those duties only for the period in which the military service member to whom the spouse is married is stationed at a military installation in Texas, but not to exceed three years from the date the military spouse receives approval from the commission to engage in those duties.

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 27, 2019.
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Tim Rutland
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: October 13, 2019
For further information, please call: (512) 936-3812

CHAPTER 433. DRIVER/OPERATOR
SUBCHAPTER B. MINIMUM STANDARDS
FOR DRIVER/OPERATOR-AERIAL
APPARATUS
37 TAC §433.207

BACKGROUND AND PURPOSE
The purpose of the amendments is to remove the "grandfathering" provision from rule language for Driver/Operator-Aerial that ended on May 31, 2019.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT
Tim Rutland, 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. Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022.

PUBLIC BENEFIT
Mr. Rutland has also determined that for each year of the first five years the amendments are in effect the public benefit from the passage of the proposal will be accurate and clear and concise rules regarding obtaining Driver/Operator - Aerial ISAC seals.

ECONOMIC IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES AND RURAL COMMUNITIES
There will be no effect on persons required to comply with the amendments as proposed. There will be no impact on micro or small businesses or rural communities. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, is not required.

GOVERNMENT GROWTH IMPACT STATEMENT
The agency has determined that during the first five years the amendments are in effect:

1. the rule will not create or eliminate a government program;
2. the rule will not create or eliminate any existing employee positions;
3. the rule will not require an increase or decrease in future legislative appropriation;
4. the rule will not result in a decrease in fees paid to the agency;
5. the rule will not create a new regulation;
6. the rule will not expand a regulation;
7. the rule will not increase the number of individuals subject to the rule; and
8. the rule is 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 Government Code §2007.043.

REQUIREMENT FOR RULE INCREASING COSTS TO REGULATED PERSONS
Texas Government Code Section 2001.0045 does not apply to the proposed rule because it does not impose a cost on regulated persons, another state agency, a special district, or a local government.

ENVIRONMENTAL RULE ANALYSIS

The commission has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure. It is not a "major environmental rule," as defined by Government Code §2001.0225. As a result, the commission asserts that the preparation of an environmental impact analysis, as provided by Government Code §2001.0225, is not required.

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 Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2296, Austin, Texas 78768 or e-mailed to deborah.cowan@tcp.texas.gov. Comments will be reviewed and discussed at a future commission meeting.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.032 which allows the commission to appoint fire protection personnel.

The proposal implements Texas Government Code, Chapter 419, §419.008 and §419.032.

§433.207. International Fire Service Accreditation Congress (IFSAC) Seal.

(a) Individuals holding a current commission Driver/Operator-Aerial certification received prior to May 31, 2018 and documenting an NFPA 1001 Fire Fighter I IFSAC seal may be granted an International Fire Service Accreditation Congress (IFSAC) seal as a Driver/Operator-Aerial by making application to the commission for the IFSAC seal and paying applicable fees. This subsection will expire on May 31, 2019.

(b) Individuals completing a commission approved Driver/Operator-Aerial program; documenting an NFPA 1001 Fire Fighter I IFSAC seal and passing the applicable state examination, may be granted an IFSAC seal for Driver/Operator-Aerial by making application to the commission for the IFSAC seal and paying applicable fees. Individuals must submit the application and fee for the seal prior to the expiration of the examination in order to qualify for the IFSAC seal.

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 27, 2019.

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Tim Rutland
Executive Director
Texas Commission on Fire Protection
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For further information, please call: (512) 936-3812

CHAPTER 437. FEES

37 TAC §437.3

The Texas Commission on Fire Protection (commission) proposes amendments to Chapter 437, Fees, concerning §437.3, Certification Application Processing Fees.

BACKGROUND AND PURPOSE

The purpose of the amendments is to amend the initial certification fee for obtaining certification by the commission.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tim Rutland, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be a minor fiscal impact to state government or local governments, by reducing the amount of state funds collected by the commission for certification applications. Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022.

PUBLIC BENEFIT

Mr. Rutland has also determined that for each year of the first five years the amendments are in effect the public benefit from the passage of the proposal will be lower fees for individuals and entities when obtaining initial certification with the agency.

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

There will be no negative effect on persons required to comply with the amendments as proposed. There will be no negative impact on micro or small businesses or rural communities. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, is not required.

GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined that during the first five years the amendments are in effect:

(1) the rule will not create or eliminate a government program;
(2) the rule will not create or eliminate any existing employee positions;
(3) the rule will not require an increase or decrease in future legislative appropriation;
(4) the rule will result in a decrease in fees paid to the agency by reducing the fees collected for certification applications;
(5) the rule will not create a new regulation;
(6) the rule will not expand a regulation;
(7) the rule will not increase the number of individuals subject to the rule; and
(8) the rule is 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 Government Code §2007.043

REQUIREMENT FOR RULE INCREASING COSTS TO REGULATED PERSONS

Texas Government Code Section 2001.0045 does not apply to the proposed rule because it does not impose a cost on regulated persons, another state agency, a special district, or a local government.

ENVIRONMENTAL RULE ANALYSIS

The commission has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure. It is not a "major environmental rule," as defined by Government Code §2001.0225. As a result, the commission asserts that the preparation of an environmental impact analysis, as provided by Government Code §2001.0225, is not required.

PUBLIC COMMENT

Comments regarding the proposed amendments may be submitted, in writing, within 90 days following the publication of this notice in the Texas Register, to Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to deborah.cowan@tcpf.texas.gov. Comments will be reviewed and discussed at a future commission meeting.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.026 which allows the commission to set and collect a fee for each certificate the commission issues.

The proposal implements Texas Government Code, Chapter 419, §419.008 and §419.026.

§437.3. Certification Application Processing Fees.

(a) A non-refundable application processing fee of $55 [§55] is required for each certificate issued by the commission. If a certificate is issued within the time provided in §401.125 of this title (relating to Processing Periods), the fee will be applied to the certification. If the certificate is denied, the applicant must pay a new certification application processing fee to file a new application.

(b) The regulated employing entity shall be responsible for all certification application processing fees required as a condition of appointment.

(c) Nothing in this section shall prohibit an individual from paying a certification application processing fee for any certificate which he or she is qualified to hold, providing the certificate is not required as a condition of appointment (see subsection (b) of this section concerning certification fees).

(d) A facility that provides training for any discipline for which the commission has established a curriculum must be certified by the commission. The training facility will be charged a separate certification application processing fee for each discipline or level of discipline for which application is made.

(e) The certification application processing fee is waived for a military service member, military veteran, or military spouse who holds a current license or certification issued by another jurisdiction that has requirements substantially equivalent to the requirements for commission certification[.] and is applying for the first time for a certification required by commission rules for appointment to duties.

(f) The certification application processing fee is waived for a military service member, military veteran, or military spouse who holds a current license or certification issued by another jurisdiction that has requirements substantially equivalent to the requirements for commission certification[.] and is applying for the first time for a certification required by commission rules for appointment to duties.

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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Tim Rutland
Executive Director
Texas Commission on Fire Protection

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For further information, please call: (512) 936-3812

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CHAPTER 445. ADMINISTRATIVE INSPECTIONS AND PENALTIES

37 TAC §§445.1, 445.7, 445.9, 445.11


BACKGROUND AND PURPOSE

The purpose of the amendments is to provide additional information regarding rule violations and administrative penalties which may be issued by the commission. The new section is specific to Training Facilities certified by the commission. The proposal seeks to more closely comply with a previous Sunset Commission recommendation for the 2008-2009 Review Cycle, 81st legislative session.

SECTION-BY-SECTION SUMMARY

In subsections (a) to (c) of the proposed amendments to §445.1, the word "commission" is no longer capitalized to conform with the use of the term in other commission rules.

The proposed amendments to §445.7 better implement the commission’s statutory enforcement authority. Subsection (c) adds penalties for uncorrected minor violations. Subsection (c)(2) sets the penalty amounts and states that each rule violation is considered a separate violation for purposes of imposing a penalty and that each day a violation occurs is considered a separate violation. The amendments to subsection (d) establish penalty amounts for uncorrected major violations and state that each rule violation is considered a separate violation for purposes of imposing a penalty and that each day a violation occurs is considered a separate violation. Subsection (e) states that repeat violations may result in higher penalties.

Subsection (c) is re-lettered to subsection (f) so the subsections appear in alphabetical order. A minor grammatical change is the proposed amendment in subsection (f).

Minor grammatical changes are proposed for §445.9 in subsections (a) and (b). Subsection (d) also makes more effective the statutory enforcement authority of the commission. Sub-
section (d)(1) adds "violation history" as a factor to determine a penalty. The proposed amendments to subsection (d) add the following factors to consider in determining a penalty: (1) nature, circumstances, extent and gravity of a prohibited act; (2) economic damage to property or the public’s interests or confidence caused by the violation; (3) any economic benefit gained through the violation; (4) actions deemed necessary to deter future violations; and (5) any demonstrated good faith/efforts to correct the violation.

Section 445.11 is a proposed new rule to regulate training facilities through disciplinary actions for violations of the commission’s rules, standards, and curriculum. The proposed rule also authorizes the commission to take disciplinary action against students, instructors, and field examiners at the facilities.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tim Rutland, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there may be an increase in general revenue to the state, to the extent that the enforcement actions could result in paid administrative penalties. Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022.

PUBLIC BENEFIT

Mr. Rutland has also determined that for each year of the first five years the amendments are in effect the public benefit from the passage of the proposal will be more information regarding rule violations, administrative penalty types and amounts which may be assessed pursuant to violations of commission rules. The rule will more effectively implement the commission’s statutory enforcement authority.

Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022.

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

There will be no effect on persons required to comply with the amendments as proposed. There will be no impact on micro or small businesses or rural communities. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, is not required.

GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined 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 an increase or decrease in fees paid to the agency;
(5) the rules will create a new regulation to the extent that the rules implement existing statutes related to training facilities;
(6) the rules will expand a regulation to include training facilities;
(7) the rules will increase the number of individuals subject to the rule because training facility students, instructors, and field examiners may be subject to disciplinary action; 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 Government Code §2007.043.

REQUIREMENT FOR RULE INCREASING COSTS TO REGULATED PERSONS

Texas Government Code Section 2001.0045 does not apply to the proposed rule because §2001.0045(c)(6) exempts the agency because agency rules are necessary to protect the health, safety and welfare of the residents of this state.

ENVIRONMENTAL RULE ANALYSIS

The commission has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure. It is not a "major environmental rule," as defined by Government Code §2001.0225. As a result, the commission asserts that the preparation of an environmental impact analysis, as provided by Government Code §2001.0225, is not required.

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 Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to deborah.cowan@tcpf.texas.gov. Comments will be reviewed and discussed at a future commission meeting.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; §419.027, which authorizes the commission to inspect facilities conducting training; §419.028, which authorizes the commission to regulate training programs and instructors; §419.029, which authorizes the commission to establish minimum curriculum requirements; §419.036, which authorizes the commission to take disciplinary action; and §419.047, which allows the commission to enforce minimum standards adopted by the commission.

The proposal implements Texas Government Code, Chapter 419, §419.008, §419.027, §419.028, §419.029, §419.036; and §419.047.

§445.1. Entity Inspections.

(a) The commission [Commission] shall conduct at least biennial inspections of the entities that fall under the regulatory authority of the commission [Commission] and may perform risk-based [risk based] inspections of entities the commission [Commission] determines to be at risk.
(b) The purpose of these inspections shall be to promote safety and proficiency in the fire service by ensuring compliance with state law and commission [Commission] rules pertaining to minimum standards for fire protection personnel education, protective clothing, self-contained breathing apparatus, personal alert safety systems, standard operating procedures, or any other aspect of the fire service regulated by the commission [Commission].

(c) This shall include inspections of volunteer fire fighters and fire departments that participate in the voluntary regulation program pursuant to §419.071 of the Texas Government Code in one or more of the component areas.

§445.7. Procedures.

(a) The inspector shall, if possible, notify the current or acting, on duty and available, department head of the inspector's presence at the department and his intention to conduct a departmental inspection.

(b) During the course of the inspection, any noncompliance with state law or commission rule shall be noted. Violations shall be determined to be either minor or major violations based upon the following guidelines.

(c) Penalty amounts for uncorrected minor violations.

(1) Minor violations shall be defined as those violations which the inspector determines do not pose a serious threat to personnel safety due to lack of personnel protection equipment or training, are not widespread, or are not repeat violations of the same nature for which the entity was cited within the previous five years. See minor violations and penalties in the applicable table.

(2) $250 - $500 per day. Each rule violation is considered a separate violation for purposes of imposing a penalty. Each day a violation continues to occur is considered a separate violation for purposes of imposing a penalty.

Figure: 37 TAC §445.7(c)

(d) Penalty amounts for uncorrected major violations.

(1) Major violations shall be defined as those violations which in the inspector's opinion constitute an immediate threat to personnel safety, flagrant or repeated violations in the same or similar areas, fraud, or obvious attempts to circumvent state law or commission rule. A major violation may be as follows but not limited to a deficiency or safety issue involving protective clothing, a self-contained breathing apparatus, personal alert safety systems, breathing air, or other matter that in the inspector's judgment presents an immediate and significant risk of injury. See major violations and penalties in the applicable table.

(2) $500 - $1,000 per day. Each rule violation is considered a separate violation for purposes of imposing a penalty. Each day a violation continues to occur is considered a separate violation for purposes of imposing a penalty.

Figure: 37 TAC §445.7(d)

(e) Repeat violations of rules may result in higher penalty sanctions.

(f) In order to determine compliance with commission requirements pertaining to a particular item[,] the inspector may examine as many items of protective clothing and equipment deemed necessary by the inspector.


(a) Findings of only minor violations. If during [the course of] a departmental inspection the inspector determines the department has committed only minor violations, the following procedure applies.

(1) The inspector shall issue an inspector's [inspectors] report which will identify the findings from the compliance inspection. The inspector's report is a written summary of an inspector's findings that is given to an inspected entity after an inspection. In cases of minor violations, the inspector's report may identify deficiencies and prescribe corrective action within specific timeframes.

(2) The department then has 30 calendar days from the date the inspector's report is received to provide the commission with a written schedule of actions that will be taken to correct the violations. The schedule of actions will allow necessary amounts of time for such things as obtaining items through city requisitions and bid processes, when necessary. Lack of funds is not an acceptable reason for delay.

(b) Findings of major violations. If during [the course of] a departmental inspection the inspector determines the department has committed a major violation, the following procedure applies.

(1) The inspector or compliance officer shall issue a notice of alleged violation. The notice shall identify the violations and require the department or provider to correct the violation. In addition, the notice of alleged violation may:

(A) allow extra time to come into compliance;

(B) assess administrative penalties which may be prorated;

(C) suspend or revoke licenses or certificates; and

(D) require proof of compliance.

(2) In addition to any of the above, the commission may also temporarily suspend a person's or regulated entity's certificate on a determination by a panel of the commission that continued activity by the person or entity would present an immediate threat to the public, regulated personnel, or fire service trainees; and seek an injunction in a district court in Travis County along with civil penalties, court costs, and attorney's fees. See Tex. Gov't Code §419.906(a), (d).

(c) If a fire department or training provider fails to correct the alleged violation in a timely manner or fails to request a preliminary staff conference (information settlement conference) before the 61st day after the date it receives a notice of alleged violation, the commission through its executive director may issue a default order.

(d) When determining administrative penalties for a notice of alleged violation or default order the following factors shall be considered:

**BACKGROUND AND PURPOSE**

The purpose of the amendments is to remove the "grandfathering" provision from rule language for Hazardous Materials - Incident Commander that ended on May 31, 2019.

**FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT**

Tim Rutland, 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. Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022.

**PUBLIC BENEFIT**

Mr. Rutland has also determined that for each year of the first five years the amendments are in effect the public benefit from the passage of the proposal will be accurate and clear and concise rules regarding obtaining Hazardous Materials- Incident Commander IFSAC seals.

**ECONOMIC IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES AND RURAL COMMUNITIES**

There will be no effect on persons required to comply with the amendments as proposed. There will be no impact on micro or small businesses or rural communities. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, is not required.

**GOVERNMENT GROWTH IMPACT STATEMENT**

The agency has determined that during the first five years the amendments are in effect:

1. the rule will not create or eliminate a government program;
2. the rule will not create or eliminate any existing employee positions;
3. the rule will not require an increase or decrease in future legislative appropriation;
4. the rule will not result in a decrease in fees paid to the agency;
5. the rule will not create a new regulation;
6. the rule will not expand a regulation;
7. the rule will not increase the number of individuals subject to the rule; and
8. the rule is 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 Government Code §2007.043.
REQUIREMENT FOR RULE INCREASING COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to the proposed rule because it does not impose a cost on regulated persons, another state agency, a special district, or a local government.

ENVIRONMENTAL RULE ANALYSIS

The commission has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure. It is not a "major environmental rule," as defined by Government Code §2001.0225. As a result, the commission asserts that the preparation of an environmental impact analysis, as provided by Government Code §2001.0225, is not required.

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 Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or emailed to deborah.cowan@tcfp.texas.gov. Comments will be reviewed and discussed at a future commission meeting.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.032 which allows the commission to appoint fire protection personnel.

The proposal implements Texas Government code, Chapter 419, §419.008 and §419.032.

§453.207 International Fire Service Accreditation Congress (IF-SAC) Seal.

(a) Individuals holding a current commission Hazardous Materials Incident Commander certification received prior to May 31, 2018 may be granted an International Fire Service Accreditation Congress (IF-SAC) seal as a Hazardous Materials Incident Commander by making application to the commission for the IF-SAC seal and paying applicable fees. Individuals must also document the required prerequisite IF-SAC seals listed in subsection (b) of this section. This subsection (a) will expire on May 31, 2019.

(b) Individuals completing a commission approved Hazardous Materials Incident Commander program and documenting the following IF-SAC seals:

1. Hazardous Materials Awareness Level Personnel; and

2. Hazardous Materials Operations Level Responders, including the Mission-Specific Competencies for Personal Protective Equipment and Product Control under the current edition; or

3. NFPA 472 Hazardous Materials Operations prior to the 2008 edition; and

4. upon passing the applicable state examination, may be granted an IF-SAC seal for Hazardous Materials Incident Commander by making application to the commission for the IF-SAC seal and paying applicable fees. Individuals must submit the application and fee for the seal prior to the expiration of the examination in order to qualify for the IF-SAC seal.

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 27, 2019.

TRD-201902917

Tim Rutland

Executive Director

Texas Commission on Fire Protection

Earliest possible date of adoption: October 13, 2019

For further information, please call: (512) 936-3812

CHAPTER 457. MINIMUM STANDARDS FOR INCIDENT SAFETY OFFICER CERTIFICATION

37 TAC §457.7

The Texas Commission on Fire Protection (commission) proposes amendments to Chapter 457, Minimum Standards For Incident Safety Officer Certification, concerning §457.7, International Fire Service Accreditation Congress (IF-SAC) Seal.

BACKGROUND AND PURPOSE

The purpose of the amendments is to remove the "grandfathering" provision from rule language for Incident Safety Officer that ended on May 31, 2019.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Mr. Rutland, 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. Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022.

PUBLIC BENEFIT

Mr. Rutland has also determined that for each year of the first five years the amendments are in effect the public benefit from the passage of the proposal will be accurate and clear and concise rules regarding obtaining Incident Safety Officer IF-SAC seals.

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

There will be no effect on persons required to comply with the amendments as proposed. There will be no impact on micro or small businesses or rural communities. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, is not required.

GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined that during the first five years the amendments are in effect:

1. the rule will not create or eliminate a government program;

2. the rule will not create or eliminate any existing employee positions;

3. the rule will not require an increase or decrease in future legislative appropriation;

4. the rule will not result in a decrease in fees paid to the agency;
(5) the rule will not create a new regulation;
(6) the rule will not expand a regulation;
(7) the rule will not increase the number of individuals subject to the rule; and
(8) the rule is 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 Government Code §2007.043

REQUIREMENT FOR RULE INCREASING COSTS TO REGULATED PERSONS

Texas Government Code Section 2001.0045 does not apply to the proposed rule because it does not impose a cost on regulated persons, another state agency, a special district, or a local government.

ENVIRONMENTAL RULE ANALYSIS

The commission has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure. It is not a “major environmental rule,” as defined by Government Code §2001.0225. As a result, the commission asserts that the preparation of an environmental impact analysis, as provided by Government Code §2001.0225, is not required.

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 Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to deborah.cowan@tcfp.texas.gov. Comments will be reviewed and discussed at a future commission meeting.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.032 which allows the commission to appoint fire protection personnel.

The proposal implements Texas Government code, Chapter 419, §419.008 and §419.032.

§457.7 International Fire Service Accreditation Congress (IFSC) Seal.

(a) Individuals holding a current commission Incident Safety Officer certification received prior to May 31, 2013 and documenting Fire Fighter II, Instructor I and Fire Officer I seals may be granted an International Fire Service Accreditation Congress (IFSC) seal as an Incident Safety Officer by making application to the commission for the IFSC seal and paying applicable fees. This subsection will expire on May 31, 2019.

(b) Individuals completing a commission approved Incident Safety Officer program documenting Fire Fighter II, Instructor I and Fire Officer I seals, and passing the applicable state examination, may be granted an IFSC seal for Incident Safety Officer by making application to the commission for the IFSC seal and paying applicable fees. Individuals must submit the application and fee for the seal prior to the expiration of the examination in order to qualify for the IFSC seal.

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 27, 2019.
TRD-201902918
Tim Rutland
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: October 13, 2019
For further information, please call: (512) 936-3812

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1.


BACKGROUND AND PURPOSE

The purpose of the amendments, new sections, and repeals in 40 TAC, Chapter 19, is to make HHSC rules consistent with federal regulations for nursing facilities participating in Medicare and

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Medicaid and to protect the health and safety of nursing facility residents.

The Code of Federal Regulations, Title 42, Subpart B, §§483.1, 483.5, 483.10, 483.12, 483.15, 483.20, 483.21, 483.24, 483.25, 483.30, 483.35, 483.40, 483.45, 483.50, 483.55, 483.60, 483.65, 483.70, 483.75, 483.80, 483.85, 483.90 and 483.95, was amended effective November 28, 2016, to revise the requirements that nursing facilities must meet to participate in the Medicare and Medicaid programs.

The proposed rules focus on person-centered care and culture change, quality of life improvement, care and services, health outcomes, individual choice, resident safety, professional standards, and quality assurance and performance improvement. The rule changes are necessary to enhance health and safety protections for nursing facility residents, streamline regulatory requirements for nursing facility providers, and improve consistency of regulatory survey activity.

HHSC replaces references to both the "Texas Department of Human Services" or "DHS" and the "Department of Aging and Disability Services" or "DADS" with references to the "Texas Health and Human Services Commission" or "HHSC" throughout the proposal. The terms "responsible party," "legal representative," and other similar terms are replaced with the term "resident representative," throughout the proposal. The word "Texas" is added to the beginning of Texas codes. HHSC also makes editorial changes throughout the proposal to remove gender-specific language, adopt person-first respectful language, make plural nouns singular such as "resident" instead of "residents," and improve clarity and readability of the rules.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §19.1 clarifies the requirements for nursing facilities for licensure and certification in the Medicare and Medicaid programs.


The proposed amendment to §19.401(b) adopts by reference the Centers for Medicare and Medicaid Services (CMS) rule regarding resident rights found in 42 Code of Federal Regulations, Section 483.10 adopted to be effective November 28, 2016. As a requirement for obtaining a license under the Texas Health and Safety Code, Chapter 242, a nursing facility must comply with the rules related to resident rights in 42 CFR, Section 483.10. Also, §19.401(c)(3) is amended to require that a resident be free from neglect, as well as abuse and exploitation. This change makes this reference consistent with other similar references in Chapter 19.

The proposed amendment to §19.402 makes editorial changes to remove gender specific language, use person-first language, use the same terminology to refer to the resident's representative, and replace term used for mental competency to add clarity and consistency to the rule. Also, the amendment of §19.402(g) clarifies that any legal surrogate designated in accordance with state law may exercise a resident's rights to the extent provided by state law even if the resident has not been found to lack capacity by a state court.

The proposed amendment to §19.403 makes editorial changes to use the same term to refer to a resident representative to add clarity and consistency to the rule. Also, the proposed amendment to §19.403(1)(2)(A) removes an unnecessary citation to §19.701(4)(B), related to Quality of Life, and §19.403(m)(1) removes an unnecessary citation to §19.402, relating to Exercise of Rights. Finally, the proposed amendments to §19.403(f)(2) and (i) make this rule consistent with requirements in 42 Code of Federal Regulations, Section 483.10.

The proposed amendment to §19.404 updates the language related to the management of financial affairs and replaces the term "responsible party" with "resident representative" to provide clarity and consistency in the rule.

The proposed amendment to §19.405 makes minor editorial and organizational changes for clarity and consistency, such as replacing "DADS" and "the Department of Aging and Disability Services" with HHSC, and replacing terms, such as "legally authorized representative" or "responsible party" with "resident representative" and "attorney general" with "Office of the Attorney General." Specifically, the proposed amendment to subsection (f) clarifies how the facility must convey funds and a final accounting of funds to a resident who is discharged or evicted, or to the individual or probate jurisdiction administering the resident's estate of a resident who has died. The proposed amendment to subsection (j) adds clarifying language related to the requirements for requesting items or services that may be charged to a resident's personal funds. Edits are also made to update references.

The proposed amendment to §19.406 makes editorial changes such as replacing "adjudged incompetent" with "found to lack capacity" and deletes an unnecessary reference to §19.1502(b)(3), relating to Choice of Pharmacy Provider.
The proposed amendment to §19.407 replaces obsolete citations to §19.1910(e), relating to Clinical Records, and §19.403, relating to Notice of Rights and Services. Also, the proposed amendment makes editorial and organizational changes related to a resident's right to refuse release of personal and clinical records; governmental searches of resident records; and the protection of information that contains personal identification information.

The proposed amendment to §19.408 replaces "family member" and "guardian of the resident" with "resident representative" and editorial changes are made for clarity and consistency.

The proposed amendment to §19.409 makes editorial and organizational changes for clarity and consistency. Specifically, §19.409(b) is added to clarify the requirement to make survey results available for examination in a place readily accessible to residents. This requirement was previously in §19.409(a)(1).

The proposed amendment to §19.410 makes minor editorial and organizational changes for clarity and consistency, such as replacing "DHS" with "HHSC," and "responsible party" with "resident representative." Also, the proposed amendment to §19.410(b)(2) removes an unnecessary citation to §19.2316(f), relating to Collection of Applied Income.

The proposed amendment to §19.411 makes editorial changes by replacing "he" with "the resident" and "plan of care" with "care plan" to remove gender specific language and to ensure use of consistent terminology.

The proposed amendment to §19.413 adds a resident representative to the list of individuals that a resident has the right to have immediate access to. Also, the proposed amendment makes minor editorial changes such as replacing "responsible party" and "legally authorized representative" with "resident representative." In addition, the proposed amendment to §19.413(e) updates a citation to subsections (c)(1)(C) and (d)(1)(A), (B) or (C) of this section.

The proposed amendment to §19.414 deletes an outdated provision prohibiting a facility from requiring a resident's private telephone to be connected to a central switchboard.

The proposed amendment to §19.416 updates a citation to the Estates Code and deletes a cross reference to §19.1921.

The proposed amendment to §19.417 replaces "his" with "the resident" to remove gender specific language.

The proposed repeal of §19.418 deletes a rule relating to a resident self-administering drugs. This requirement is now addressed in proposed §19.401(b) of this title which incorporates by reference 42 CFR, Section 483.10.

The proposed amendment to §19.421 replaces "individual" with "resident" for clarity and consistent use of terms.

The proposed amendment to §19.501 adds new subsections (a), (b)(3), (e), and (f). New subsection (a) requires the facility to establish and implement an admissions policy. New subsection (b)(3) adds that the facility must not require a resident or potential resident to waive potential facility liability for losses of personal property. New subsection (e) adds that the facility must provide a resident or potential resident notice of special characteristics or service limitations of the facility. New subsection (f) requires the facility that is a composite distinct part to disclose its physical configuration and specify the policies that apply to room changes between its different locations. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.502(b)(5) more fully explains the circumstance of nonpayment that could lead to the discharge of a resident from a nursing facility. The proposed amendment to §19.502(c) adds requirements related to the information and documentation that must be communicated between the discharging and receiving health care institutions or providers when a resident is transferred or discharged. The proposed amendment to §19.502(d) deals with facility initiated discharges or transfers and outlines the facility responsibilities for notifying the resident, resident representative, and the State Ombudsman of a discharge or transfer before it occurs. The proposed amendment to §19.502(f)(4)(A) increases the time a resident has to appeal a discharge or transfer from 10 days to 90 days, which makes the rule consistent with the HHSC hearing rules. The proposed amendment to §19.504(f)(4)(B) and (C) adds requirements related to filing an appeal when a resident has been notified of transfer or discharge from a facility. Proposed new §19.502(g) requires the facility to update a notice of transfer or discharge as soon as practicable if any information in the notice changes before the transfer or discharge. The proposed amendment to §19.502(h)(1) requires the facility to document that a resident is sufficiently prepared to ensure a safe transfer or discharge from the facility. It also requires that the facility provide the orientation in a form and manner that the resident can understand. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.503 changes the rule title to "Notice of Bed Hold Policy and Return to Medicaid-certified Facilities," makes changes to subsections (a) and (c), and adds a new subsection (d). The change to subsection (a) adds that the notice given to a resident before the resident transfers to the hospital or goes on therapeutic leave must include the reserved bed payment policy in the state plan. The change to subsection (c) requires a facility to allow a resident whose hospitalization or therapeutic leave exceeds the bed-hold period to return to the resident's previous room if it is available. The change to subsection (c) also requires the facility to provide the notice required under §19.502 to a resident expected to return to the facility when the facility determines the resident cannot return to the facility. The change to subsection (c) requires the facility to notify the resident of the option to return to that location when a bed is available. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.504(a) adds the requirement that a facility must provide equal access to quality care regardless of diagnosis, severity of condition, or payment source. Additional edits were made to update references and the subsections were reordered to account for the addition of a subsection.

The proposed amendment to Subchapter G changes the title of the subchapter to "Freedom from Abuse, Neglect, and Exploitation."

The proposed amendment to §19.601 changes the rule title to "Freedom from Abuse, Neglect and Exploitation" to better identify the subject of the section. The proposed amendment to §19.601(a) - (c) updates the requirements related to residents' rights to be free from abuse, neglect, and exploitation; the facility's employment practices; the facility's responsibilities for reporting and investigating allegations of abuse, neglect and ex-
exploitation; and the facility's responsibility for prohibiting and preventing mistreatment, abuse, neglect, exploitation, and misappropriation of residents' property. The proposed amendment to §19.601(d) adds facility requirements related to the use of restraints. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.602 changes the rule title to "Incidents of the Texas Health and Human Services Commission and Law Enforcement Agencies by Facilities." It adds a new subsection (a) and makes changes to subsection (d). New subsection (a) adds the requirements related to the facility's investigatory and reporting duties in response to allegations of abuse, neglect, exploitation, or mistreatment. The changes to subsection (d) add that the facility must submit a written investigative report to HHSC no later than the fifth working day after the initial report. The subsections are reordered to account for the addition of a subsection. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.606 updates and corrects a statutory reference by replacing Texas Health and Safety Code §242.134 with the Texas Health and Safety Code §260A.016. The proposed changes make minor editorial and organizational changes for clarity and consistency, such as updating Texas Department of Human Services (DHS) to HHSC.

The repeal of §19.701 is proposed because the content of the existing section has been moved to other sections. The requirements in §19.701(1)-(4) are covered by §19.401(b) which states that HHSC is adopting by reference the CMS rule regarding resident rights found in 42 Code of Federal Regulations, Section 483.10. Also, §19.701(5) is added to the new proposed §19.701(d).

Proposed new §19.701 requires the facility to provide the care and services necessary for the resident to attain or maintain the highest practicable physical, mental, and psychosocial well-being consistent with the resident's plan of care. Subsection (c) incorporates the existing requirement of §19.701(c) that care for a child in a facility must meet the child's unique medical and developmental needs. Subsection (d) incorporates the existing requirement of §19.701(5) that pediatric residents should be matched with roommates of similar age and developmental levels.

The proposed amendment to §19.702(a) requires the facility to provide a program of activities for residents designed to encourage independence and interaction in the community. The proposed amendment to §19.702(b) clarifies the certification and training requirements for an activity director hired by the facility. These changes are consistent with the recent revision of the Code of Federal Regulations. Edits were also made to update references.

The proposed amendment to §19.703(b) updates the statutory authority for licensing a social worker in Texas from Human Resources Code, Chapter 50 to Texas Occupations Code, Chapter 55 and adds "gerontology" as a human service field of study under the qualifications of an individual employed by a facility as a social worker. This change is consistent with the recent revision of the Code of Federal Regulations.

The proposed repeal of §19.705 deletes a rule relating to the environment the facility must provide a resident. The contents of this rule have been added to proposed new §19.401(b) which incorporates by reference 42 CFR, Section 483.10.

The proposed amendment to §19.706(c) adds clarifying language that explains the resident has the right to have a family member or other resident representative meet in the facility with the family or resident representative of other residents and organize a family council. The proposed amendment to §19.706(d)(2) requires that if a family council exists, a facility demonstrate responses to the grievances and recommendations of the family council. The proposed amendment to §19.706(d)(3) requires the facility to make residents and family members aware of upcoming meetings in a timely manner. The proposed amendment to §19.706(d)(4) gives the resident or family group the right to approve the staff person designated to assist the resident or family group. The proposed amendment to §19.706(e)(7) adds the requirement that the facility allow a resident to participate in a family council. The proposed amendment to §19.706(g)(3) states the facility must not limit the rights of a resident, resident's family member, or a family council member to meet with another resident representative. These changes are consistent with the recent revision of the Code of Federal Regulations. A few paragraphs were renumbered to account for the additional paragraphs.

The proposed amendment to §19.801(2) requires the facility to complete a comprehensive assessment of a resident's needs, strengths, goals, life history, and preferences. The proposed amendment to §19.801(5) adds requirements related to coordinating assessments with the Preadmission Screening and Resident Review (PASRR) process in 42 CFR, Part 483, Subpart C. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.802 changes the rule title to "Comprehensive Person-Centered Care Planning" to demonstrate the focus on comprehensive person-centered care planning. The proposed amendment to §19.802(a) requires a facility to develop and implement a baseline care plan for each resident within 48 hours after the facility admits the resident. The proposed amendment to §19.802(b) adds requirements related to the comprehensive care plan and the inclusion of PASRR services in the plan. The proposed amendment to §19.802(b) also requires the comprehensive care plan to include the resident's goals, the resident's preferences, the resident's potential for future discharge, and discharge plans, as appropriate. The facility must develop this part of the comprehensive care plan in consultation with the resident and the resident's representative. The proposed amendment to §19.802(c) adds two mandatory members to the interdisciplinary team that prepares the comprehensive care plan: a nurse aide with responsibility for the resident and the qualified dietitian or director of food and nutrition services. The proposed amendment to §19.802(d) requires the facility to include an explanation in the resident's clinical record if the facility determines that the resident and the resident representative cannot practicably participate in the development of the resident's comprehensive care plan. The proposed amendment to §19.802(h) requires the services provided or arranged by the facility be culturally-competent and trauma-informed. These changes are consistent with the recent revision of the Code of Federal Regulations. Subsections were reordered to account for the addition of subsections.

The proposed amendment to §19.803 requires the facility to develop and implement a discharge planning process and states what must be included in the discharge summary. These changes are consistent with the recent revision of the Code of Federal Regulations. Subsections and paragraphs were reordered to account for the addition of a subsection.
The proposed amendment to §19.901 requires the nursing facility to ensure a resident receives treatment and care in accordance with professional standards of practice, the comprehensive person-centered care plan, and the resident's choices, and defines what must be included in the care plan. The proposed amendment deletes several subsections in §19.901 because the content of the rule has been added to other sections. These include: §19.901(7), which relates to the activities of daily living, and has been moved to §19.701, §19.901(8), which relates to mental and psychosocial functioning, and has been moved to §19.904, §19.901(9), which relates to nutrition, and has been moved to §19.901(6), §19.901(10), which relates to hydration, and has been moved to §19.901(6), §19.901(11), which relates to special needs, and has been moved to §19.901(2), §19.901(7), §19.901(8), and §19.901(9), §19.901(12), which relates to unnecessary drugs and §19.701(13), which relates to medication errors, and has been moved to §19.1501. These changes are consistent with the recent revision of the Code of Federal Regulations. The section is reordered to account for the addition and deletion of subsections.

Proposed new §19.904 requires the facility to provide the necessary behavioral health care and services so each resident can attain or maintain the highest practicable physical, mental, and psychosocial well-being in accordance with the comprehensive assessment and care plan. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1001(a) updates the requirement that the facility have sufficient staff, with appropriate competencies and skill sets considering the number, acuity, and diagnoses of the facility's resident population as determined by the facility assessment. The proposed amendment to §19.1001(a)(1) requires a facility to ensure that its licensed nurses have the competencies and skill sets necessary to care for the facility's residents, as identified through resident assessments and care plans. The proposed amendment to §19.1001(a)(3) adds requirements related to the proficiency of nurse aides. The proposed amendment to §19.1001(a)(4) adds requirements for facility hiring and the use of nurse aides. The proposed amendments to §19.1001(5)(D) and §19.1001(6)(B) add statutory authorities for advocacy systems for individuals with mental illness and individuals with intellectual or developmental disabilities. These changes are consistent with the recent revision of the Code of Federal Regulations. Edits are also made to reorder subsections and paragraphs to account for the addition and deletion of subsections and paragraphs.

The proposed amendment to §19.1010(c)(3) corrects a cross-reference from §19.602(e)(2) to §19.602(g)(2), relating to Incidents of Abuse, Neglect and Exploitation Reportable to the Texas Health and Human Service Commission and Law Enforcement Agencies, and changes the name of DADS to HHSC.

The proposed amendment to Subchapter L changes the title of the subchapter to "Food and Nutrition Services."

The proposed amendment to §19.1101 changes the rule title to "Food and Nutrition Services" and requires the facility to take into account the dietary preferences of each resident. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed repeal of §19.1102 is replaced with new §19.1102. The new section incorporates provisions of the existing section and adds new education, training, and certification requirements for a dietitian and a director of food and nutrition services.

The new section permits a dietitian hired or contracted before November 28, 2016, to meet the stricter requirements by November 28, 2021, if they are either registered by the Commission on Dietetic Registration or are licensed in Texas with at least one year of supervisory experience in dietetic services of a health care facility. The proposed new rule language requires facilities, when making food and nutrition staffing determinations, to take into account resident assessments, individual plans of care, and the characteristics of the resident population, as determined by the facility assessment. It also adds a paragraph (5) that requires sufficient staff to carry out the functions of the facility's food and nutrition services. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed repeal of §19.1103 deletes the rule because the content of the rule has been added to proposed amended §19.1102 as paragraph (5).

The proposed amendment to §19.1104(c) removes the requirement that a qualified dietitian must be a part of the interdisciplinary team because the content of rule has been added to proposed §19.802.

The proposed amendment to §19.1107(a) changes the rule title to "Menus, Nutritional Adequacy, and Meal Service" and requires facilities to provide residents with a menu that meets established national guidelines for nutrition; takes into account religious, ethnic, and cultural needs of facility residents, and is updated periodically. The proposed amendment to §19.1107(g)(4) also requires the facility to provide assistance to a resident who uses special eating utensils to ensure that the resident is able to use the special equipment for consuming meals and snacks. The proposed addition of §19.1107(i) adds that this section does not limit a resident's right to make personal dietary choices. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1108 changes the rule title to "Food and Drink." It also adds requirements related to the provision of adequate food and drink in the facility. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1109 corrects the cross-reference by replacing §19.1911(12)(B)(vi) of this chapter with §19.1911(b)(16)(E) related to Contents of the Clinical Record.

The proposed amendment to §19.1110 amends subsections (a) and (b) and replaces subsections (c) and (d) with a new subsection (c). As amended subsection (a) requires the facility to serve meals at regular times comparable to normal mealtimes in the community or in accordance with a resident's needs, preferences, requests, or care plan. The proposed amendment to §19.1110(b) allows the facility to have up to 16 hours between a substantial evening meal and breakfast the following day if a resident group agrees to this meal span. The new subsection (c) adds the requirement that alternative meals and snacks must be provided to a resident who wants to eat at non-traditional times or outside of scheduled meal service times, consistent with the resident's plan of care. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1111(a)(1) - (3) specifically permits the facility to procure food from local producers and to use produce grown in facility gardens, subject to compliance with applicable state and local laws and safe growing and food handling practices. It also states that this section does not preclude
a resident from consuming foods not procured by the facility. The proposed amendment to §19.1111 adds subsection (d). This new subsection requires the facility to have a written policy regarding use and storage of foods brought to a resident by family and other visitors to ensure safe and sanitary storage, handling, and consumption. The proposed amendment to §19.1111(g) clarifies the requirement that the facility and all food service personnel must meet the standards imposed by local, state, and federal codes regarding food and food handling. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1113(a) eliminates redundant language related to the required training for paid feeding assistants. The proposed amendment to §19.1113(c)(1) adds new requirements related to resident selection criteria for the use of paid feeding assistants. These changes are consistent with the recent revision of the Code of Federal Regulations.

Proposed new §19.1114 states that therapeutic diets must be prescribed by the attending physician unless the physician delegates this duty to a registered or licensed dietitian. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1201 adds that a physician, physician assistant or advanced practice registered nurse must provide orders for a resident's immediate care and needs upon admission to the facility. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1202 requires that the physician sign and date all orders with the exception of influenza and pneumococcal vaccines, which may be administered per a physician's standing order. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1203(3), §19.1205(a), and §19.1205(c) change references to a nurse practitioner or clinical nurse specialist to references to an advanced practice registered nurse. This is the terminology currently used by the Texas Board of Nursing for this classification of nurses. A few references were updated in §19.1203.

The proposed amendment to §19.1205(d) permits a physician to delegate the task of writing dietary orders to a qualified dietitian. The proposed amendment to §19.1205(e) permits a physician to delegate the task of writing therapy orders to a qualified therapist. The proposed amendment to §19.1205(f) changes a reference to a physician extender to a reference to a physician assistant or advanced practice registered nurse. This is the terminology currently used by the Texas Medical Board and the Texas Board of Nursing. These changes are consistent with the recent revision of the Code of Federal Regulations. Additionally, a few paragraphs were renumbered to account for the deletion of a paragraph.

The proposed amendment to §19.1401(b)(3) requires the facility to make a referral for dental services within three days for a resident with lost or damaged dentures. If the referral does not occur within three days, the proposed amendment requires the facility to provide documentation of what it did to ensure the resident could still eat and drink adequately while awaiting dental services and the extenuating circumstances that led to the delay. The proposed amendment to §19.1401(c) adds that the facility must have a policy identifying those circumstances when the loss or damage of dentures is the facility's responsibility and may not charge a resident for the replacement of lost or dam-

aged dentures determined, in accordance with facility policy, to be the facility's responsibility. These changes are consistent with the recent revision of the Code of Federal Regulations. A few subsections were reordered to account for the addition of sub-sections.

The proposed amendment of §19.1501 adds subparagraphs (4)(B) and (4)(D), amends subparagraph (4)(C), and adds paragraphs (5), (6), and (7). New subparagraph (4)(B) defines psychotropic drugs. The revisions to subparagraph (4)(C) describe the circumstances under which a pharmacist must report drug irregularities to the attending physician, medical director, and the director of nurses and also requires the attending physician to document any identified irregularity in the resident's clinical record. New subparagraph (4)(D) requires a facility to develop and maintain written policies and procedures for the monthly drug regiment review. New paragraph (5) adds requirements related to unnecessary drugs. New paragraph (6) adds requirements related to the use of psychotropic drugs in the facility. New paragraph (7) adds requirements related to the medication error rate. Existing paragraphs (5) and (6) are renumbered as (8) and (9). These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1601(a) - (c) requires a facility to establish an infection prevention and control program and designate an infection preventionist. The proposed amendment to §19.1601(d) requires a facility to report to the health officer having jurisdiction the name of any resident with a reportable disease and to implement infection control procedures directed by the local health authority. The proposed amendment to §19.1601(e) adds more specific requirements for pneumococcal and influenza vaccinations for residents. The proposed amendment also deletes §19.1601(g) related to the Quality and Assurance Committee in the facility. The content of §19.1601(g) has been moved to proposed §19.1917. These changes are consistent with the recent revision of the Code of Federal Regulations. Subsections were reordered to account for the addition and deletion of subsections.

The proposed amendment to §19.1901 adds and corrects citations for federal statutory provisions that pertain to nursing facilities licensed by HHSC. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1902(b) requires the governing board of the facility to appoint the facility administrator. It also requires the facility administrator to report to, as well as be accountable to, the governing body for the overall management of a facility. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed repeal of §19.1903 deletes a rule relating to the required training of nurse aides. The content of this rule has been added to new proposed §19.1001(a)(3) and (4). These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed repeal of §19.1904 deletes a rule relating to the proficiency of nurse aides. The content of this rule has been added to new proposed §19.1001(3). These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1908(b)(1) clarifies that a physician, physician assistant, or advanced practice registered nurse may order laboratory services for a resident. The proposed amendment to §19.1908(b)(2) requires the facility to
promptly notify the ordering physician, physician assistant, or advanced practice registered nurse of laboratory results that fall outside of clinical reference ranges. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1909(b)(1) clarifies that a physician, physician assistant, or advanced practice registered nurse may order radiology or other diagnostic services for a resident. The proposed amendment to §19.1909(b)(2) requires the facility to promptly notify the ordering physician, physician assistant, or advanced practice registered nurse of radiology or other diagnostic results that fall outside of clinical reference ranges. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1910(d) adds the circumstances under which release of the nursing facility's clinical records is required or permitted. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1911(a) corrects the reference regarding a resident's clinical record by replacing 1 TAC §371.214 (relating to Resource Utilization Review) with Texas Administrative Code, Title 1, Part 15, Chapter 371, Subchapter C (relating to Utilization Review). The proposed amendment to §19.1911(17) adds that laboratory, radiology, and other diagnostic services reports must be included in the clinical records of a resident in the facility. It also repeals a requirement that letters of guardianship be maintained in the clinical record. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1912 adds §19.1912(b)(1). This new paragraph requires the facility to have written policies and procedures to ensure that the administrator's duties and responsibilities involve providing the appropriate notices as required in §19.2310 (relating to Nursing Facility Ceases to Participate) in the event the facility closes or changes ownership or administrative authority. Also, the proposed amendment to §19.1912 makes minor editorial and organizational changes for clarity and consistency, such as updating DHS to HHSC and replacing terms such as "legally authorized representative," "representative payee," or "responsible party" with "resident representative." These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1915(a)(1) adds that another practitioner other than the resident's attending physician can order a transfer from the facility to a hospital in an emergency situation. The proposed amendment to §19.1915(a)(2) clarifies the requirement that when the facility transfers a resident, providers will exchange medical and other information needed for care and treatment of the resident in order to determine if the resident can receive appropriate services, receive services in a less restrictive setting than a facility, or reintegrate into the community. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1917(a) specifies which facility staff must be members of the Quality Assessment and Assurance Committee. The proposed amendment to §19.1917(b) clarifies the functions and responsibilities of the committee. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1929 adds language regarding the development, implementation, and maintenance of effective training programs, consistent with expected roles, for all new and existing staff, contractors, and volunteers to make this rule consistent with federal rules governing Medicaid-certified facilities. Beginning November 28, 2019, a facility must determine the amount and types of training necessary for its staff based on the facility assessment as specified in §19.1931. The proposed amendment to §19.1929(1)(C) - (E) requires the training each employee receives as part of orientation and annually to include activities that constitute abuse, neglect, and exploitation (ANE); procedures for reporting ANE; dementia management; and resident abuse prevention. The proposed amendment to §19.1929(7) requires, beginning November 28, 2019, that the facility's mandatory training for staff must include the topics of effective communications for direct care staff, rights of the resident, the facility's infection prevention and control program, and behavioral health. The changes to §19.1929 are consistent with the recent revision of the Code of Federal Regulations.

Proposed new §19.1931 requires the facility to conduct, document and annually review a facility-wide assessment to determine what resources are necessary to care for its residents competently during day-to-day operations and emergencies. The facility assessment addresses the facility's resident population and their needs, resources and risks. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.2704 adds paragraph (j)(12). This new paragraph requires the facility to promptly report a significant change in the mental or physical condition of a resident, with mental illness or an intellectual or developmental disability, by submitting a MDS Significant Change in Status Assessment Form in the LTC Online Portal. This change is consistent with the recent revision of the Code of Federal Regulations.

FISCAL NOTE

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

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

Trey Wood has also determined that there will be an adverse economic effect on small businesses or micro-businesses, or rural communities.
The facilities certified to participate in Medicare and Medicaid will not incur additional costs to comply with the proposed changes that implement changes in the federal regulations. These facilities have already incurred the cost of complying with the federal regulations. The seven facilities that are licensed-only facilities, and do not receive Medicare and Medicaid funds, will incur costs to comply with the changes made as a result of changes in the federal regulations.

HHSC estimates that the number of small businesses or micro-businesses subject to the proposed rules is seven licensed-only nursing facilities. The projected economic impact for a small business or micro-business is $36,463.00.

HHSC determined that alternative methods to achieve the purpose of the proposed rules for small businesses or micro-businesses would not be consistent with ensuring the health and safety of residents in nursing facilities.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas and to receive a source of federal funds or comply with federal law.

PUBLIC BENEFIT AND COSTS

David Kostroun, Deputy Executive Commissioner for Regulatory Services, has determined that for each year of the first five years the rules are in effect, the public benefit will be enhanced health and safety protections for nursing facility residents, streamlined regulatory requirements for nursing facility providers, and improved consistency of regulatory survey activity.

Trey Wood has determined that for the first five years the rules are in effect, persons who are required to comply with the proposed rules may incur economic costs. For Medicare and Medicaid certified nursing facilities, there will be no costs to comply with the rules, because these facilities will incur the cost of complying with the federal regulations. The rules will result in a cost for licensed-only facilities that are not certified to participate in Medicare and Medicaid because these facilities will be required to comply with the changes made as a result of changes in the federal regulations.

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 Government Code §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sharon Wallace at (210) 619-8292 in HHSC Long-term Care Regulatory Services.

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or emailed to HHSCRulesCoordinationOffice@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed 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 e-mailing comments, please indicate “Comments on Proposed Rule 40R010” in the subject line.

SUBCHAPTER A. BASIS AND SCOPE

40 TAC §19.1

STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.


(a) Basis in legislation. The Nursing Facility Requirements for Licensure and Medicaid Certification implement the [specify] requirements of federal and state laws and regulations governing licensed nursing facilities and nursing facilities participating in the Medicaid program [the Title XIX Nursing Facilities vendor program] administered by HHSC [the Texas Department of Human Services (DHS)] in cooperation with other federal and state agencies. If there is a conflict between material in these requirements and the laws or regulations governing the Medicaid program, the Medicaid laws and regulations [latter] are controlling. It is the intent of the Texas Legislature that rules adopted under Chapter 242 [§242] of the Texas Health and Safety Code may be more stringent than [that] the standards imposed by federal law for certification for participation in the state Medicaid program. The rules and standards may not be less stringent than the Medicaid certification standards imposed under the Omnibus Budget Reconciliation Act of 1987.

(b) Scope. The Nursing Facility Requirements for Licensure and Medicaid Certification contain the requirements that an institution must meet in order to be licensed as a nursing facility and also to qualify to participate in the Medicaid program. The requirements serve as a basis for survey activities for licensure and certification.

(1) Certain requirements are specific to Medicaid-certified facilities and are so designated. The Medicaid-specific requirements apply to all residents, including[ ], but not limited to[ ] private pay, Medicaid applicants and recipients, U.S. Department of Veteran’s Affairs [VA] patients, and Medicare recipients, who are admitted to and reside in a Medicaid-certified facility or a Medicaid-certified distinct part of a facility.

(2) Additional requirements [Requirements] for facilities or distinct parts of facilities that are certified for Medicare-only participation are in [Chapter] [42][] CFR §§483.5-483.95 [Code of Federal Regulations, §§483.5-483.75].

(3) These requirements do not apply to skilled nursing facilities [SNFs] licensed under the Texas Health and Safety Code, Chapter 241, participating only in the Medicare program.

(4) Additional documents that a facility may need for reference include, but are not limited to:

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

1. Abuse—Negligent or willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical or emotional harm or pain to a resident; or sexual abuse, including involuntary or nonconsensual sexual conduct that would constitute an offense under Texas Penal Code §21.08 (indecent exposure) or Texas Penal Code Chapter 22 (assaultive offenses), sexual harassment, sexual coercion, or sexual assault.


3. Activities assessment—See Comprehensive Assessment and Comprehensive Care Plan.

4. Activity director—The qualified individual appointed by the facility to direct the activities program as described in §19.702 of this chapter (relating to Activities).

5. Addition—The addition of floor space to an institution.

6. Administrator—A person currently licensed in accordance with 26 TAC Chapter 555 (relating to Nursing Facility Administrators) [Licensed nursing facility administrator].

7. Admission MDS assessment—An MDS assessment that determines a recipient’s initial determination of eligibility for medical necessity for admission into the Texas Medicaid Nursing Facility Program.

8. Advanced practice registered nurse—A person licensed [by the Texas Board of Nursing] as a registered nurse and approved to practice as an advanced practice registered nurse by the Texas Board of Nursing.

9. Adverse event—An untoward, undesirable, and usually unanticipated event that causes death or serious injury, or the risk of death or serious injury.

10. Affiliate—With respect to a—

11. Applicant—A person or governmental unit, as those terms are defined in the Texas Health and Safety Code, Chapter 242, applying for a license under that chapter.
(12) Attending physician--A physician, currently licensed by the Texas Medical Board, who is designated by the resident or resident representative as having primary responsibility for the treatment and care of the resident.

(13) Authorized electronic monitoring--The placement of an electronic monitoring device in a resident's room and using the device to make tapes or recordings after making a request to the facility to allow electronic monitoring.

(14) Barrier precautions--Precautions including the use of gloves, masks, gowns, resuscitation equipment, eye protectors, aprons, face shields, and protective clothing for purposes of infection control.

(15) Care and treatment--Services required to maximize resident independence, personal choice, participation, health, self-care, psychosocial functioning and reasonable safety, all consistent with the preferences of the resident.

(16) Certification--The determination by HHSC that a nursing facility meets all the requirements of the Medicaid or Medicare programs.

(17) Certified facility--A facility that meets the requirements of the Medicare program, the Medicaid program, or both.

(18) Certified Ombudsman--Has the meaning given in 26 TAC §88.2 (relating to Definitions).


(20) Change of ownership--An event that results in a change to the federal taxpayer identification number of the license holder of a facility. The substitution of a personal representative for a deceased license holder is not a change of ownership.

(21) Chemical restraints--Any drug administered for the purpose of discipline or convenience, and not required to treat the resident's medical symptoms.

(22) CMS--Centers for Medicare & Medicaid Services.

(23) Complaint--Any allegation received by HHSC other than an incident reported by the facility. Such allegations include, but are not limited to, abuse, neglect, exploitation, or violation of state or federal standards.

(24) Completion date--The date an RN assessment coordinator signs an MDS assessment as complete.

(25) Comprehensive assessment--An interdisciplinary description of a resident's needs and capabilities including daily life functions and significant impairments of functional capacity, as described in §19.801(2) of this chapter (relating to Resident Assessment).

(26) Comprehensive care plan--A plan of care prepared by an interdisciplinary team that includes measurable short-term and long-term objectives and time frames to meet the resident's needs developed for each resident after admission. The plan addresses at least the following needs: medical, nursing, rehabilitative, psychosocial, dietary, activity, and resident's rights. The plan includes strategies developed by the team, as described in §19.802(a)(2) of this chapter (relating to Comprehensive Person-Centered Care Planning Plans), consistent with the physician's prescribed plan of care, to assist the resident in eliminating, managing, or alleviating health or psychosocial problems identified through assessment. Planning includes:

(A) goal setting;

(B) establishing priorities for management of care;

(C) making decisions about specific measures to be used to resolve the resident's problems; and

(D) assisting in the development of appropriate coping mechanisms.

(27) Controlled substance--A drug, substance, or immediate precursor as defined in the Texas Controlled Substance Act, Texas Health and Safety Code, Chapter 481, or the Federal Controlled Substance Act of 1970, Public Law 91-513.

(28) Controlling person--A person with the ability, acting alone or in concert with others, to directly or indirectly, influence, direct, or cause the direction of the management, expenditure of money, or policies of a nursing facility or other person. A controlling person does not include a person, such as an employee, lender, secured creditor, or landlord, who does not exercise any influence or control, whether formal or actual, over the operation of a facility. A controlling person includes:

(A) a management company, landlord, or other business entity that operates or contracts with others for the operation of a nursing facility;

(B) any person who is a controlling person of a management company or other business entity that operates a nursing facility or that contracts with another person for the operation of a nursing facility;

(C) an officer or director of a publicly traded corporation that is, or that controls, a facility, management company, or other business entity described in subparagraph (A) of this paragraph but does not include a shareholder or lender of the publicly traded corporation; and

(D) any other individual who, because of a personal, familial, or other relationship with the owner, manager, landlord, tenant, or provider of a nursing facility, is in a position of actual control or authority with respect to the nursing facility, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the facility.

(29) Covert electronic monitoring--The placement and use of an electronic monitoring device that is not open and obvious, and the facility and HHSC have not been informed about the device by the resident, by a person who placed the device in the room, or by a person who uses the device.

(30) DADS--The term referred to the Department of Aging and Disability Services; it now refers to HHSC.

(31) Dangerous drugs--Any drug as defined in the Texas Health and Safety Code, Chapter 481.

(32) Dentist--A practitioner licensed to practice dentistry by the Texas State Board of Dental Examiners.

(33) Department--The Health and Human Services Commission.

(34) DHS--This term referred to the Texas Department of Human Services; it now refers to HHSC [unless the context concerns an administrative hearing. Administrative hearings were formerly the responsibility of DHS; they now are the responsibility of the HHSC].
(32) [(35)] Dietitian--A qualified dietitian is one who is qualified based upon either:
   (A) registration by the Commission on Dietetic Registration of the Academy of Nutrition and Dietetics; or
   (B) licensure, or provisional licensure, as a dietitian under Texas Occupations Code, Chapter 701 and one year of supervisory experience in dietetic service of a health care facility.

[(36) Direct care by licensed nurses--Direct care consonant with the physician's planned regimen of total resident care includes:]
   [(A) assessment of the resident's health care status;]
   [(B) planning for the resident's care;]
   [(C) assignment of duties to achieve the resident's care;]
   [(D) nursing intervention; and]
   [(E) evaluation and change of approaches as necessary.]

(33) [(37)] Direct ownership interest--Ownership of equity in the capital, stock, or profits of, or a membership interest in, an applicant or license holder.

(34) [(38)] Disclosable interest--Five percent or more direct or indirect ownership interest in an applicant or license holder.

(35) [(39)] Distinct part--That portion of a facility certified to participate in the Medicaid Nursing Facility program or as a SNF in the Medicare program.

(36) [(40)] Drug (also referred to as medication)--Any of the following:
   (A) any substance recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;
   (B) any substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans [man];
   (C) any substance (other than food) intended to affect the structure or any function of the body of a human [man]; and
   (D) any substance intended for use as a component of any substance specified in subparagraphs (A) - (C) of this paragraph. It does not include devices or their components, parts, or accessories.

(37) [(41)] Electronic monitoring device--Video surveillance cameras and audio devices installed in a resident's room, designed to acquire communications or other sounds that occur in the room. An electronic, mechanical, or other device used specifically for the nonconsensual interception of wire or electronic communication is excluded from this definition.

(38) [(42)] Emergency--A sudden change in a resident's condition requiring immediate medical intervention.

(39) [(43)] Executive Commissioner--The executive commissioner of the Health and Human Services Commission.

(40) [(44)] Exploitation--The illegal or improper act or process of a caregiver, family member, or other individual who has an ongoing relationship with a resident using the resources of the resident for monetary or personal benefit, profit, or gain without the informed consent of the resident.

[(45) Exposure (infections)--The direct contact of blood or other potentially infectious materials of one person with the skin or mucous membranes of another person. Other potentially infectious materials include the following human body fluids: semen, vaginal secre-

tsions, cerebrospinal fluid, peritoneal fluid, amniotic fluid, saliva in dental procedures, and body fluid that is visibly contaminated with blood and all body fluids when it is difficult or impossible to differentiate between body fluids.]

(41) [(46)] Facility--Unless otherwise indicated, a facility is an institution that provides organized and structured nursing care and service and is subject to licensure under Texas Health and Safety Code, Chapter 242.

   (A) For Medicaid, a facility is a nursing facility which meets the requirements of §1919(a) - (d) of the Social Security Act. A facility may not include any institution that is for the care and treatment of mental diseases except for services furnished to individuals age 65 and over and who are eligible as defined in 26 TAC Chapter 303 [Chapter 17 of this title] (relating to Preadmission Screening and Resident Review (PASRR)).

   (B) For Medicare and Medicaid purposes (including eligibility, coverage, certification, and payment), the "facility" is always the entity which participates in the program, whether that entity is comprised of all of, or a distinct part of, a larger institution.

   (C) "Facility" is also referred to as a nursing home or nursing facility. Depending on context, these terms are used to represent the management, administrator, or other persons or groups involved in the provision of care of the resident; or to represent the physical building, which may consist of one or more floors or one or more units, or which may be a distinct part of a licensed hospital.

(42) [(47)] Family council--A group of family members, friends, or legal guardians of residents, who organize and meet privately or openly.

(43) [(48)] Family representative--An individual appointed by the resident to represent the resident and other family members, by formal or informal arrangement.

(44) [(49)] Fiduciary agent--An individual who holds in trust another's monies.

[(50] Free choice--Unrestricted right to choose a qualified provider of services.]

(45) [(51)] Goals--Long-term: general statements of desired outcomes. Short-term: measurable time-limited, expected results that provide the means to evaluate the resident's progress toward achieving long-term goals.

(46) [(52)] Governmental unit--A state or a political subdivision of the state, including a county or municipality.

(47) [(53)] Health care provider--An individual, including a physician, or facility licensed, certified, or otherwise authorized to administer health care, in the ordinary course of business or professional practice.

(48) [(54)] Hearing--A contested case hearing held in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001, and the formal hearing procedures in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act) and Chapter 91 of this title (relating to Hearings Under the Administrative Procedure Act).

(49) [(55)] HHSC--The Texas Health and Human Services Commission.

(50) [(56)] HIV--Human Immunodeficiency Virus.

(51) [(57)] Incident--An abnormal event, including accidents or injury to staff or residents, which is documented in facility
reports. An occurrence in which a resident may have been subject to abuse, neglect, or exploitation must also be reported to HHSC.

(52) []] Indirect ownership interest--Any ownership or membership interest in a person that has a direct ownership interest in an applicant or license holder.

(53) []] Infection control--A program designed to prevent the transmission of disease and infection in order to provide a safe and sanitary environment.

(54) []] Inspection--Any on-site visit to or survey of an institution by HHSC for the purpose of licensing, monitoring, complaint investigation, architectural review, or similar purpose.

[(61) Interdisciplinary care plan--See the definition of "comprehensive care plan."]

(55) []] Involuntary seclusion--Separation of a resident from others or from the resident's room or confinement to the resident's room, against the resident's will or the will of a person who is legally authorized to act on behalf of the resident. Monitored separation from other residents is not involuntary seclusion if the separation is a therapeutic intervention that uses the least restrictive approach for the minimum amount of time, not exceed to 24 hours, until professional staff can develop a care plan [plan of care] to meet the resident's needs.

(56) []] IV--Intravenous.

(57) []] Legend drug or prescription drug--Any drug that requires a written or telephonic order of a practitioner before it may be dispensed by a pharmacist, or that may be delivered to a particular resident by a practitioner in the course of the practitioner's practice.

(58) []] License holder--A person that holds a license to operate a facility.

(59) []] Licensed health professional--A physician; physician assistant; advanced practice registered nurse; physical, speech, or occupational therapist; pharmacist; physical or occupational therapy assistant; registered professional nurse; licensed vocational nurse; licensed dietitian; [67] licensed social worker; or certified respiratory care practitioner.

[62] Licensed nursing home (facility) administrator--A person currently licensed by HHSC in accordance with Chapter 18 of this title (relating to Nursing Facility Administrators).

(60) []] Licensed vocational nurse (LVN)--A nurse who is currently licensed by the Texas Board of Nursing as a licensed vocational nurse.


(62) []] Life safety features--Fire safety components required by NFPA 101, including building construction, fire alarm systems, smoke detection systems, interior finishes, sizes and thicknesses of doors, exits, emergency electrical systems, and sprinkler systems.

(63) []] Life support--Use of any technique, therapy, or device to assist in sustaining life. (See §19.419 of this chapter (relating to Advance Directives)).

(64) []] Local authorities--Persons, including, but not limited to, local health authority, fire marshal, and building inspector, who may be authorized by state law, county order, or municipal ordinance to perform certain inspections or certifications.

(65) []] Local health authority--The physician appointed by the governing body of a municipality or the commissioner's court of the county to administer state and local laws relating to public health in the municipality's or county's jurisdiction as defined in Texas Health and Safety Code, §121.021.

(66) [] Long-term care-regulatory--HHSC Regulatory Services Division, which is responsible for surveying nursing facilities to determine compliance with regulations for licensure and certification for Medicaid [Title XIX] participation.

(67) []] Major injury--An injury that qualifies as a major injury under NFPA 99.

(68) Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services do not include contracts solely for maintenance, laundry, or food service.

(69) []] Manager--A person, other than a licensed nursing home administrator, having a contractual relationship to provide management services to a facility.

[71] Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services do not include contracts solely for maintenance, laundry, or food service.

(70) []] Managing local ombudsman--Has the meaning given in 26 TAC §88.2 (relating to Definitions).

(71) []] MDS--Minimum data set. See RAI [Resident Assessment Instrument (RAI)].

(72) []] MDS nurse reviewer--A registered nurse employed by HHSC to monitor the accuracy of the MDS assessment submitted by a Medicaid-certified nursing facility.

(73) []] Medicaid applicant--A person who requests the determination of eligibility to become a Medicaid recipient.

(74) []] Medicaid nursing facility vendor payment system--Electronic billing and payment system for reimbursement to nursing facilities for services provided to eligible Medicaid recipients.

(75) []] Medicaid recipient--A person who meets the eligibility requirements of the Title XIX Medicaid program, is eligible for nursing facility services, and resides in a Medicaid-participating facility.

(76) []] Medical director--A physician licensed by the Texas Medical Board, who is engaged by the nursing home to assist in and advise regarding the provision of nursing and health care.

(77) []] Medical power of attorney--The legal document that designates an agent to make treatment decisions if the individual designator becomes incapable.

(78) []] Medical-social care plan--See Interdisciplinary Care Plan.

(79) []] Medically related condition--An organic, debilitating disease or health disorder that requires services provided in a nursing facility, under the supervision of licensed nurses.

(80) []] Medication aide--A person who holds a current permit issued under the Medication Aide Training Program as described in Chapter 95 of this title (relating to Medication Aides--Program Requirements) and acts under the authority of a person who holds a current license under state law which authorizes the licensee to administer medication.

(81) []] Misappropriation of funds--The taking, secretion, misapplication, deprivation, transfer, or attempted transfer to any
person not entitled to receive any property, real or personal, or anything of value belonging to or under the legal control of a resident without the effective consent of the resident or other appropriate legal authority, or the taking of any action contrary to any duty imposed by federal or state law prescribing conduct relating to the custody or disposition of property of a resident.

(80) [\{90\}] MN--Medical necessity. A determination, made by physicians and registered nurses who are employed by or contract with the state Medicaid claims administrator, that a recipient requires the services of a licensed nurse in an institutional setting to carry out a physician's planned regimen for total care. A recipient's need for custodial care in a 24-hour institutional setting does not constitute medical necessity.

(81) [\{91\}] Neglect--The failure to provide goods or services, including medical services that are necessary to avoid physical or emotional harm, pain, or mental illness.

(82) [\{92\}] NFPA--National Fire Protection Association.


[\{95\}] NHIC--This term referred to the National Heritage Insurance Corporation. It now refers to the state Medicaid administrator.

[\{96\}] Nonnursing personnel--Persons not assigned to give direct personal care to residents; including administrators, secretaries, activities directors, bookkeepers, cooks, janitors, maids, laundry workers, and yard maintenance workers.

(85) [\{97\}] Nurse aide--An individual who provides nursing or nursing-related services to residents in a facility under the supervision of a licensed nurse. This term may include an individual who provides these services through an agency or under a contract with the facility. This definition does not include an individual who is a licensed health professional, a registered dietitian, or someone who volunteers such services without pay. A nurse aide is not authorized to provide nursing or nursing-related services for which a license or registration is required under state law. Nurse aides do not include those individuals who furnish services to residents only as paid feeding assistants.

[\{98\}] Nurse aide trainee--An individual who is attending a program teaching nurse aide skills.

(86) [\{99\}] Nurse practitioner--An advanced practice registered nurse licensed by the Texas Board of Nursing in the role of Nurse Practitioner.

(87) [\{100\}] Nurses' station--A nurses' station is an area designated as the focal point for all shifts for the administration and supervision of resident-care activities for a designated number of resident bedrooms.

[\{101\}] Nursing assessment--See definition of "comprehensive assessment" and "comprehensive care plan."

(88) [\{102\}] Nursing care--Services provided by nursing personnel which include, but are not limited to, observation; promotion and maintenance of health; prevention of illness and disability; management of health care during acute and chronic phases of illness; guidance and counseling of individuals and families; and referral to physicians, other health care providers, and community resources when appropriate.

(89) [\{103\}] Nursing facility or nursing home [facility/home]--See definition of "facility." [An institution that provides organized and structured nursing care and service, and is subject to licensure under Texas Health and Safety Code, Chapter 242. The nursing facility may also be certified to participate in the Medicaid Title XIX program. Depending on context, these terms are used to represent the management, administrator, or other persons or groups involved in the provision of care to the residents; or to represent the physical building, which may consist of one or more floors or one or more units, or which may be a distinct part of a licensed hospital.]

(104) [\{104\}] Nursing facility/home administrator--See the definition of "licensed nursing home (facility) administrator."

(90) [\{105\}] Nursing personnel--Persons assigned to give direct personal and nursing services to residents, including registered nurses, licensed vocational nurses, nurse aides, and medication aides. Unlicensed personnel function under the authority of licensed personnel.

(91) [\{106\}] Objectives--See definition of "goals."

(92) [\{107\}] OBRA--Omnibus Budget Reconciliation Act of 1987, which includes provisions relating to nursing home reform, as amended.

(93) [\{108\}] Ombudsman intern--Has the meaning given in 26 TAC §88.2 (relying on Definitions).

(94) [\{109\}] Ombudsman Program--Has the meaning given in 26 TAC §88.2 (relying on Definitions).

[\{110\}] Optometrist--An individual with the profession of examining the eyes for defects of refraction and prescribing lenses for correction who is licensed by the Texas Optometry Board.

(95) [\{111\}] Paid feeding assistant--An individual who meets the requirements of §19.1113 of this chapter (relating to Paid Feeding Assistants) and who is paid to feed residents by a facility or who is used under an arrangement with another agency or organization.

(96) [\{112\}] PASARR or PASRR--Preadmission Screening and Resident Review.

(97) [\{113\}] Palliative Plan of Care--Appropriate medical and nursing care for residents with advanced and progressive diseases for whom the focus of care is controlling pain and symptoms while maintaining optimum quality of life.

(98) [\{114\}] Patient care-related electrical appliance--An electrical appliance that is intended to be used for diagnostic, therapeutic, or monitoring purposes in a patient care area, as defined in Standard 99 of the National Fire Protection Association.

(99) [\{115\}] Person--An individual, firm, partnership, corporation, association, joint stock company, limited partnership, limited liability company, or any other legal entity, including a legal successor of those entities.

(100) [\{116\}] Person-centered care--To focus on the resident as the locus of control, and to support the resident in making choices and having control over the resident's daily life.

(101) [\{117\}] Pharmacist--An individual, licensed by the Texas State Board of Pharmacy to practice pharmacy, who prepares and dispenses medications prescribed by a practitioner.

(102) [\{118\}] Physical restraint--Any manual method, or physical or mechanical device, material or equipment attached, or adjacent to the resident's body, that the individual cannot remove easily which restricts freedom of movement or normal access to one's body. The term includes a restraint hold. [See Restraints (physical).]
(103) [4123] Physician--A doctor of medicine or osteopathy currently licensed by the Texas Medical Board to practice medicine.

(104) [4129] Physician assistant (PA)--An individual who is licensed as a physician assistant under Texas Occupations Code, Chapter 204.

(105) [4120] Podiatrist--A practitioner whose profession encompasses the care and treatment of feet who is licensed to practice podiatry by the Texas State Board of Podiatric Medical Examiners.

(106) [4124] Poison--Any substance that federal or state regulations require the manufacturer to label as a poison and is to be used externally by the consumer from the original manufacturer's container. Drugs to be taken internally that contain the manufacturer's poison label, but are dispensed by a pharmacist only by or on the prescription order of a practitioner, are not considered a poison, unless regulations specifically require poison labeling by the pharmacist.

(107) [4122] Practitioner--A physician, podiatrist, dentist, or an advanced practice registered nurse or physician assistant to whom a physician has delegated authority to sign a prescription order, when relating to pharmacy services.

(108) [4123] Private and unimpeded access--Access to enter a facility, or communicate with a resident outside of the hearing or view of others, without interference or obstruction from facility employees, volunteers, or contractors.

(109) [4124] PRN (pro re nata)--As needed.

(110) [4125] Provider--The individual or legal business entity that is contractually responsible for providing Medicaid services under an agreement with HHSC.

(111) [4126] Psychoactive drugs--Drugs prescribed to control mood, mental status, or behavior.

(112) [4127] Qualified mental health professional - community services--Has the meaning given in 25 TAC §412.303 (relating to Definitions).

(113) [4128] Qualified surveyor--An employee of HHSC who has completed state and federal training on the survey process and passed a federal standardized exam.

(114) [4129] Quality assessment and assurance committee--A group of health care professionals in a facility who develop and implement appropriate action to identify and rectify substandard care and deficient facility practice.

(115) [4130] Quality-of-care monitor--A registered nurse, pharmacist, or dietitian employed by HHSC who is trained and experienced in long-term care facility regulation, standards of practice in long-term care, and evaluation of resident care, and functions independently of HHSC Regulatory Services Division.

(116) [4144] Quality measure report--A report that provides information derived from an MDS that provides a numeric value to quality indicators. This data is available to the public as part of the Nursing Home Quality Initiative (NHQI), and is intended to provide objective measures for consumers to make informed decisions about the quality of care in a nursing facility.

(117) [4122] Recipient--Any individual residing in a Medicaid certified facility or a Medicaid certified distinct part of a facility whose daily vendor rate is paid by Medicaid.

(118) [4123] Rehabilitative services--Rehabilitative therapies and devices provided to help a person regain, maintain, or prevent deterioration of a skill or function that has been acquired but then lost or impaired due to illness, injury, or disabling condition. The term includes physical and occupational therapy, speech-language pathology, and psychiatric rehabilitation services.

(119) [4125] Representative payee--A person designated by the Social Security Administration to receive and disburse benefits, act in the best interest of the beneficiary, and ensure that benefits will be used according to the beneficiary's needs.

(120) [4126] Resident--Any individual residing in a nursing facility.

(121) [4127] Resident group--A group or council of residents who meet regularly to:

(A) discuss and offer suggestions about the facility policies and procedures affecting residents' care, treatment, and quality of life;

(B) plan resident activities;

(C) participate in educational activities; or

(D) for any other purpose.

(122) Resident representative--

(A) Any of the following:

(i) an individual chosen by the resident to act on behalf of the resident in order to support the resident in decision-making; access medical, social, or other personal information of the resident; manage financial matters; or receive notifications;

(ii) a person authorized by state or federal law (including agents under power of attorney, representative payees, and other fiduciaries) to act on behalf of the resident in order to support the resident in decision-making; access medical, social, or other personal information of the resident; manage financial matters; or receive notifications;

(iii) legal representative, as used in Section 712 of the Older Americans Act; or

(iv) the court-appointed guardian of a resident.

(B) This definition is not intended to expand the scope of authority of any resident representative beyond that authority specifically authorized by the resident, state or federal law, or a court of competent jurisdiction.

(123) [4130] Responsible party--An individual authorized by the resident to act for him as an official delegate or agent. Responsible party is usually a family member or relative, but may be a legal guardian or other individual. Authorization may be in writing or may be given orally.

(124) Restraint--A chemical or physical restraint.

(125) [4131] Restraint hold--

(A) A manual method, except for physical guidance or prompting of brief duration, used to restrict:
(i) free movement or normal functioning of all or a portion of a resident's body; or

(ii) normal access by a resident to a portion of the resident's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the resident resists the guidance or prompting.

(140) Restraints (chemical)--Psychoactive drugs administered for the purposes of discipline, or convenience, and not required to treat the resident's medical symptoms.

(141) Restraints (physical)--Any manual method, or physical or mechanical device, material or equipment attached, or adjacent to the resident's body, that the individual cannot remove easily which restricts freedom of movement or normal access to one's body. The term includes a restraint hold.

(126) [4423] RN--Registered nurse. An individual currently licensed by the Texas Board of Nursing as a registered nurse.

(127) [4423] RN assessment coordinator--A registered nurse who signs and certifies a comprehensive assessment of a resident's needs, using the RAI, including the MDS, as specified by HHSC.

(128) [4444] RUG--Resource Utilization Group. A categorization method, consisting of 34 categories based on the MDS, that is used to determine a recipient's service and care requirements and to determine the daily rate HHSC pays a nursing facility for services provided to the recipient.

(129) [4453] Secretary--Secretary of the U.S. Department of Health and Human Services.

(130) [4469] Services required on a regular basis--Services which are provided at fixed or recurring intervals and are needed so frequently that it would be impractical to provide the services in a home or family setting. Services required on a regular basis include continuous or periodic nursing observation, assessment, and intervention in all areas of resident care.

(131) [4473] SNF--A skilled nursing facility or distinct part of a facility that participates in the Medicare program. SNF requirements apply when a certified facility is billing Medicare for a resident's per diem rate.

(132) [4483] Social Security Administration--Federal agency for administration of social security benefits. Local social security administration offices take applications for Medicare, assist beneficiaries file claims, and provide information about the Medicare program.

(133) [4493] Social worker--A qualified social worker is an individual who is licensed, or provisionally licensed, by the Texas State Board of Social Work Examiners as prescribed by the Texas Occupations Code, Chapter 505, and who has at least:

(A) a bachelor's degree in social work; or

(B) similar professional qualifications, which include a minimum educational requirement of a bachelor's degree and one year experience met by supervised employment providing social services in a health care setting.

(134) [4450] Standards--The minimum conditions, requirements, and criteria established in this chapter with which an institution must comply to be licensed under this chapter.

(135) [4454] State Medicaid claims administrator--The entity under contract with HHSC to process Medicaid claims in Texas.

(136) [4452] State Ombudsman--Has the meaning given in 26 TAC §88.2 (relating to Definitions).

(137) [4453] State plan--A formal plan for the medical assistance program, submitted to CMS, in which the State of Texas agrees to administer the program in accordance with the provisions of the State Plan, the requirements of Titles XVIII and XIX, and all applicable federal regulations and other official issuances of the U.S. Department of Health and Human Services.

(144) State survey agency--HHSC is the agency, which through contractual agreement with CMS is responsible for Title XIX (Medicaid) survey and certification of nursing facilities.

(138) [4455] Stay agreement--An agreement between a license holder and the executive commissioner that sets forth all requirements necessary to lift a stay and rescind a license revocation proposed under §19.2107 of this chapter (relating to Revocation of a License by the HHSC Executive Commissioner).

(139) [4456] Substandard quality of care violation--A violation [One or more violations] of §19.401(a), §19.401(b), §19.402(b), (c), or (m); §19.406(d)-(h); §19.417(a), (b), or (d); §19.425(b)(1); §19.504(a); §19.601; §19.602; §19.701; §19.703; §19.706(a), (c), (d), (l), (d)(5), or (f); §19.801; §19.901; §19.904(2) or (4); §19.1501(5), (6), or (7); or §19.1601(e)(2) of this chapter that constitutes: §19.601 of this chapter (relating to Substandard Quality of Care, §§19.601 of this chapter (relating to Quality of Life), and §19.901 of this chapter (relating to Quality of Care) that constitutes:

(A) an immediate threat to resident health or safety;

(B) a pattern of or actual harm that is not an immediate threat; or

(C) a widespread potential for more than minimal harm, but less than an immediate threat, with no actual harm.

(145) Supervising physician--A physician who assumes responsibility and legal liability for services rendered by a physician assistant (PA) and has been approved by the Texas Medical Board to supervise services rendered by specific PAs. A supervising physician may also be a physician who provides general supervision of an advanced practice registered nurse providing services in a nursing facility.

(140) [4458] Supervision--General supervision, unless otherwise identified.

(141) [4459] Supervision (direct)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within the qualified person's [his] sphere of competence. If the person being supervised does not meet assistant-level qualifications specified in this chapter and in federal regulations, the supervisor must be on the premises and directly supervising.

(142) [4460] Supervision (general)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within the qualified person's [his] sphere of competence. The person being supervised must have access to the qualified person providing the supervision.

(144) Supervision (intermittent)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence, with initial direction and periodic inspection of the actual act of accomplishing the function or activity. The person being supervised must have access to the qualified person providing the supervision.
(143) Survey agency--HHSC is the agency that, through contractual agreement with CMS, is responsible for Title XIX (Medicaid) survey and certification of nursing facilities.

(144) [**Texas Register**--A publication of the Texas Register Publications Section of the Office of the Secretary of State that contains emergency, proposed, withdrawn, and adopted rules issued by Texas state agencies. The Texas Register was established by the Administrative Procedure and Texas Register Act of 1975.

(145) Therapeutic diet--A diet ordered by a physician as part of treatment for a disease or clinical condition, in order to eliminate, decrease, or increase certain substances in the diet or to provide food which has been altered to make it easier for the resident to eat.

(146) Therapy week--A seven-day period beginning the first day rehabilitation therapy or restorative nursing care is given. All subsequent therapy weeks for a particular individual will begin on that day of the week.

(147) Threatened violation--A situation that, unless immediate steps are taken to correct, may cause injury or harm to a resident's health and safety.

(148) Title II--Federal Old-Age, Survivors, and Disability Insurance Benefits of the Social Security Act.

(149) Title XV--Supplemental Security Income (SSI) of the Social Security Act.

(150) Title XVII--Medicare provisions of the Social Security Act.

(151) Total health status--Includes functional status, medical care, nursing care, nutritional status, rehabilitation and restorative potential, activities potential, cognitive status, oral health status, psychosocial status, and sensory and physical impairments.

(152) Universal precautions--The use of barrier precautions and other precautions to prevent the spread of blood-borne diseases.

(153) Unreasonable confinement--Involuntary seclusion.

(154) Vaccine preventable diseases--The diseases included in the most current recommendations of the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention.

(155) Vendor payment--Payment made by HHSC on a daily-rate basis for services delivered to recipients in Medicaid-certified nursing facilities. Vendor payment is based on the nursing facility's approved-to-pay claim processed by the state Medicaid claims administrator. The Nursing Facility Billing Statement, subject to adjustments and corrections, is prepared from information submitted by the nursing facility, which is currently on file in the computer system as of the billing date. Vendor payment is made at periodic intervals, but not less than once per month for services rendered during the previous billing cycle.

(156) Widespread--When the problem causing a violation is pervasive in a facility or represents systemic failure that affected or has the potential to affect a large portion or all of a facility's residents.

(157) Willfully interfere--To act or not act to intentionally prevent, interfere with, or impede or to attempt to intentionally prevent, interfere with, or impede.

(158) Working day--Any 24-hour period, Monday through Friday, excluding state and federal holidays.

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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**\*  **

SUBCHAPTER E. RESIDENT RIGHTS


STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.


§19.401. Introduction.

(a) The resident has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility. A facility must protect and promote the rights of each resident.

(b) HHSC adopts by reference as a requirement for obtaining a license under Texas Health and Safety Code Chapter 242 the Centers for Medicare and Medicaid Services rule regarding resident rights, 42 CFR §483.10, adopted to be effective November 28, 2016. The adopted rule was published in the October 4, 2016, issue of the Federal Register (81 Fed. Reg. 68688, 68849).

(c) [**(b)**] HHSC [The Texas Department of Human Services (DHS)] has developed the following statement of the rights of a resident.

Figure: 40 TAC §19.401(c)

[Figure: 40 TAC §19.401(b)]

(d) [**(c)**] The facility must give a copy of the Statement of Resident Rights to each resident, next of kin or guardian, and facility staff.
member. The facility must maintain a copy of the statement, signed by the resident or the resident's next of kin or guardian, in the facility records.

(e) [ed] The Statement of Resident Rights must be posted in accordance with §19.121 of this chapter [title] (relating to General Requirements for a Nursing Facility).


(a) The resident has the right to exercise the resident's [his] rights as a resident at the facility and as a citizen or resident of the United States.

(b) The resident has the right to be free of interference, coercion, discrimination, or reprisal from the facility in exercising the resident's [his] rights.

(c) In the case of a resident found to lack capacity [adjudged incompetent] under the laws of the State of Texas by a court of competent jurisdiction, the rights of the resident are exercised by the resident representative [person] appointed under Texas law to act on the resident's behalf.

(d) The facility must comply with all applicable provisions of the Texas Human Resources Code, Title 6, Chapter 102. An individual may not be denied appropriate care on the basis of the individual's [his] race, religion, color, national origin, sex, age, disability [handicap], marital status, or source of payment.

(e) The facility must allow the resident the right to observe the resident's [his] religious beliefs. The facility must respect the religious beliefs of the resident in accordance with 42 United States Code §1396f.

(f) Competent adults may issue directives or durable powers of attorney for health care, subject to the requirements of §19.419 of this subchapter [title] (relating to Advance Directives [and Durable Powers of Attorney for Health Care]).

(g) In the case of a resident who has not been found to lack capacity [not adjudicated incompetent] by a state court, any legal surrogate designated in accordance with state law may exercise the resident's rights to the extent provided by state law.


(a) The facility must inform the resident, [the resident's next of kin or guardian,] both orally and in writing, in a language that the resident understands, of the resident's rights and all rules and regulations governing resident conduct and responsibilities during the stay in the facility. This notification must be made prior to or upon admission and during the resident's stay if changed.

(b) The facility must also inform the resident, upon admission and during the stay, in a language the resident understands, of the following:

(1) facility admission policies;

(2) a description of the protection of personal funds as described in §19.404 of this subchapter (relating to Protection of Resident Funds);

(3) the Texas Human Resources Code, Title 6, Chapter 102; or a written list of the rights and responsibilities contained in the Texas Human Resources Code, Title 6, Chapter 102;

(4) a written description of the services available through the Ombudsman Program. This information must be made available to each facility by the ombudsman program. Facilities are responsible for reproducing this information and making it available to residents, their families, and resident [legal] representatives;

(5) a written statement to the resident, the resident's next of kin, or guardian describing the facility's policy for:

(A) the drug testing of employees who have direct contact with residents; and

(B) the criminal history checks of employees and applicants for employment; and

(6) HHSC rules and the facility's policies related to the use of restraint and involuntary seclusion. This information must also be given to the resident's legally authorized representative, if the resident has one.

(c) Upon admission of a resident, a facility must:

(1) provide written information to the resident's family representative, in a language the representative understands, of the right to form a family council; or

(2) inform the resident's family representative, in writing, if a family council exists, of the council's meeting time, date, location and contact person.

(d) Receipt of information in subsections (b) - (d) [1a] - [1e] of this section, and any amendments to it, must be acknowledged in writing by all parties receiving the information.

(e) The facility must post a copy of the documents specified in subsections (a) and (b) [subsections (a) - (b)] of this section in a conspicuous location.

(f) The resident or the resident's legal representative has the following rights:

(1) upon an oral or written request to the facility, to access all records pertaining to the resident, including clinical records, within 24 hours (excluding weekends and holidays); and

(2) [after receipt of the resident's records for inspection,] to purchase photocopies of all or any portion of the records, [at a cost not to exceed the community standard,] upon request and two workdays advance notice to the facility.

(g) The resident has the right to be fully informed in language the resident understands of the resident's total health status, including the resident's medical condition.

(h) The resident has the right to refuse treatment, to formulate an advance directive (as specified in §19.419 of this subchapter [relating to Advance Directives]), and to refuse to participate in experimental research.

(1) If the resident refuses treatment, the resident must be informed of the possible consequences.

(2) If the resident chooses to participate in experimental research, the resident must be fully notified of the research and possible effects of the research. The research may be carried on only with the full written consent of the resident's physician, and the resident.

(3) Experimental research must comply with Federal Drug Administration regulations on human research as found in 45 CFR, Part 46 [Code of Federal Regulations, Part 46, Subpart A].

(i) The facility must inform a resident before, or at the time of admission, and periodically during the resident's stay (if there are any changes), of services available in the facility and of charges for those services, including any charges for services not covered under Medicare or by the facility's per diem rate. [Notice must be in writing at least 30 days before the effective date of any changes in rates for services not covered by the current charge, or in Medicaid-certified facilities, by Medicaid.]
(j) The facility must provide a written description of a resident's legal rights, which includes:

(1) a description of the manner of protecting personal funds, described in §19.404 of this subchapter;

(2) a posting of names, addresses, and telephone numbers of all pertinent state client advocacy groups such as HHSC, the Ombudsman Program, the protection and advocacy network, and, in Medicaid-certified facilities, the Medicaid fraud control unit; and

(3) a statement that the resident may file a complaint with HHSC concerning resident abuse, neglect, and misappropriation of resident property in the facility.

(k) The facility must inform a resident of the name, specialty, and way of contacting the physician responsible for the resident's care.

(l) Notification of changes.

(1) A facility must immediately inform the resident; consult with the resident's physician; and [if known, notify, consistent with the representative's authority, the resident representative [resident's legal representative or an interested family member] when there is:

(A) an accident involving the resident that results in injury and has the potential for requiring physician intervention;

(B) a significant change in the resident's physical, mental, or psychosocial status (that is, a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications);

(C) a need to alter treatment significantly (that is, a need to discontinue an existing form of treatment due to adverse consequences, or to commence a new form of treatment); or

(D) a decision to transfer or discharge the resident from the facility.

(2) The facility also must promptly notify the resident and [if known, the resident [resident's legal representative, if any, or interested family member] when there is:

(A) a change in room or roommate assignment with the reason for the change provided in writing [as described in §19.701(4)(B) of this chapter (relating to Quality of Life)]; or

(B) a change in resident rights under federal or state law or regulations as described in subsection (b) [(aa)] of this section.

(3) The facility must record and periodically update the address and phone number of the resident representative [resident's family or legal representative, or a responsible party].

(m) Additional requirements for Medicaid-certified facilities. Medicaid-certified facilities must:

(1) provide the resident with the state-developed notice of rights under §1919(e)(6) of the Social Security Act [(see also §19.402 of this subchapter (relating to Exercise of Rights))];

(2) inform a resident who is entitled to Medicaid benefits, in writing, at the time of admission to the nursing facility or, when the resident becomes eligible for Medicaid of:

(A) the items and services that are included in nursing facility services provided under the State Plan and for which the resident may not be charged;

(B) those other items and services that the facility offers for which the resident may be charged, and the amount of charges for those services;

(3) inform each resident when changes are made to the items and services specified in paragraphs (2)(A) and (2)(B) of this subsection;

(4) provide a written description of the requirements and procedures for establishing eligibility for Medicaid, including the right to request an assessment under §1924(c) of the Social Security Act, which:

(A) is used to determine the extent of a couple's nonexempt resources at the time of institutionalization; and

(B) attributes to the community spouse an equitable share of resources that cannot be considered available for payment toward the cost of the institutionalized spouse's medical care in the process of spending down to Medicaid eligibility levels; and

(5) prominently display in the facility written information, and provide to residents and potential residents oral and written information about how to apply for and use Medicare and Medicaid benefits, and how to receive refunds [funds] for previous payments covered by such benefits.

§19.404. Protection of Resident Funds

(a) Management of financial affairs. The resident has the right to manage the resident's [his] financial affairs and the facility may not require a resident [residents] to deposit their personal funds with the facility. A [The] resident may designate another person to manage the resident's [his] financial affairs.

(b) Management of personal funds.

(1) Licensed-only facilities. Upon written authorization of a resident, the facility may hold, safeguard, manage, and account for the personal funds of the resident deposited with the facility. The facility will act as a fiduciary agent if the facility holds, safeguards, and accounts for the resident's personal funds.

(2) Medicaid-certified facilities. Upon written authorization of a resident, the facility must hold, safeguard, manage, and account for the personal funds of the resident deposited with the facility, as described in §19.405 of this subchapter [title] (relating to Additional Requirements for Trust Funds in Medicaid-certified [Medicaid-Certified] Facilities). The facility will act as a fiduciary agent if the facility holds, safeguards, and accounts for the resident's personal funds.

(c) Statement of resident rights and responsibilities. The facility must provide each resident and resident representative [responsible party] with a written statement at the time of admission that meets the following requirements:

(1) the statement describes the resident's rights to select how personal funds will be handled. The following alternatives must be included:

(A) the resident has the right to manage the resident's [his] financial affairs;

(B) the facility may not require a resident [residents] to deposit the resident's [their] personal funds with the facility;

(C) the facility has an obligation, upon written authorization of a resident, to hold, safeguard, manage, and account for the personal funds of the resident deposited with the facility;

(D) the resident has a right to apply to the Social Security Administration to have a representative payee designated for federal or state benefits to which the resident [he] may be entitled; and

(E) except when subparagraph (D) of this paragraph applies, the resident has a right to designate in writing another person to manage the resident's personal funds;
(2) the statement notes, when applicable, that any charge for the facility handling a Medicaid recipient's personal funds is included in the facility's basic rate; and

(3) the statement advises the resident that the facility must have written permission from the resident or resident representative [responsible party, or legal representative] to handle the resident's [his] personal funds.

§19.405. Additional Requirements for Trust Funds in Medicaid-certified Facilities.

(a) Deposit of funds. The facility must keep funds received from a resident for holding, safeguarding, and accounting, separate from the facility's funds.

(1) This separate account must be identified "(Name of Facility), Resident's Trust Fund Account," or by a similar title that shows a fiduciary relationship exists between a resident and the facility.

(2) A facility may commingle the trust funds of Medicaid residents and private-pay residents.

(3) If the funds are commingled, the facility must provide, upon request, the following records to HHSC [the Department of Aging and Disability Services], the Texas Office of the Attorney General [attorney general's] Medicaid Fraud Control Unit, and the U.S. Department of Health and Human Services:

(A) copies of release forms signed and dated by each private-pay resident or resident representative [responsible party] whose funds are commingled; and

(B) legible copies of the trust fund records of private-pay residents whose funds are commingled.

(4) The facility must maintain the forms and records described in paragraph (3) of this subsection in the same manner as the financial records of Medicaid residents as specified in this section.

(5) A facility must ensure that a release form described in paragraph (3)(A) of this subsection:

(A) includes permission for the facility to maintain trust fund records of private-pay residents in the same manner as those of Medicaid residents;

(B) is obtained from a private-pay resident upon admission or at the time of request for trust fund services; and

(C) includes a provision allowing inspection of the private-pay resident's trust fund records by the agencies described in paragraph (3) of this subsection.

(b) Funds in excess of $50. The facility must deposit any residents' personal funds in excess of $50 in an interest-bearing account (or accounts) that is separate from any of the facility's operating accounts, and that credits all interest earned on the residents' funds to that account. In pooled accounts, there must be a separate accounting for each resident's share.

(c) Funds less than $50. The facility may maintain a resident's personal funds that do not exceed $50 in a noninterest-bearing account, interest-bearing account, or petty cash fund.

(d) Accounting and records.

(1) The facility must:

(A) establish and maintain current, written, individual records of all financial transactions involving a resident's personal funds that the facility is holding, safeguarding, and accounting;

(B) keep these records in accordance with:

(i) the American Institute of Certified Public Accountants' Generally Accepted Accounting Principles; and

(ii) the requirements of law for a fiduciary relationship; and

(C) include at least the following in these records:

(i) resident's name;

(ii) identification of the resident's representative payee and resident representative, [resident's legally authorized representative, representative payee, or responsible party, if any,] and payor source;

(iii) valid letter of guardianship, if any;

(iv) valid power of attorney, if any;

(v) resident's admission and discharge dates;

(vi) resident's trust fund ledger containing the following:

(I) description of each transaction;

(II) the date and amount of each deposit and withdrawal;

(III) the name of the person who accepted any withdrawn funds;

(IV) the balance after each transaction; and

(V) amount of interest earned, posted at least quarterly;

(vii) receipts for purchases and payments, including cash-register tapes or sales statements from a seller;

(viii) written requests for personal funds from the trust fund account; and

(ix) written requests for specific brands, items, or services.

(2) The facility must maintain the following as general trust fund records:

(A) valid trust fund trial balance;

(B) petty cash logs;

(C) bank statements for trust fund and operating accounts;

(D) trust fund checkbook and register;

(E) trust fund account monthly reconciliations;

(F) trust fund bank account agreement form;

(G) applied income ledgers;

(H) applied income payment plans from HHSC [DADS];

(I) proof of surety bond;

(J) written agreements (e.g., bed hold, private room); and

(K) facility census, admission, discharge, and leave records.

(3) A resident must approve a withdrawal from the resident's personal funds by signing a document that shows the resident's approval and the date of the approval.
(4) Except as provided in subparagraph (B) of this paragraph, a facility must obtain a receipt for the purchase of an item or service.

(A) The receipt must contain:

(i) the resident's name;

(ii) the date the receipt was written or created;

(iii) the amount of funds spent;

(iv) the specific item or service purchased;

(v) the name of the business from which the purchase was made; and

(vi) the signature of the resident.

(B) A receipt is not required if:

(i) a purchase is made with funds withdrawn in accordance with paragraph (3) of this subsection;

(ii) a purchase is made by the resident, a resident representative, a legally authorized representative, a responsible party or an individual, other than facility personnel, authorized in writing by the resident; or

(iii) the item purchased costs one dollar or less.

(5) If a facility cannot obtain the signature of a resident as required by paragraph (3) or (4)(A)(vi) of this subsection, the facility must obtain the signature of a witness. The witness may not be the person responsible for accounting for the resident's trust funds, that person's supervisor, or the person who accepts the withdrawn funds or who sells the item being purchased. The facility and HHSC [DADS] staff must be able to identify the witness's name, address, and relationship to the resident or facility.

(e) Notice of certain balances. The facility must notify each resident that receives Medicaid benefits:

(1) if the amount in the resident's account reaches $200 less than SSI resource limit for one person, specified in §1611(a)(3)(B) of the Social Security Act; and

(2) that, if the amount in the account, in addition to the value of the resident's other nonexempt resources, reaches the SSI resource limit for one person, the resident may lose eligibility for Medicaid or SSI.

(f) Conveyance upon death.

(1) Upon the death of a resident with a personal fund deposited with the facility [If a resident with personal funds managed by a facility dies], the facility must convey, within 30 days after the date of the resident's death, the resident's funds and final accounting to the individual or probate jurisdiction administering the resident's estate, or make a bona fide effort to locate the resident representative or heir to the estate [see also §19.416 of this title (relating to personal property)].

(2) If a facility is not able to convey funds in accordance with paragraph (1) of this subsection, the facility must, within 30 days after the resident's death:

(A) hold the funds by depositing them in a separate account or maintaining them in an existing account, designating on the account records that the resident is deceased; or

(B) submit funds to HHSC [DADS] in accordance with paragraph (4) of this subsection.

(3) If the facility holds funds in accordance with paragraph (2)(A) of this subsection:

(A) the facility must provide HHSC [DADS] with a notarized affidavit that contains:

(i) the resident's name;

(ii) the amount of funds being held;

(iii) a description of the facility's efforts to locate a resident representative or heir;

(iv) a statement acknowledging that the funds are not the property of the facility, but the property of the deceased resident's estate; and

(v) a statement that the facility will hold the funds until they are conveyed to a resident representative or heir or submitted to HHSC [DADS] in accordance with paragraph (4) of this subsection;

(B) the facility must submit the funds to HHSC [DADS] in accordance with paragraph (4) of this subsection within 180 days after the resident's death; and

(C) funds held by a facility in accordance with this paragraph may be monitored or reviewed by HHSC [DADS] or the [Health and Human Services Commission] Office of Inspector General.

(4) A facility must submit unclaimed funds to HHSC [DADS], Accounts Receivable[, Mail Code E-411, P.O. Box 149030, Austin Texas 78714-9030].

(A) The funds must be identified as money that will escheat to the state.

(B) If the facility held the funds in accordance with paragraph (3) of this subsection, the facility must include the notarized affidavit described in paragraph (3)(A) of this subsection.

(g) Assurance of financial security. The facility must purchase a surety bond, or otherwise provide assurance satisfactory to the Secretary of Health and Human Services to ensure the security of all personal funds of residents deposited with the facility.

(1) The amount of a surety bond must equal the average monthly balance of all the facility's resident trust fund accounts for the 12-month period preceding the bond issuance or renewal date.

(2) Resident trust fund accounts are specific only to the single facility purchasing a resident trust fund surety bond.

(3) If a facility employee is responsible for the loss of funds in a resident's trust fund account, the resident, the resident's family, and the resident representative are not obligated to make any payments to the facility that would have been made out of the trust fund had the loss not occurred.

(h) Items and services that may not be charged to a resident's personal funds.

(1) The facility may not impose a charge against the personal funds of a resident for any item or service for which payment is made under Medicaid or Medicare.

(2) Items or services included in Medicare or Medicaid payment that may not be billed to the resident's personal funds by the facility include:

(A) nursing services as required in §19.1001 of this chapter (relating to Nursing Services);
(B) dietary services as required in §19.1101 of this chapter [title] (relating to Food and Nutrition Services [Dietary Services]);

(C) an activities program as required in §19.702 of this chapter [title] (relating to Activities);

(D) room and bed maintenance services;

(E) routine personal hygiene items and services as required to meet the needs of the resident, including [but not limited to]:
   (i) hair hygiene supplies, including shampoo, comb, and brush;
   (ii) bath soaps, disinfecting soaps, or specialized cleansing agents when indicated to treat special skin problems or to fight infection;
   (iii) razor and shaving cream;
   (iv) toothbrush, toothpaste, and dental floss;
   (v) denture adhesive and denture cleanser;
   (vi) moisturizing lotion;
   (vii) tissues, cotton balls, and cotton swabs;
   (viii) deodorant;
   (ix) incontinent care and supplies, to include [but not limited to], cloth or disposable incontinent briefs;
   (x) sanitary napkins and related supplies;
   (xi) towels and washcloths;
   (xii) hospital gowns;
   (xiii) over-the-counter drugs;
   (xiv) hair and nail hygiene services; and
   (xv) personal laundry; and

(F) medically-related social services as required in §19.703 of this chapter [title] (relating to Social Services General Requirements).

(3) A facility must base necessity for and type of incontinent brief described in paragraph (2)(E)(ix) of this subsection on an assessment of the resident's medical and psychosocial condition and resulting determination.

   (i) Items and services that may be charged to a resident's personal funds. The facility may charge a resident for requested services that are more expensive than or in excess of covered services in accordance with §19.2601 of this chapter [title] (relating to Vendor Payment (Items and Services Included)). The following list contains general categories and examples of items and services that the facility may charge to a resident's personal funds if they are requested by a resident, if the facility informs the resident that there will be a charge, and if payment is not made by Medicare or Medicaid:

   (1) telephone;
   (2) television or radio for personal use;
   (3) personal comfort items, including smoking materials, notions and novelties, and confections;
   (4) cosmetics and grooming items and services in excess of those for which payment is made under Medicare or Medicaid;
   (5) personal clothing;
   (6) personal reading material;
   (7) gifts purchased on behalf of a resident;
   (8) flowers and plants;
   (9) social events and entertainment offered outside the scope of the activities program, provided under §19.702 of this chapter [title];
   (10) noncovered special care services, such as privately hired nurses and aides;
   (11) private room, except when therapeutically required, such as isolation for infection control;
   (12) specially-prepared or alternative food requested instead of the food generally prepared by the facility, as required in §19.1101 of this chapter [title]; and
   (13) incontinent briefs if the resident representative [resident's legally authorized representative or responsible party] submits a written request to the facility and the attending physician and director of nurses (DON) determine and document in the clinical record that there is no medical or psychosocial need for supplies.

   (j) Request for items or services that may be charged to a resident's personal funds. [The facility must:

   (1) The facility can only charge a resident for an item or service not included under §19.2601 of this chapter if the resident or the resident representative specifically requests the item or service [not charge a resident, nor his representative, for any item or service not requested by the resident];

   (2) The facility must not require a resident or resident representative [not require a resident, or his representative, to request any item or service as a condition of admission or continued stay]; and

   (3) The facility must inform, orally and in writing, the resident or resident representative, when the resident or resident representative [inform the resident or his representative, when he] requests an item or service for which a charge will be made, that there will be a charge for the item or service and the amount of the charge.

   (k) Access to financial record. The individual financial record must be available on request to the resident, resident representative, and [legal representative] representative payee [or legal representative].

   (l) Quarterly statement.

   (1) The individual financial record must be available, through quarterly statements and on request, to the resident, representative payee, and resident representative, [legally authorized representative, representative payee, or responsible party]; and

   (2) The statement must reflect any resident's funds that the facility has deposited in an account as well as any resident's funds held by the facility in a petty cash account.

   (3) The statement must include at least the following:

   (A) balance at the beginning of the statement period;
   (B) total deposits and withdrawals;
   (C) interest earned, if any;
   (D) bank name and location of any account in which the resident's personal funds have been deposited; and
   (E) ending balance.

   (m) Banking charges.

   (1) Charges for checks, deposit slips, and services for pooled checking accounts are the responsibility of the facility and
may not be charged to the resident or resident representative[. legally
authorized representative, or responsible party.]

(2) Bank service charges and charges for checks and de-
posit slips may be deducted from the individual checking accounts if
it is the resident's written, individual choice to have this type of account.

(3) Bank fees on individual accounts established solely for
the convenience of the facility are the responsibility of the facility
and may not be charged to the resident or resident representative[. legally
authorized representative, or responsible party.]

(4) The facility may not charge the resident or resident rep-
resentative[. legally authorized representative, or responsible party] for
the administrative handling of either type of account.

(5) If the facility places any part of the resident's funds in
savings accounts, certificates of deposit, or any other plan whereby in-
terest or other benefits are accrued, the facility must distribute the in-
terest or benefit to participating residents on an equitable basis. If pooled
accounts are used, interest must be prorated on the basis of actual earn-
ings or end-of-quarter balances.

(n) Access to funds.

(1) Disbursements from the trust fund.

(A) A request for funds from the trust fund or trust fund
petty cash box may be made, either orally or in writing, by the resident,
or resident representative[. the resident's legally authorized representa-
tive, representative payee, or responsible party] to cover a resident's
expenses.

(B) The facility must respond to a request received dur-
ing normal business hours at the time of the request.

(C) The facility must respond to a request received dur-
ing hours other than normal business hours immediately at the begin-
ing of the next normal business hours.

(2) Discontinuing trust fund participation.

(A) If a resident or resident representative[. legally au-
thorized representative, or responsible party] requests that the facility
discontinue managing the resident's personal funds the facility must re-
turn to the resident or resident representative[. legally authorized repre-
sentative, or responsible party] all of the resident's personal funds held
by the facility, including any interest accrued.

(B) If the request is made during normal business hours,
the facility must immediately return the funds.

(C) If the request is made during hours other than nor-
mal business hours, the facility must return the funds immediately
during the next normal business hours.

(3) Transfer or discharge. If a resident is transferred or dis-
charged from a facility, the facility must, within five working days after
the transfer or discharge, return to the resident or resident representa-
tive[. legally authorized representative, or responsible party] all of the resi-
dent's personal funds held by the facility, including any interest ac-
crued.

(4) For purposes of this subsection, normal business hours
are 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding national
holidays.

(o) Handling of monthly benefits. If the Social Security Ad-
ministration has determined that a Title II and Title XVI Supplemental
Security Income (SSI) benefit to which the resident is entitled should be
paid through a representative payee, the provisions in 20 CFR [Code
of Federal Regulations (CFR)] §§404.2001 - 404.2065, for Old Age,
Survivors, and Disability Insurance benefits and 20 CFR[§§416.601
- 416.665, for SSI benefits apply.

(p) Change of ownership. If the ownership of a facility
changes, the former owner must transfer the bank balances or trust
funds to the new owner with a list of the residents and their balances.
The former owner must get a receipt from the new owner for the
transfer of these funds. The former owner must keep this receipt for
monitoring or audit purposes.

(q) Alternate forms of documentation. Without HHSC's
[DADS] prior written approval, a facility may not submit alternate
forms of documentation, including affidavits, to verify a resident's
personal fund expenditures or as proof of compliance with any
requirements specified in these requirements for the resident's personal
funds.

(r) Limitation on certain charges. A nursing facility may not
impose charges for certain Medicaid-eligible individuals, for nursing
facility services that exceed the per diem amount established by HHSC
[DADS] for such services. "Certain Medicaid-eligible individuals
means an individual who is entitled to medical assistance for nursing fa-
cility services, but for whom such benefits are not being paid because,
in determining the individual's income to be applied monthly to the
payment for the costs of nursing facility services, the amount of such
income exceeds the payment amounts established by HHSC [DADS].

(s) Trust fund monitoring and audits.

(1) HHSC [DADS] may periodically monitor all trust fund
accounts to assure compliance with this section. HHSC [DADS] noti-
fies a facility of monitoring plans and gives a report of the findings to
the facility.

(2) HHSC [DADS] may, as a result of monitoring, refer a
facility to the Office of Inspector General (OIG) for an audit.

(3) The facility must provide all records and other docu-
ments required by subsection (d) of this section to HHSC [DADS] upon
request.

(4) HHSC [DADS] provides the facility with a report of
the findings, which may include corrective actions that the facility must
take and internal control recommendations that the facility may follow.

(5) The facility may request an informal review in accor-
dance with subsection (i) of this section or a formal hearing in accor-
dance with subsection (u) of this section to dispute the report of find-
ings.

(6) If the facility does not request an informal review or a
formal hearing and the report of findings requires corrective actions, the
facility must complete corrective actions within 60 days after receiving
the report of findings.

(7) If the facility does not complete corrective actions re-
quired by HHSC [DADS] within 60 days after receiving the report of
findings, HHSC [DADS] may impose a vendor hold on payments due
to the facility under the provider agreement until the facility completes
corrective actions.

(8) If HHSC [DADS] imposes a vendor hold in accordance
with paragraph (7) of this subsection, the facility may request a formal
hearing in accordance with subsection (u)(5) of this section. If the
failure to correct is upheld, HHSC [DADS] continues the vendor hold
until the facility completes the corrective actions.

(t) Informal review.

(1) A facility that disputes the report of findings described
in subsection (s)(4) of this section may request an informal review un-
der this section. The purpose of an informal review is to provide for the informal and efficient resolution of the matters in dispute and is conducted according to the following procedures.[6]

(A) HHSC [DADS] must receive a written request for an informal review by United States [U.S.] mail, hand delivery, special mail delivery, or fax no later than 15 days after the date on the written notification of the report of findings described in subsection (s)(4) of this section. If the 15th day is a Saturday, Sunday, national holiday, or state holiday, then the first day following the 15th day is the final day the written request will be accepted. A request for an informal review that is not received by the stated deadline is not granted.

(B) A facility must submit a written request for an informal review to the HHSC Trust Fund Monitoring Unit.[7]

(1) by U.S. mail to DADS Trust Fund Monitoring Unit, Attn: Manager, P.O. Box 149030, Mail Code W-340, Austin, Texas 78714-9030.

(2) hand delivery or special mail delivery to 701 West 51st Street, Austin, Texas 78751-2324; or

(3) by fax to (512) 438-3630.

(C) A facility must, with its request for an informal review:

(i) submit a concise statement of the specific findings it disputes;

(ii) specify the procedures or rules that were not followed;

(iii) identify the affected cases;

(iv) describe the reason the findings are being disputed; and

(v) include supporting information and documentation that directly demonstrates that each disputed finding is not correct.

(D) HHSC [DADS] does not grant a request for an informal review that does not meet the requirements of this subsection.

(2) Informal review process. Upon receipt of a request for an informal review, the Trust Fund Monitoring Unit Manager coordinates the review of the information submitted.

(A) Additional information may be requested by HHSC [DADS], and must be received in writing [by U.S. mail, hand delivery, special mail delivery, or fax in accordance with paragraph (1)(B)(ii)-(iii) of this subsection] no later than 15 days after the date the facility receives the written request for additional information. If the 15th day is a Saturday, Sunday, national holiday, or state holiday, then the first day following the 15th day is the final day the additional information will be accepted.

(B) HHSC [DADS] sends its written decision to the facility by certified mail, return receipt requested.

(i) If the original findings are upheld, HHSC [DADS] continues the schedule of deficiencies and requirement for corrective action.

(ii) If the original findings are reversed, HHSC [DADS] issues a corrected schedule of deficiencies with the written decision.

(iii) If the original findings are revised, HHSC [DADS] issues a revised schedule of deficiencies including any revised corrective action.

(iv) If the original findings are upheld or revised, the facility may request a formal hearing in accordance with subsection (u) of this section.

(v) If the original findings are upheld or revised and the facility does not request a formal hearing, the facility has 60 days from the date of receipt of the written decision to complete the corrective actions. If the facility does not complete the corrective actions by that date, HHSC [DADS] may impose a vendor hold. If HHSC [DADS] imposes a vendor hold, the facility may request a formal hearing in accordance with subsection (u)(5) of this section. If the failure to correct is upheld, HHSC [DADS] continues the vendor hold until the facility completes the corrective action.

(u) Formal hearing.

(1) The facility must submit a written request for a formal hearing under this section to the [6] HHSC Appeals Division[7], Mail Code W-611, P.O. Box 149030, Austin, Texas 78714-9030.

(2) The written request for a formal hearing must be received within 15 days after:

(A) the date on the written notification of the report of findings described in subsection (s)(4) of this section; or

(B) the facility receives the written decision sent as described in subsection (1)(2)(B) of this section.

(3) A formal hearing is conducted in accordance with Texas Administrative Code, Title 1, Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act).

(4) No later than 60 days after a final determination is issued as a result of a formal hearing requested by a facility under subsection (s)(8) or (1)(2)(B)(iv) of this section, the facility must complete any corrective action required by HHSC [DADS] or be subject to a vendor hold on payments due to the facility under the provider agreement until the facility completes corrective action. If HHSC [DADS] imposes a vendor hold, the facility may request a formal hearing in accordance with paragraph (5) of this subsection. If the failure to correct is upheld, HHSC [DADS] continues the vendor hold until the facility completes the corrective action.

(5) If HHSC [DADS] imposes a vendor hold under subsections (s)(7), (1)(2)(B)(v), or (u)(4) of this section, the facility may request a formal hearing within 15 days after receiving notice of the correction failure and the vendor hold. The formal hearing is limited to the issue of whether the facility completed the corrective action.


(a) Resident rights. The resident has the right to:

(1) choose and retain a personal attending physician, subject to that physician's compliance with the facility's standard operating procedures for physician practices in the facility;

(2) be fully informed in advance about care and treatment and of any changes in that care or treatment that may affect the resident's well-being; and

(3) unless found to lack capacity [adjudged incompetent or otherwise found to be incapacitated] under the laws of the State of Texas, participate in planning care and treatment or changes in care and treatment. See §19.419 of this title (relating to Advance Directives) [and Durable Powers of Attorney].

(b) Licensed-only facilities. The resident must be allowed complete freedom of choice to obtain pharmacy services from any pharmacy that is qualified to perform the services. A facility must not require residents to purchase pharmaceutical supplies or services from
the facility itself or from any particular vendor. The resident has the right to be informed of prices before purchasing any pharmaceutical item or service from the facility, except in an emergency.

(c) Additional requirements regarding freedom of choice for Medicaid recipients. The recipient must be allowed complete freedom of choice to obtain any Medicaid services from any institution, agency, pharmacy, person, or organization that is qualified to perform the services, unless the provider causes the facility to be out of compliance with the requirements specified in this chapter.

(1) A facility must not require recipients to purchase supplies or services, including pharmaceutical supplies or services, from the facility itself or from any particular vendor. The recipient has the right to be informed of prices before purchasing any item or services from the facility, except in an emergency (see §19.1502(b)(3) of this title (relating to Choice of Pharmacy Provider)).

(2) The facility must furnish Medicaid recipients with complete information about available Medicaid services, how to obtain these services, their rights to freely choose service providers as specified in this subsection and the right to request a hearing before HHSC [the Texas Department of Human Services (DHS)] if the right to freely choose providers has been abridged without due process.


The resident has the right to personal privacy and confidentiality of the resident's [his] personal and clinical records. ([See also §19.1910(e) of this title (relating to Clinical Records) and §19.403(e) of this title (relating to Notice of Rights and Services).]

(1) Personal privacy includes accommodations, medical treatment, written and telephone communications, personal care, visits, and meetings of family and resident groups, but this does not require the facility to provide a private room for each resident.

(2) Except as provided in paragraph (3)(B) of this section, the resident may approve or refuse the release of personal and clinical records to any individual outside of the facility.

(3) The resident's right to refuse release of personal and clinical records does not apply [when]:

(A) when the resident is transferred to another health care institution;

(B) when the record release is required by law or permitted under §19.1910(d) of this chapter (relating to Clinical Records); or

(C) during surveys.

(4) The facility must ensure the resident's right to privacy in the following areas:

(A) accommodations as described in §19.1701 of this chapter [title] (relating to Physical Environment [General Requirements]);

(B) medical treatment, including[. The facility must provide privacy to each resident] during examinations, treatment, case discussions, and consultations[. Staff must treat these matters confidentially];

(C) personal care;

(D) access and visitation as described in §19.413 of this subchapter [title] (relating to Access and Visitations Rights); and

(E) meetings with family and resident groups.

(5) [E] Governmental [governmental] searches are permitted only if there exists probable cause to believe an illegal substance or activity is being concealed. Administrative searches by the appropriate entity, such as the fire inspector, are allowed only for limited purposes, but such searches would not ordinarily extend to the resident's personal belongings. HHSC [The Texas Department of Human Services (DHS)] and the nursing facility must provide for and allow residents their individual freedoms. State statutes authorize inspections of the nursing facility but do not authorize inspection of those areas in which an individual has a reasonable expectation of privacy. Any direct participation by HHSC [DHS] personnel in an inspection of "the contents of residents' personal drawers and possessions," is in violation of federal and state law; and

[F] the resident has the right to privacy for meetings with family and resident groups.

(6) [§] All information that contains personal identification or descriptions which would uniquely identify an individual resident [or a provider of health care] is considered to be personal and private and will be kept confidential. [Personal identifying information (except for PCN numbers) will be deleted from all records, reports, and/or minutes from formal studies which are forwarded to DHS, or anyone else. These records, reports, and/or minutes, which have been de-identified, will still be treated as confidential. All such material mailed to DHS or anyone else must be in a sealed envelope marked "Confidential."]

§19.408. Grievances.

(a) A resident has the right to:

(1) voice grievances without discrimination or reprisal including[. These] grievances regarding [include those with respect to] treatment that [which] has been furnished as well as treatment that [which] has not been furnished;

(2) prompt efforts by the facility to resolve grievances the resident may have, including those with respect to the behavior of other residents; and

(3) notify state agencies of complaints against a facility. Complaints will be acknowledged by the staff of the agency that receives the complaint. All complaints will be investigated, whether oral or written.

(b) A nursing facility may not retaliate or discriminate against a resident, a resident representative, [family member or guardian of the resident], or a volunteer because the resident, the resident representative, [resident's family member or guardian], a volunteer, or any other person:

(1) makes a complaint or files a grievance concerning the facility;

(2) reports a violation of law, including a violation of laws or regulations regarding nursing facilities; or

(3) initiates or cooperates in an investigation or proceeding of a governmental entity relating to care, services, or conditions at the nursing facility.

(c) A facility may not discharge or otherwise retaliate against:

(1) an employee, resident, or other person because the employee, resident, or other person files a complaint, presents a grievance, or otherwise provides in good faith information relating to the misuse of a restraint or involuntary seclusion at the facility; or

(2) a resident because someone on behalf of the resident files a complaint, presents a grievance, or otherwise provides in good faith information relating to the misuse of a restraint or involuntary seclusion at the facility.
§19.409. Examination of Survey Results.

(a) The resident has the right to:

(1) examine the results of the most recent survey of the facility conducted by federal or state surveyors and any plan of correction in effect with respect to the facility. The facility must make the results available for examination in a place readily accessible to residents, and must post a notice of their availability; and

(2) receive information from agencies acting as client advocates, and be afforded the opportunity to contact these agencies.

(b) The facility must make the survey results available for examination in a place readily accessible to residents and must post a notice of their availability.


(a) The nursing facility must refund private funds paid to the facility for periods covered by Medicaid, including retroactive periods of Medicaid coverage, when:

(1) the Medicaid vendor payment has been accepted by the nursing facility; or

(2) the nursing facility has been notified by HHSC [the Texas Department of Human Services (DHS)] about an individual's eligibility for Medicaid.

(b) The nursing facility must make the refund within 30 days of:

(1) notification of eligibility for nursing home coverage;

(2) notification of correction of applied income [see also §19.231(f) of this title (relating to Collection of Applied Income) which specifies procedures concerning applied income refunds at the time of discharge]; or

(3) receipt of any vendor payment from HHSC [DHS] for any covered period.

(c) When the facility becomes aware of the need for a refund as indicated in subsection (a) of this section, facility staff must write to the resident or resident representative, [his responsible party] notifying the resident [him] about the [his] right to a refund and the amount due.


The resident has the right to:

(1) refuse to perform services for the facility; and

(2) perform services for the facility, if the resident [he] chooses, when:

(A) the facility has documented the resident's need or desire for work in the care plan [of care];

(B) the care plan specifies the nature of the services performed and whether the services are voluntary or paid;

(C) compensation for paid services is at or above prevailing rates; and

(D) the resident agrees to the work arrangement described in the care plan [of care].


(a) A resident has the right to have access to, and the facility must provide immediate access to a resident to, the following:

(1) in Medicaid-certified facilities, any [a] representative of the Secretary of Health and Human Services;

(2) any [a] representative of the State of Texas;

(3) the resident's individual physician;

(4) the State Ombudsman;

(5) a certified ombudsman;

(6) any [a] representative of the protection and advocacy system for individuals with intellectual or developmental disabilities established under the Developmental Disabilities Assistance and Bill of Rights Act, 42 USC Chapter 144, Subchapter I, Part C;

(7) any [a] representative of the protection and advocacy system for individuals with mental illness established under the Protection and Advocacy for Mentally Ill Individuals Act, 42 USC Chapter 114, Subchapter I;

(8) subject to the resident's right to deny or withdraw consent at any time, immediate family or other relatives of the resident; and

(9) subject to reasonable restrictions and the resident's right to deny or withdraw consent at any time, others who are visiting with the consent of the resident; and

(10) the resident representative.

(b) A facility must provide reasonable access to a resident by any entity or individual that provides health, social, legal, or other services to the resident, subject to the resident's right to deny or withdraw consent at any time.

(c) In accordance with the Older Americans Act, §712(b)(1)(A) and 45 CFR §1324.11(e)(2), a facility must allow:

(1) the State Ombudsman, a certified ombudsman, and an ombudsman intern to have:

(A) immediate, private, and unimpeded access to enter the facility at any time during the facility's regular business hours or regular visiting hours;

(B) immediate, private, and unimpeded access to a resident; and

(C) immediate and unimpeded access to the name and contact information of a resident representative [responsible party] if the State Ombudsman, a certified ombudsman, or an ombudsman intern determines the information is needed to perform a function of the Ombudsman Program; and

(2) the State Ombudsman and a certified ombudsman to have immediate, private, and unimpeded access to enter the facility at a time other than regular business hours or visiting hours, if the State Ombudsman or a certified ombudsman determines access may be required by the circumstances to be investigated.

(d) A facility, in accordance with the Older American Act, §712(b)(1)(B) and 45 CFR §1324.11(e)(2), must allow the State Ombudsman and a certified ombudsman immediate access to:

(1) all files, records, and other information concerning a resident, including an incident report involving the resident, if:

(A) the State Ombudsman or certified ombudsman has the consent of the resident or resident [legally authorized] representative;

(B) the resident is unable to communicate consent to access and has no resident [legally authorized] representative; or

(C) such access is necessary to investigate a complaint and the following occurs:
§19.414. Telephone.  
(a) The resident has the right to have reasonable access to the use of a telephone, [(i) other than a pay phone] where calls can be made without being overheard, and which can also be used for making calls to summon help in case of emergency.  
(b) The facility must permit residents to contract for private telephones at their own expense.  [The facility must not require private telephone to be connected to a central switchboard.]

The resident has the right to retain and use personal possessions, including some furnishings, and appropriate clothing as space permits, unless to do so would infringe upon the rights or health and safety of other residents.  Reasons for any limitations are documented in the resident’s clinical record.  [See §19.1921(i) of this title (relating to General Requirements for a Nursing Facility).]  
(1) If the resident dies, personal property must be transferred to the estate or the person designated by the resident.  
(2) If it is donated or sold to the facility by the resident or estate, the transaction must be documented.  
(3) If the resident dies and there is no resident representative or family [responsible party, family, or legal guardian] and no arrangements have been made for the disposition of property, the facility must dispose of property according to the Texas Property Code, Title 6, Chapter 71 (concerning Escheat of Property) and according to the Texas Estates Code, Chapter 551 (concerning Payment of Certain Estates to State) [Probate Code, Chapter 10 (concerning Payment of Estates into State Treasury)].

A [The] resident must be ensured privacy for visits with the resident’s [his] spouse.  The resident has the right to share a room with the resident’s [his] spouse when married residents live in the same facility and both spouses consent to the arrangement.

(a) A resident [an individual] has the right to refuse a transfer to another room within the facility, if the purpose of the transfer is to relocate:
HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.


(a) The facility must establish and implement an admissions policy.

(b) [(a)] The facility must not request or require:

(1) a resident [residents] or a potential resident [potential residents] to waive the resident's or potential resident's [their] rights, including the resident's or potential resident's rights to Medicare or Medicaid; and

(2) oral or written assurance that a resident [residents] or a potential resident is [potential residents are] not eligible for, or will not apply for, Medicare or Medicaid benefits; and

(3) a resident or a potential resident to waive potential facility liability for losses of personal property.

(c) [(b)] The facility must not request or require a third-party guarantee of payment to the facility as a condition of admission or expedited admission, or continued stay in the facility. However, the facility may require an individual who has legal access to a resident's income or resources available to pay for facility care to sign a contract, without incurring personal financial liability, to provide facility payment from the resident's income or resources.

(d) [(c)] In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State Plan, any gift, money, donation, or other consideration as a precondition of admission, expedited admission, or continued stay in the facility. However, a nursing facility may:

(1) charge a resident who is eligible for Medicaid for items and services the resident has requested and received, and that are not specified in the State Plan as included in the term "nursing facility services" so long as the facility gives proper notice of the availability and cost of these services to a resident [residents] and does not condition the resident's admission or continued stay on the request for and receipt of these additional services; and

(2) solicit, accept, or receive a charitable, religious, or philanthropic contribution from an organization or from a person unrelated to a Medicaid-eligible resident or potential resident, but only to the extent that the contribution is not a condition of admission, expedited admission, or continued stay in the facility for a Medicaid-eligible resident.

(e) A nursing facility must disclose and provide a resident or potential resident before time of admission, notice of special characteristics or service limitations of the facility.

(f) A nursing facility that is a composite distinct part, as defined by 42 CFR §483.5, must disclose in its admission agreement its physical configuration, including the various locations that comprise the composite distinct part, and must specify the policies that apply to room changes between its different locations.

§19.502. Transfer and Discharge in Medicaid-certified Facilities.

(a) Examples. [Definition] Transfer and discharge includes movement of a resident to a bed outside the certified facility, whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement within the same certified facility.

(b) Transfer and discharge requirements. The facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless:

(1) the transfer or discharge is necessary for the resident's welfare, and the resident's needs cannot be met in the facility;

(2) the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;

(3) the safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;

(4) the health of other individuals in the facility would otherwise be endangered;

(5) the resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. Nonpayment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for the resident's stay. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid;

(6) the resident or resident representative [responsible party, or family or legal representative] requests a voluntary transfer or discharge; or

(7) the facility ceases to operate as a nursing facility and no longer provides resident care.

(c) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in subsection (b)(1) - (7) [b)(1) - (5)] of this section, the facility must ensure that the transfer or discharge is documented in the resident's clinical record and appropriate information is communicated to the receiving health care institution or provider. [must be documented. The documentation must be made by]

1. Documentation must include:

(A) the basis for the transfer per subsection (b)(1) - (7)

(B) in the case of subsection (b)(1) of this section, the specific resident's needs that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the needs.

2. The documentation required by paragraph (1) of this subsection, must be made by:

(A) the resident's physician when transfer or discharge is necessary under subsection (b)(1) or (b)(2) of this section; or

(B) a physician when transfer or discharge is necessary under subsection (b)(3) or (b)(4) of this section.

3. Information provided to the receiving health care institution or provider must include the following:

(A) contact information of the practitioner responsible for the care of the resident;

(B) resident representative information, including contact information;

(C) advance directive information;
(D) all special instructions or precautions for ongoing care, as appropriate;

(E) comprehensive care plan goals; and

(F) all other necessary information, including a copy of the resident's discharge summary, consistent with §19.803 of this chapter (relating to Discharge Summary (Discharge Plan of Care)), as applicable, to ensure a safe and effective transition of care.

[4.1] the resident's physician when transfer or discharge is necessary under subsection (b)(1) or (2) of this section; and

[4.2] a physician when transfer or discharge is necessary under subsection (b)(4) of this section.

(d) Notice before transfer or discharge. Before a facility transfers or discharges a resident, the facility must:

(1) notify the resident and the resident representative, if known, a responsible party or family or legal representative of the resident about the transfer or discharge and the reasons for the move in writing and in a language and manner the resident understands;

(2) if the discharge or transfer is initiated by the facility, send a copy of the notice to a representative of the Ombudsman Program at the time a discharge notice is presented to the resident and resident representative, in accordance with the timeframes described in subsection (e) of this section, except that the notice may be provided as soon as practicable, such as in a list of residents sent on a monthly basis, when a resident is temporarily transferred on an emergency basis to an acute care facility;

(3) [4.2] record the reasons for the transfer or discharge in the resident's clinical record;

(4) [4.3] include in the notice the items described in subsection (f) of this section; and

(5) [4.4] comply with §19.2310 of this chapter (relating to Nursing Facility Ceases to Participate) when the facility voluntarily withdraws from Medicaid or Medicare or is terminated from Medicaid or Medicare participation by HHSC or the secretary.

(e) Timing of the notice.

(1) Except when specified in paragraph (3) of this subsection or in §19.2310 of this chapter, the notice of transfer or discharge required under subsection (d) of this section must be made by the facility at least 30 days before the resident is transferred or discharged.

(2) The requirements described in paragraph (1) of this subsection and subsection (b) [(e)] of this section do not have to be met if the resident or resident representative, responsible party, or family or legal representative requests the transfer or discharge.

(3) Notice must [may] be made as soon as practicable before transfer or discharge when:

(A) the safety of individuals in the facility would be endangered, as specified in subsection (b)(3) of this section;

(B) the health of individuals in the facility would be endangered, as specified in subsection (b)(4) of this section;

(C) the resident's health improves sufficiently to allow a more immediate transfer or discharge, as specified in subsection (b)(2) of this section;

(D) the transfer and discharge is necessary for the resident's welfare because the resident's needs cannot be met in the facility, as specified in subsection (b)(1) of this section, and the resident's urgent medical needs require an immediate transfer or discharge; or

(E) a resident has not resided in the facility for 30 days.

(4) When an immediate involuntary transfer or discharge as specified in subsection (b)(3) or (4) of this section, is contemplated, unless the discharge is to a hospital, the facility must:

(A) immediately call the staff of the state office Consumer Rights and Services section of HHSC to report its intention to discharge; and

(B) submit to HHSC the required physician documentation regarding the discharge.

(f) Contents of the notice. For nursing facilities, the written notice specified in subsection (d) of this section must include the following:

(1) the reason for transfer or discharge;

(2) the effective date of transfer or discharge;

(3) the location to which the resident is transferred or discharged;

(4) a statement of the resident's appeal rights, including [that]:

(A) the resident has the right to appeal the action as outlined in HHSC's Fair and Fraud Hearings[, Fraud, and Civil Rights] Handbook by requesting a hearing through the Medicaid eligibility worker at the local HHSC office within 90 [100] days after the date of the notice;

(B) if the resident requests the hearing before the discharge date, the resident has the right to remain in the facility until the hearing officer makes a final determination unless failure to transfer or discharge would endanger the health or safety of the resident or individuals in the facility. The facility must document the danger failure to discharge would present; and

(C) information on how to obtain an appeal form and assistance in completing the form and submitting the appeal hearing request;

(5) the name, address, email address, and telephone number of the managing local ombudsman and the toll-free number of the Ombudsman Program;

(6) in the case of a resident with mental illness, the address, email address, and phone number of the state mental health authority; and

(7) in the case of a resident with an intellectual or developmental disability, the authority for individuals with intellectual and developmental disabilities, and the phone number, address, and email address of the agency responsible for the protection and advocacy of individuals with intellectual and developmental disabilities.

(g) Changes to the notice. If the information in the notice changes before effecting the transfer or discharge, the facility must update the recipients of the notice as soon as practicable once the updated information becomes available.

(h) [4.5] Orientation for transfer or discharge. A facility must provide and document sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. This orientation must be provided in a form and manner that the resident can understand.

(i) [4.6] Notice of relocation to another room. Except in an emergency, the facility must notify the resident and the resident representative, if the responsible party or the family or legal representative, at least five days before relocation of the resident to another room.
within the facility. The facility must prepare a written notice which contains:

(1) the reasons for the relocation;
(2) the effective date of the relocation; and
(3) the room to which the facility is relocating the resident.

(j) Fair hearings.

(1) Individuals who receive a discharge notice from a facility have 90 days to appeal. If the recipient appeals before the discharge date, the facility must allow the resident to remain in the facility, except in the circumstances described in subsections (b)(5) and (c)(3) of this section, until the hearing officer makes a final determination. Vendor payments and eligibility will continue until the hearing officer makes a final determination. If the recipient has left the facility, Medicaid eligibility will remain in effect until the hearing officer makes a final determination.

(2) When the hearing officer determines that the discharge was inappropriate, the facility, upon written notification by the hearing officer, must readmit the resident immediately, or to the next available bed. If the discharge has not yet taken place, and the hearing officer finds that the discharge will be inappropriate, the facility, upon written notification by the hearing officer, must allow the resident to remain in the facility. The hearing officer will also report the findings to HHSC [Long-Term Care] Regulatory Services Division for investigation of possible noncompliance.

(3) When the hearing officer determines that the discharge is appropriate, the resident is notified in writing of this decision. Any payments made on behalf of the resident past the date of discharge or decision, whichever is later, must be recouped.

(k) Discharge of married residents. If two residents in a facility are married and the facility proposes to discharge one spouse to another facility, the facility must give the other spouse notice of the spouse's right to be discharged to the same facility. If the spouse notifies a facility, in writing, that the spouse wishes to be discharged to another facility, the facility must discharge both spouses on the same day, pending availability of accommodations.


(a) Notice before transfer. Before a nursing facility transfers a resident to a hospital or a resident goes [allows a resident to go] on therapeutic leave, the nursing facility must provide written information to the resident [and a family member] or resident [legal] representative that specifies:

(1) the duration of the bed-hold policy under the Medicaid State Plan, [see §19.2603 of this title (relating to Therapeutic Home Visits Away from the Facility)] if any, during which the resident is permitted to return and resume residence in the facility; [and]
(2) the reserved bed payment policy, in the State plan;
(3) [the] the facility's policies regarding bed-hold periods, which must be consistent with subsection (c) of this section, permitting a resident to return; and[1]
(4) the information specified in §19.502 of this subchapter (relating to Transfer and Discharge in Medicaid-certified Facilities).

(b) Bed-hold notice upon transfer. At the time of transfer of a resident to a hospital or for therapeutic leave, a nursing facility must provide to the resident and resident [a family member or legal] representative, written notice which specifies the duration of the bed-hold policy described in subsection (a) of this section.

c) Permitted resident to return to facility. A nursing facility must establish and follow a written policy on permitting residents to return to the facility after they are hospitalized or placed on therapeutic leave. [under which a resident whose hospitalization or therapeutic leave]

(1) The policy must provide that a resident whose hospitalization or therapeutic leave exceeds the bed-hold period under the State Plan returns to the facility and to the resident's previous room if available or returns to the facility, is readmitted to the facility immediately upon the first availability of a bed in a semi-private room if the resident:

(A) [4] requires the services provided by the facility; and
(B) [2] is eligible for Medicare skilled nursing facility services or Medicaid nursing facility services.

(2) If the facility determines that a resident who was transferred with an expectation of returning to the facility cannot return to the facility, the facility must comply with the requirements of §19.502 of this subchapter.

(d) Readmission to a composite distinct part. When the facility to which a resident returns is a composite distinct part, as defined by 42 CFR §483.5, the resident must be permitted to return to an available bed in the particular location of the composite distinct part in which the resident resided previously. If the bed is not available in that location at the time of readmission, the resident must be given the option to return to that location upon the first availability of a bed.

(e) Bed-hold charges. The facility may enter into a written agreement with the resident [recipient] or resident representative [responsible party] to reserve a bed.

(1) The facility may charge the resident an amount not to exceed the HHSC [DHS] daily vendor rate according to the recipient's classification at the time the resident [individual] leaves the facility.

(2) The facility must document all bed-hold charges in the recipient's financial record at the time the bed-hold reservation services were provided.

(3) The facility may not charge a bed-hold fee if HHSC [the Texas Department of Human Services (DHS)] is paying for the same period of time, as in a three-day therapeutic home visit.

§19.504. Equal Access to Quality Care in Medicaid-certified Facilities.

(a) A facility must provide equal access to quality care regardless of diagnosis, severity of condition, or payment source.

(b) [A facility must establish, [and] maintain, and implement identical policies and practices regarding transfer, discharge, and the provision of services under the Medicaid State Plan for all individuals regardless of source of payment.

(c) [The facility must charge any amount for services furnished to non-Medicaid residents consistent with the notice requirement in §19.403(i) [the] and (j) [of] this chapter [title] (relating to Notice of Rights and Services).

(d) [HHS] [The Texas Department of Human Services] is not required to offer additional services on behalf of a recipient other than services provided in the State Plan.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.
SUBCHAPTER G. FREEDOM FROM ABUSE, NEGLECT, AND EXPLOITATION

40 TAC §§19.601, 19.602, 19.606

STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.


§19.601. Freedom from Abuse, Neglect, and Exploitation. [Residents Behavior and Facility Practices.]

(a) General. The resident has the right to be free from abuse, neglect, misappropriation of resident property, and exploitation as defined in §19.101 of this chapter (relating to Definitions). This includes freedom from any physical or chemical restraint not required to treat the resident's medical symptoms.

(b) Abuse. The resident has the right to be free from verbal, sexual, physical and mental abuse, corporal punishment, and involuntary seclusion.

(c) Policies and procedures. The facility must develop and implement written policies and procedures that prohibit and prevent mistreatment, abuse, neglect, and exploitation of a resident, and misappropriation of a resident’s property.

(1) The facility must:

(A) not use verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion;

(B) not employ or otherwise engage an individual who has:

(i) been found guilty of abuse, neglect, exploitation, misappropriation of property, or mistreatment of a resident by a court of law;

(ii) had a finding entered into the state nurse aide registry concerning abuse, neglect, exploitation or mistreatment of a resident, or misappropriation of a resident’s property;

(iii) been convicted of any crime contained in §250.006, Texas Health and Safety Code; or

(iv) a disciplinary action in effect against the individual’s professional license by a state licensure body as a result of a finding of abuse, neglect, exploitation, mistreatment of a resident or misappropriation of a resident’s property.

(C) report any knowledge it has of actions by a court of law against an employee, which would indicate unfitness for service as a nurse aide or other staff to the state nurse aide registry or licensing authority.

(2) The written policies and procedures must:

(A) establish protocols to investigate any such allegations; and

(B) include training as required by §19.1929 of this chapter (relating to Staff Development).

(d) [44] Restraints. The facility must ensure that the resident is free from physical or chemical restraints imposed for purposes of discipline or convenience and that are not required to treat the resident’s medical symptoms. If the use of restraints is indicated, the facility must use the least restrictive alternative for the least amount of time and document ongoing re-evaluation of the need for restraints. [The resident has the right to be free from any physical or chemical restraints imposed for purposes of discipline or convenience, and not required to treat the resident's medical symptoms.]

(1) If physical restraints are used because they are required to treat the resident's medical condition, the restraints must be released and the resident repositioned as needed to prevent deterioration in the resident's condition. Residents must be monitored hourly and, at a minimum, restraints must be released every two hours for a minimum of ten minutes, and the resident repositioned.

(2) A facility must not administer to a resident a restraint that:

(A) obstructs the resident's airway, including a procedure that places anything in, on, or over the resident’s mouth or nose;

(B) impairs the resident's breathing by putting pressure on the resident's torso;

(C) interferes with the resident's ability to communicate; or

(D) places the resident in a prone or supine hold.

(3) A behavioral emergency is a situation in which severely aggressive, destructive, violent, or self-injurious behavior exhibited by a resident:

(A) poses a substantial risk of imminent probable death of, or substantial bodily harm to, the resident or others;

(B) has not abated in response to attempted preventive de-escalatory or redirection techniques;

(C) could not reasonably have been anticipated; and

(D) is not addressed in the resident’s comprehensive care plan.

(4) If restraint is used in a behavioral emergency, the facility must use only an acceptable restraint hold. An acceptable restraint hold is a hold in which the resident's limbs are held close to the body to limit or prevent movement and that does not violate the provisions of paragraph (2) of this subsection.

(5) A staff person may use a restraint hold only for the shortest period of time necessary to ensure the protection of the resident or others in a behavioral emergency.

(6) A facility may adopt policies that allow less use of restraint than allowed by the rules of this chapter.

(7) Use of restraints and their release must be documented in the clinical record.
[16] Abuse. The resident has the right to be free from verbal, sexual, physical and mental abuse, corporal punishment, and involuntary seclusion.

[17] Staff treatment of residents. The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents, and misappropriation of residents’ property.

[18] The facility must:

[19] not use verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion; and

[20] not employ individuals who have:

[21] been found guilty of abusing, neglecting, or mistreating residents by a court of law, or

[22] had a finding entered into the state nurse aide registry concerning abuse, neglect, mistreatment of residents, or misappropriation of their property, or

[23] been convicted of an crime contained in §250.006, Health and Safety Code; and

[24] report any knowledge it has of actions by a court of law against an employee, which would indicate unfitness for service as a nurse aide or other staff to the state nurse aide registry or licensing authority.

[25] The facility must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property, are reported immediately to the administrator of the facility and to other officials in accordance with Texas law through established procedures (see §19.602 of this title (relating to Incidents of Abuse and Neglect Reportable to the Texas Department of Human Services and Law Enforcement Agencies by Facilities)).

[26] The facility must have evidence that all alleged violations are thoroughly investigated and must prevent further potential abuse while the investigation is in progress.

[27] The results of all investigations must be reported to the administrator or his designated representative and to other officials in accordance with Texas law (including to the state survey and certification agency) within five working days of the incident, and if the alleged violation is verified, appropriate corrective action must be taken.

§19.602. Incidents of Abuse, [and] Neglect, and Exploitation Reportable to the Texas Health and Human Services Commission [Department of Aging and Disability Services (DADS)] and Law Enforcement Agencies by Facilities.

(a) In response to allegations of abuse, neglect, exploitation, or mistreatment, the facility must:

(1) ensure that all alleged violations involving abuse, neglect, exploitation or mistreatment, including injuries of unknown source and misappropriation of resident property are reported:

(A) immediately to the administrator of the facility and to HHSC, but no later than two hours after the allegation is made, if the events that cause the allegation involve abuse, or result in serious bodily injury; or

(B) no later than 24 hours after the allegation is made to the administrator of the facility and to HHSC, if the events that cause the allegation do not involve abuse and do not result in serious bodily injury;

(2) conduct an investigation of the reported acts and have evidence that all alleged violations are thoroughly investigated;

(3) prevent further potential abuse, neglect, exploitation, or mistreatment while the investigation is in progress; and

(4) report the results of all investigations to the administrator or the administrator's designee and to HHSC within five working days of the incident and, if the alleged violation is verified, take appropriate corrective action.

(b) [Note: A facility owner or employee who has cause to believe that the physical or mental health or welfare of a resident has been or may be adversely affected by abuse, neglect, or exploitation caused by another person must report the abuse, neglect, or exploitation.

(c) [Note: Reports described in subsections (a)(1) and (b) [subsection (a)] of this section must be made to HHSC. [DADS at 1-800-458-9858 and]

(d) Written investigation [written] reports described in subsection (a)(4) of this section must be sent to: HHSC no later than the fifth working day after the initial report [DADS Consumer Rights and Services, P. O. Box 14030, Austin, Texas 78714-9030].

(e) The person reporting must make the telephone report immediately on learning of the alleged abuse, neglect, exploitation, conduct, or conditions. The person must send a written report to DADS Consumer Rights and Services within five days after the telephone report.

(f) The facility must conduct an investigation of the reported acts. The facility must send a written report of the investigation to DADS no later than the fifth working day after the oral report.

(g) As a condition of employment, an employee of a facility must sign a statement that states:

(1) the employee may be criminally liable for failure to report abuses; and

(2) [under the Texas Health and Safety Code, Title 4, §260A.14,] the employee has a cause of action against a facility, its owners or employees [owners or employees] if the employee [he] is suspended, terminated, disciplined, or disciplined against, under the Texas Health and Safety Code, Title 4, §260A.014, as a result of:

(A) reporting to the employee's supervisor, the administrator, HHSC [DADS], or a law enforcement agency a violation of law, including a violation of laws or regulations regarding nursing facilities; or

(B) initiating or cooperating in any investigation or proceeding of a governmental entity relating to care, services, or conditions at the nursing facility.

(h) The statements described in subsection [section] (e) [subsection (e)] of this section must be available for inspection by HHSC [DADS].

(i) A local or state law enforcement agency must be notified of reports described in subsection (b) [subsection (c)] of this section that allege that:

(1) a resident's health or safety is in imminent danger;

(2) a resident has recently died because of conduct alleged in the report of abuse or neglect or other complaint;

(3) a resident has been hospitalized or treated in an emergency room because of conduct alleged in the report of abuse or neglect or other complaint;

(4) A facility owner or employee who has cause to believe that the physical or mental health or welfare of a resident has been or may be adversely affected by abuse, neglect, or exploitation caused by another person must report the abuse, neglect, or exploitation.

(5) Written investigation [written] reports described in subsection (d) of this section must be sent to: HHSC no later than the fifth working day after the initial report [DADS Consumer Rights and Services, P. O. Box 14030, Austin, Texas 78714-9030].

(6) The person reporting must make the telephone report immediately on learning of the alleged abuse, neglect, exploitation, conduct, or conditions. The person must send a written report to DADS Consumer Rights and Services within five days after the telephone report.

(7) The facility must conduct an investigation of the reported acts. The facility must send a written report of the investigation to DADS no later than the fifth working day after the oral report.

(8) As a condition of employment, an employee of a facility must sign a statement that states:

(9) the employee may be criminally liable for failure to report abuses; and

(10) [under the Texas Health and Safety Code, Title 4, §260A.14,] the employee has a cause of action against a facility, its owners or employees [owners or employees] if the employee [he] is suspended, terminated, disciplined, or disciplined against, under the Texas Health and Safety Code, Title 4, §260A.014, as a result of:

(A) reporting to the employee's supervisor, the administrator, HHSC [DADS], or a law enforcement agency a violation of law, including a violation of laws or regulations regarding nursing facilities; or

(B) initiating or cooperating in any investigation or proceeding of a governmental entity relating to care, services, or conditions at the nursing facility.

(11) The statements described in subsection (e) [subsection (e)] of this section must be available for inspection by HHSC [DADS].

(12) A local or state law enforcement agency must be notified of reports described in subsection (b) [subsection (c)] of this section that allege that:

(13) a resident's health or safety is in imminent danger;

(14) a resident has recently died because of conduct alleged in the report of abuse or neglect or other complaint;

(15) a resident has been hospitalized or treated in an emergency room because of conduct alleged in the report of abuse or neglect or other complaint;
(4) a resident has been a victim of any act or attempted act described in the Texas Penal Code, §§21.02, 21.11, 22.011, or 22.021; or

(5) a resident has suffered bodily injury, as that term is defined in the Texas Penal Code, §1.07, because of conduct alleged in the report of abuse or neglect or other complaint.

§19.606. Reporting of Resident Death Information.

(a) All licensed facilities must report [submit] to HHSC the death [the Texas Department of Human Services (DHS) a report of deaths] of any resident [persons residing] in the facility and any resident who is transferred [those persons transferred] from the facility to a hospital and who dies [expire] within 24 hours after transfer.

(b) The facility must submit to HHSC [DHS] a standard HHSC [DHS] form within ten working days [workdays] after the last day of the month in which a resident death occurs. The form must include:

(1) name of deceased;
(2) social security number of the deceased;
(3) date of death; and
(4) name and address of the institution.

(c) These reports are confidential under the Texas Health and Safety Code, §260A.016 [§242.134]; however, a licensed facility [facilities] must make available historical statistics provided to the facility [thesea] by HHSC [DHS] and must provide the statistics, if requested, to an applicant [the applicants] for admission or the applicant's [their] representative.

(d) HHSC [DHS] produces statistical information of official causes of death to determine patterns and trends of incidents of death among the elderly and in specific facilities and makes this information available to the public upon request.

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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Karen Ray
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SUBCHAPTER H. QUALITY OF LIFE

40 TAC §19.701, §19.705

STATUTORY AUTHORITY

The rules are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.


§19.701. Quality of Life.


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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40 TAC §§19.701 - 19.703, 19.706

STATUTORY AUTHORITY

The new sections and amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The new sections and amendments affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

§19.701. Quality of Life.

(a) Each resident must receive, and the facility must provide, the necessary care and services to attain or maintain the highest practicable, physical, mental, and psychosocial well-being consistent with the resident’s comprehensive assessment and care plan.

(1) Based on the comprehensive assessment of a resident and consistent with the resident’s needs and choices, the facility must provide the necessary care and services to ensure that a resident’s abilities in activities of daily living do not diminish unless circumstances of the resident’s clinical condition demonstrate that such diminution was unavoidable.

(2) This includes the facility ensuring that:

(A) a resident is given the appropriate treatment and services to maintain or improve the ability to carry out the activities of daily living, including those specified in subsection (b) of this section;

(B) a resident who is unable to carry out activities of daily living receives the necessary services to maintain good nutrition, grooming, and personal and oral hygiene; and

(C) personnel provide basic life support, including CPR, to a resident requiring such emergency care prior to the arrival of emergency medical personnel and subject to related physician orders and the resident’s advance directives.

(b) The facility must provide care and services in accordance with subsection (a) of this section for the following activities of daily living:

(1) hygiene - bathing, dressing, grooming, and oral care;

(2) mobility - transfer and ambulation, including walking;

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§19.702. Activities.

(a) The facility must provide, based on the comprehensive assessment and care plan and the preferences of each resident, an ongoing program to support a resident in the resident's choice of activities, both facility-sponsored group and individual activities and independent activities, designed to meet the interests of and support, in accordance with the comprehensive assessment, the resident by the professional, physical, mental, and psychosocial well-being of each resident, encouraging both independence and interaction in the community.

(b) The activities program must be directed by a qualified professional who:

[(4)] is a qualified therapeutic recreation specialist or an activities professional who [46]:

[(A) licensed or registered, if applicable, by the state in which practicing and if]

(1) [(B)] is eligible for certification as a therapeutic recreation specialist, [therapeutic recreation assistant, or as an activities professional by a recognized accrediting body, such as the National Council for Therapeutic Recreation Certification, or on a state level comparable to the National Council, as of October 1, 1990; [or]

(2) has two years of experience in a social or recreational program within the last five years, one of which was full-time in a therapeutic [patient] activities program in a health care setting; [or]

(3) is a qualified occupational therapist or occupational therapy assistant; or

(4) has completed an activity director training course approved by a recognized certifying body [any state. The Texas Department of Human Services (DHS) does not review or approve any courses. DHS accepts training courses approved by a recognized certifying body], such as the National Certification Council for Activity Professionals, National Council for Therapeutic Recreation Certification, [the National Therapeutic Recreation Society] or the Consortium for Therapeutic Recreation/Activities Certification, Inc.

(c) An activity director [Activity directors] must complete eight hours of approved continuing education or equivalent continuing education units each year. Approval bodies include organizations or associations recognized as such by certified therapeutic recreation specialists or certified activity professionals or registered occupational therapists.

(d) The facility must ensure that activities assessment and care planning are completed and reviewed or updated as provided in §19.801 and §19.802 of this chapter [title] (relating to Resident Assessment and Comprehensive Person-Centered Care Planning [Plans]). If indicated by the RAI or [Resident Assessment Instrument (RAI) and/or the resident's need, an in-depth assessment is required.

(e) Toys and recreational equipment for a pediatric resident [residents] must be appropriate for the size, age, and developmental level of the resident [residents].

§19.703. Social Services General Requirements.

(a) The facility must provide medically-related social services to attain the highest practicable physical, mental, or psychosocial well-being of each resident. [See also §19.901 of this title (relating to Quality of Care) for information concerning psychosocial functioning.]

(1) A facility with more than 120 beds must employ a qualified social worker on a full-time basis.

(2) A facility of 120 beds or less must employ or contract with a qualified social worker (or in lieu thereof, a social worker who is licensed by the Texas State Board of Social Worker [Work] Examiners, and who meets the requirements of subsection (b)(2) of this section) to provide social services a sufficient amount of time to meet the needs of the residents.

(b) A qualified social worker is an individual who is licensed, including a temporary or provisional license, by the Texas State Board of Social Worker [Work] Examiners as prescribed by Texas Occupations Code, Chapter 505 [Chapter 50 of the Human Resources Code], and who has at least:

(1) a bachelor's degree in social work, or a bachelor's degree in a human services field, including sociology, gerontology, special education, rehabilitation counseling, and psychology; and

(2) one year of supervised social work experience in a health care setting working directly with individuals.


(a) A resident has the right to organize and participate in resident groups in a facility.

(b) A facility must assist a resident [residents] who requires assistance to attend resident group meetings.

(c) A resident [residents' family] has the right to have a family member or other resident representative meet in the facility with the family or resident representative [families] of other residents in the facility and organize a family council. A family council may:

(1) make recommendations to the facility proposing policy and operational decisions affecting resident care and quality of life; and

(2) promote educational programs and projects intended to promote the health and happiness of residents.

(d) If a resident group or family council exists, a facility must:

(1) listen to and consider the views of a resident group or family council and act promptly upon the grievances and recommendations of residents and families concerning issues of [proposed policy and operational decisions affecting] resident care and life in the facility;

(2) be able to demonstrate responses to the grievances and recommendations of the resident group or family council and the rationale for such responses;

(3) [2] provide a resident group or family council with private space and take reasonable steps with the approval of the group, to make residents and family members aware of upcoming meetings in a timely manner;

(4) [2] provide a designated staff person who is approved by the resident or family group and the facility and who is responsible for providing assistance and responding to written requests that result from resident group and family council meetings; and

(5) [4] allow staff or visitors to attend meetings only at the resident group's or family council's invitation.
(e) If a family council exists, a facility must:

(1) upon written request, allow the family council to meet in a common meeting room of the facility at least once a month during hours mutually agreed upon by the family council and the facility;

(2) provide the family council with adequate space on a prominent bulletin board to post notices and other information;

(3) designate a staff person to act as the family council's liaison to the facility;

(4) respond in writing to written requests by the family council within five working days;

(5) include information about the existence of the family council in a mailing that occurs at least semiannually; and

(6) permit a representative of the family council to discuss concerns with an individual conducting an inspection or survey of the facility.

(7) allow a resident to participate in a family council.

(f) Unless the resident objects, a family council member may authorize, in writing, another member to visit and observe a resident represented by the authorizing member.

(g) A facility must not limit the rights of a resident, a resident's family member, or a family council member to meet with an outside person, including:

(1) an employee of the facility during the employee's non-working hours if the employee agrees; or

(2) a member of a nonprofit or government organization; or

(3) another resident representative.

(h) A facility must not:

(1) terminate an existing family council;

(2) prevent or interfere with the family council from receiving outside correspondence addressed to the family council or open family council mail; or

(3) willfully interfere with the formation, maintenance, or operation of a family council, including interfering by:

(A) denying a family council the opportunity to accept help from an outside person;

(B) discriminating or retaliating against a family council participant; or

(C) willfully scheduling events in conflict with previously scheduled family council meetings, if the facility has other scheduling options.

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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SUBCHAPTER I. RESIDENT ASSESSMENT

40 TAC §§19.801 - 19.803

STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.


§19.801. Resident Assessment.

A facility must conduct, initially and periodically, a comprehensive, accurate, standardized, reproducible assessment of a resident's functional capacity. The facility must electronically transmit to CMS resident-entry-and-death-in-facility tracking records required by the RAI; and OBRA assessments, including admission, annual, quarterly, significant change, significant correction, and discharge assessments.

(1) Admission orders. At the time a resident is admitted, the facility must have physician orders for the resident's immediate care.

(2) Comprehensive assessments.

(A) A facility must make a comprehensive assessment of a resident's needs, strengths, goals, life history, and preferences, using the current RAI process, including the MDS, Care Area Assessment process, and the Utilization Guidelines specified by HHSC [DADS] and approved by CMS. The current RAI process is found in the MDS 3.0 manual posted by CMS on http://www.cms.gov.

(B) A facility must conduct an additional assessment and document the summary information if the MDS indicates an additional assessment on a care area is required.

(C) A facility must conduct a comprehensive assessment of a resident as follows:

(i) within 14 calendar days after admission, excluding readmissions in which there is no significant change in the resident's physical or mental condition. For purposes of this section, "readmission" means a return to the facility following a temporary absence for hospitalization or for therapeutic leave; and

(ii) within 14 calendar days after the facility determines, or should have determined, that there has been a significant change in the resident's physical or mental condition. For purposes of this section, a "significant change" means a major decline or improvement in the resident's status that will not normally resolve itself without further intervention by staff or by implementing standard disease-related clinical interventions, that has an impact on more than one area of the resident's health status, and requires interdisciplinary review or revision of the care plan, or both; and

(iii) not less often than once every 12 months.

(3) Quarterly review assessment. A facility must assess a resident using the quarterly review instrument specified by HHSC [DADS] and approved by CMS not less frequently than once every three months.

(4) Use. A facility must maintain all resident assessments completed within the previous 15 months in the resident's active record and use the results of the assessments to develop, review, and revise the
resident's comprehensive care plan [of care] as specified in §19.802 of this subchapter (relating to Comprehensive Person-Centered Care Planning [Plans]).

(5) PASRR. A Medicaid-certified facility must:

(A) coordinate assessments with the PASRR [PASRR] process in 42 CFR, Part 483, Subpart C to the maximum extent practicable to avoid duplicative testing and effort, including:

(i) incorporating the recommendations from the PASRR level II determination and the PASRR evaluation report into a resident's assessment, care planning, and transitions of care; and

(ii) referring a level II resident and a resident suspected of having mental illness, an intellectual disability, or a developmental disability for level II resident review upon a significant change in status assessment; and

(B) promptly report a significant change in the mental or physical condition of a resident by submitting a MDS Significant Change in Status Assessment Form in the LTC Online Portal, in accordance with §19.2704(i)(12) of this chapter (Nursing Facility Responsibilities Related to PASRR).

(6) Automated data processing requirement.

(A) A facility must complete an MDS for a resident. The facility must enter MDS data into the facility's assessment software within 7 days after completing the MDS and electronically transmit the MDS data to CMS within 14 days after completing the MDS.

(B) A facility must complete the Long Term Care Medicaid Information form on an OBRA assessment that is submitted to the state Medicaid claims system for a Medicaid recipient or Medicaid applicant according to HHSC [DADS] instructions located on the Texas Medicaid Healthcare Partnership Long Term Care Portal at http://www.tmhp.com.

(C) Data format. The facility must transmit MDS data to CMS in the format specified by CMS and HHSC [DADS].

(D) Information concerning a resident is confidential and a facility must not release information concerning a resident except as allowed by this chapter, including §19.407 of this chapter (relating to Privacy and Confidentiality) and §19.1910(d) of this chapter (relating to Clinical Records).

(7) Accuracy of assessments. The assessment must accurately reflect the resident's status.

(8) Coordination. A registered nurse must conduct or coordinate each assessment with the appropriate participation of health professionals.

(9) Certification.

(A) A registered nurse must sign and certify that the assessment is completed.

(B) Each individual who completes a portion of the assessment must sign and certify the accuracy of that portion of the assessment.

(10) Penalty for falsification under Medicare and Medicaid.

(A) An individual who willfully and knowingly:

(i) certifies a material and false statement in a resident assessment is subject to a civil money penalty of not more than $1,000 for each assessment; or

(ii) causes another individual to certify a material and false statement in a resident assessment is subject to a civil money penalty of not more than $5,000 for each assessment.

(B) Clinical disagreement does not constitute a material and false statement.

(11) Use of independent assessors in Medicaid-certified facilities and dually certified facilities. If HHSC [DADS] determines, under a certification survey or otherwise, that there has been a knowing and willful certification of false statements under paragraph (10) of this section, HHSC [DADS] may require (for a period specified by HHSC [DADS]) individuals who are independent of the facility and who are approved by HHSC [DADS] to conduct and certify the resident assessments under this section.

(12) Pediatric resident assessment.

(A) A facility must ensure that a pediatric assessment:

(i) is performed by a licensed health professional experienced in the care and assessment of children;

(ii) includes parents or guardians in the assessment process; and

(iii) includes a discussion with a parent or guardian about the potential for community transition.

(B) The clinical record of a child must include a record of immunizations, blood screening for lead, and developmental assessment. The local school district's developmental assessment may be used if available. [See §19.1934 of this chapter (relating to Educational Requirements for Persons Under Age 22).]

(C) A licensed health professional must assess a child's functional status in relation to pediatric developmental levels, rather than adult developmental levels.

(D) A facility must ensure pediatric residents receive services in accordance with the guidelines established by the Department of State Health Services' Texas Health Steps (THSteps). For Medicaid-eligible pediatric residents between the ages of six months and six years, blood screening for lead must be done in accordance with THSteps guidelines.

§19.802. Comprehensive Person-Centered Care Planning [Plans].

(a) Baseline care plan.

(1) The facility must develop and implement a baseline care plan for each resident that includes the instructions needed to provide effective and person-centered care of the resident that meet professional standards of quality care. The baseline care plan must:

(A) be developed within 48 hours of a resident's admission;

(B) include the minimum healthcare information necessary to properly care for a resident, including:

(i) initial goals based on admission orders;

(ii) physician orders;

(iii) dietary orders;

(iv) therapy services;

(v) social services; and

(vi) PASRR recommendation, if applicable;

(2) The facility may develop a comprehensive care plan in place of the baseline care plan if the comprehensive care plan:
(A) is developed within 48 hours of the resident's admission; and
(B) meets the requirements set forth in subsections (b) - (g) of this section, except subsection (c)(1) of this section.

(3) The facility must provide the resident and the resident representative a summary of the baseline care plan that includes:
(A) the initial goals of the resident;
(B) a summary of the resident's medications and dietary instructions;
(C) any services and treatments to be administered by the facility and personnel acting on behalf of the facility; and
(D) any updated information based on the details of the comprehensive care plan, as necessary.

(b) [1] A facility must develop a comprehensive person-centered care plan for each resident, consistent with the resident's rights, that includes measurable short-term and long-term objectives and timeframes [timetables] to meet a resident's medical, nursing, mental, and psychosocial needs that are identified in the comprehensive assessment. If a child is admitted to the facility, the comprehensive care plan must be based on the child's individual needs. The comprehensive care plan must describe the following:
(1) the services that are to be furnished to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being as required under §19.701 of this chapter (relating to Quality of Life) and §19.901 of this chapter [title] (relating to Quality of Care); and
(2) any services that would otherwise be required under §19.701 of this chapter and §19.901 of this chapter [title] but are not provided due to the resident's exercise of rights, including the right to refuse treatment under §19.403(i) [§19.402(i)] of this chapter [title] (relating to Notice [Exercise] of Rights and Services);[1]
(3) any nursing facility specialized services or nursing facility PASRR support activities the nursing facility will provide as a result of PASRR recommendations, in accordance with Subchapter BB of this chapter (relating to Nursing Facility Responsibilities Related To Preadmission Screening And Resident Review (PASRR)); and
(4) in consultation with the resident and resident representative:
(A) the resident's goals for admission and desired outcomes;
(B) the resident's preference and potential for future discharge, whether the resident's desire to return to the community was assessed, and any referrals to local contact agencies or other appropriate entities; and
(C) discharge plans in the comprehensive care plan as appropriate, in accordance with §19.803 of this subchapter (relating to Discharge Summary (Discharge Plan of Care)).

(c) [1] The comprehensive care plan must be:
(1) developed within seven days after completion of the comprehensive assessment;
(2) prepared by an interdisciplinary team that includes:
(A) the attending physician;[2]
(B) a registered nurse with responsibility for the resident;[2, and]
(C) a nurse aide with responsibility for the resident;
(D) the qualified dietitian or director of food and nutrition services;
(E) other appropriate staff in disciplines as determined by the resident's needs or as requested by the resident;[3] and [5]
(F) to the extent practicable, [with] the participation of the resident and the resident's family or legal representative;
(3) periodically reviewed and revised by a team of qualified persons after each assessment, including both the comprehensive and quarterly review assessments; and
(4) for a resident under 22 years of age, annually reviewed at a comprehensive care plan meeting between the facility and the resident's LAR as defined in §19.805(a)(5) of this subchapter [title] (relating to Permanency Planning for a Resident Under 22 Years of Age), which includes a review of:
(A) the LAR's contact information as required by §19.805(b)(4) [§19.805(b)(3)] of this subchapter [title];
(B) the resident's comprehensive assessment;
(C) the resident's educational status; and
(D) the resident's permanency plan.

(d) Regarding subsection (c)(2)(F) of this section, an explanation must be included in a resident's clinical record if the participation of the resident and the resident representative is determined not practicable for the development of the resident's comprehensive care plan.

(e) [1] A comprehensive care plan must include:
(1) for a resident under 18 years of age, the activities, supports, and services that, when provided or facilitated by the facility, will enable the resident to live with a family; or
(2) for a resident 18-22 years of age, the activities, supports, and services that, when provided or facilitated by the facility, will result in the resident having a consistent and nurturing environment in the least restrictive setting, as defined by the resident and LAR as defined in §19.805(a)(5) of this subchapter [title].

(f) [1] A comprehensive care plan may include a palliative plan of care. This plan may be developed only at the request of the resident, surrogate decision maker or legal representative for residents with terminal conditions, end stage diseases or other conditions for which curative medical interventions are not appropriate. The plan of care must have goals that focus on maintaining a safe, comfortable and supportive environment in providing care to a resident at the end of life.

(g) [1] For a resident under 22 years of age, the facility must provide written notice to the LAR, as defined in §19.805(a)(5) of this subchapter [title], of a meeting to conduct an annual review of the resident's comprehensive care plan no later than 21 days before the meeting date and request a response from the LAR.

(h) [1] The services provided or arranged by the facility must:
(1) meet professional standards of quality; [and]
(2) be provided by qualified persons in accordance with each resident's written care plan; and [of care.]
(3) effective November 28, 2019, be culturally-competent and trauma-informed.

(i) [1] The comprehensive care plan must be made available to all direct care staff.
§19.803. Discharge Summary (Discharge Plan of Care).

(a) Discharge planning. The facility must develop and implement an effective discharge planning process.

(1) The facility's discharge planning process must:

(A) ensure that the discharge needs of each resident are identified and result in the development of a discharge plan for each resident;

(B) include regular re-evaluation of a resident to identify changes that require modification of the discharge plan and update the discharge plan to reflect these changes;

(C) involve the interdisciplinary team in the ongoing process of developing the discharge plan;

(D) consider caregiver or support person availability and the resident’s or caregiver's or support person’s capacity and capability to perform required care, as part of the identification of discharge needs;

(E) involve the resident and resident representative in the development of the discharge plan and inform the resident and resident representative of the final plan;

(F) address the resident’s goals of care and treatment preferences; and

(G) document that a resident has been asked about their interest in receiving information regarding returning to the community.

(i) If the resident indicates an interest in returning to the community, the facility must document any referrals to local contact agencies or other appropriate entities made for this purpose.

(ii) Facilities must update a resident's comprehensive care plan and discharge plan as appropriate, in response to information received from referrals to local contact agencies or other appropriate entities.

(iii) If discharge to the community is determined to not be feasible, the facility must document who made the determination and why.

(2) The evaluation of the resident's discharge needs and discharge plan must be completed on a timely basis and documented in the resident's clinical record.

(3) The results of the evaluation of the resident's discharge needs and discharge plan must be discussed with the resident or the resident representative.

(b) [(a)] When a facility anticipates [Before or at the time of] a resident's discharge, the facility must develop [give the resident] a discharge summary that includes:

(1) a recapitulation of the overall course of the resident’s stay that includes diagnoses, course of illness, treatment, or therapy and pertinent lab, radiology, and consultation results, a final summary of the resident's status;

(2) reconciliation or all pre-discharge medications with the resident's post-discharge medications both prescribed and over-the-counter;

(3) [(2)] a statement notifying a resident granted permanent medical necessity (PMN) under the Medicaid program that:

(A) PMN status continues after discharge, unless the resident is discharged to home;

(B) PMN status expires 30 consecutive days after the resident is discharged to home; and

(C) a new medical necessity determination is required if the resident applies to be admitted to a nursing facility under the Medicaid program more than 30 consecutive days after the resident moves home from a nursing facility; and

(4) [(3)] a post-discharge care plan [of care], developed with the participation of the resident and a resident representative that,[; and a family representative, responsible party or legal guardian, that

(A) will assist the resident to adjust to the [his] new living environment; and

(B) indicates where the resident plans to reside and arrangements that have been made for follow-up care and any post-discharge medical and non-medical services.

(c) [(b)] The facility discharge summary must be available for release to authorized persons, facilities or agencies with the consent of the resident or resident representative [as required by subsection (a) of this section when a resident is being discharged home; to another nursing facility; a Medicare skilled nursing facility; or another residential facility, such as a board and care home, an intermediate care facility for individuals with an intellectual disability or related conditions, or an assisted living facility].

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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Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 13, 2019
For further information, please call: (210) 619-8292

SUBCHAPTER J. QUALITY OF CARE

40 TAC §19.901, §19.904
STATUTORY AUTHORITY

The new section and amendment are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The new section and amendment affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

§19.901. Quality of Care.

Based on the comprehensive assessment of a resident, the facility must ensure that a resident receives treatment and care in accordance with professional standards of practice, the comprehensive person-centered care plan, and the resident's choices, including the following: [Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, as defined by and in accordance with the comprehensive assessment and plan of care. If children are ad-
mitted to the facility, care and services must be provided to meet their unique medical and developmental needs.

[(1) Activities of daily living. Based on the comprehensive assessment of the resident, the facility must ensure that:]

[(A) a resident’s abilities in activities of daily living do not diminish unless the circumstances of the individual’s clinical condition demonstrate that diminution is unavoidable. This includes the resident's abilities to:]

[(i) bathe, dress, and groom;]
[(ii) transfer and ambulate;]
[(iii) toilet;
[(iv) eat; and]
[(v) use speech, language, or other functional communication systems;]]

[(B) the resident is given the appropriate treatment and services to maintain or improve his abilities specified in paragraph (1) of this section;]

[(C) a resident who is unable to carry out activities of daily living receives the necessary services to maintain good nutrition, grooming, and personal and oral hygiene.]

(1) [(2)] Vision and hearing. To ensure that a resident receives proper treatment and assistive devices to maintain vision and hearing abilities, the facility must, if necessary, assist the resident:

(A) in making appointments; and

(B) by arranging for transportation to and from the office of a practitioner specializing in the treatment of vision or hearing impairment or the office of a professional specializing in the provision of vision or hearing assistive devices.

(2) [(3)] Skin Integrity.

(A) Pressure ulcers [sores]. Based on the comprehensive assessment of the resident, the facility must ensure that:

[(i) [(A)] a resident receives care, consistent with professional standards of practice, to prevent [who enters the facility without] pressure ulcers and [sores] does not develop pressure ulcers [sores] unless the resident's [his] clinical condition demonstrates that they are unavoidable; and

[(ii) [(B)] a resident with [having] pressure ulcers [sores] receives necessary treatment and services, consistent with professional standards of practice, to promote healing, prevent infection, and prevent new ulcers [sores] from developing.

(B) Foot Care. To ensure that a resident receives proper treatment and care to maintain mobility and good foot health, the facility must:

[(i) provide foot care and treatment, in accordance with professional standards of practice, including to prevent complications from the resident's medical condition; and

[(ii) if necessary, assist the resident in making appointments with a qualified person, and arranging for transportation to and from such appointments.

(3) [(4)] Incontinence [Urinary incontinence].

(A) The facility must ensure that a resident who is continent of bladder and bowel on admission receives services and assistance to maintain continence unless the resident's clinical condition is or becomes such that continence is not possible to maintain.

(B) For a resident with urinary incontinence, based on the comprehensive assessment of the resident, the facility must ensure that:

[(i) [(A)] a resident who enters the facility without an indwelling catheter is not catheterized unless the resident's [his] clinical condition demonstrates that catheterization is necessary; and

[(ii) a resident who enters the facility with an indwelling catheter or subsequently receives one is assessed for removal of the catheter as soon as possible unless the resident's clinical condition demonstrates that catheterization is necessary; and

[(iii) a resident who is incontinent of bladder receives appropriate treatment and services to prevent urinary tract infections and to restore continence to the extent possible.

[(B) a resident who is incontinent of bladder receives appropriate treatment and services to prevent urinary tract infections and to restore as much normal bladder function as possible.]

(C) For a resident with fecal incontinence, based on the resident's comprehensive assessment, the facility must ensure that a resident who is incontinent of bowel receives appropriate treatment and services to restore as much normal bowel function as possible.

(4) Colostomy, urostomy, or ileostomy care. The facility must ensure that a resident who requires colostomy, urostomy, or ileostomy services, receives such care consistent with professional standards of practice, the comprehensive person-centered care plan, and the resident's goals and preferences.

(5) Mobility. The facility must ensure that: [Range of motion. Based on the comprehensive assessment of the resident, the facility must ensure that:]

(A) a resident who enters the facility without a limited range of motion does not experience reduction in range of motion unless the resident's clinical condition demonstrates that a reduction in range of motion is unavoidable; and

(B) a resident with a limited range of motion receives appropriate treatment and services to increase range of motion and [and/or] to prevent further decrease in range of motion; and [and]

(C) a resident with limited mobility receives appropriate services, equipment, and assistance to maintain or improve mobility with the maximum practicable independence unless a reduction in mobility is unavoidable.

(6) Assisted nutrition and hydration. (Includes naso-gastric and gastrostomy tubes, both percutaneous endoscopic gastrostomy and percutaneous endoscopic jejunostomy, and enteral fluids). Based on a resident's comprehensive assessment, the facility must ensure that a resident:

(A) maintains acceptable parameters of nutritional status, such as usual body weight or desirable body weight range and electrolyte balance, unless the resident's clinical condition demonstrates that this is not possible or the resident preferences indicate otherwise;

(B) is offered sufficient fluid intake to maintain proper hydration and health;

(C) is offered a therapeutic diet when there is a nutritional problem and the health care provider orders a therapeutic diet;

(D) who has been able to eat enough alone or with assistance is not fed by enteral methods unless the resident's clinical con-
dition demonstrates that enteral feeding was clinically indicated and
consented to by the resident; and

(E) who is fed by enteral means receives the appropriate
treatment and services to restore, if possible, oral eating skills and
to prevent complications of enteral feeding including aspiration pneu-
monia, diarrhea, vomiting, dehydration, metabolic abnormalities, and
nasal-pharyngeal ulcers.

(7) Parenteral fluids. Parenteral fluids must be adminis-
tered consistent with professional standards of practice and in accor-
dance with physician orders, the comprehensive person-centered care
plan, and the resident's goals and preferences.

(8) Respiratory care, including tracheostomy care and tra-
cheal suctioning. The facility must ensure that a resident who needs
respiratory care, including tracheostomy care and tracheal suctioning,
is provided such care, consistent with professional standards of prac-
tice, the comprehensive person-centered care plan, the resident's goals
and preferences, and §19.802 of this chapter, (relating to Comprehen-
sive Person-Centered Care Planning).

(9) Prostheses. The facility must ensure that a resident who
has a prosthesis is provided care and assistance, consistent with profes-
sional standards of practice, the comprehensive person-centered care
plan, and the resident's goals and preferences, to wear and be able to
use the prosthetic device.

(10) Pain management. The facility must ensure that pain
management is provided to a resident who requires such services, con-
sistent with professional standards of practice, the comprehensive per-
son-centered care plan, and the resident's goals and preferences.

(11) Dialysis. The facility must ensure that a resident who
requires dialysis receives such services, consistent with professional
standards of practice, the comprehensive person-centered care plan,
and the resident's goals and preferences.

(12) Trauma-informed care. Effective November 28, 2019,
the facility must ensure that a resident who is a trauma survivor re-
ceives culturally-competent, trauma-informed care in accordance with
professional standards of practice and accounting for resident's expe-
riences and preferences in order to eliminate or mitigate triggers that
may cause re-traumatization of the resident.

(13) Bed rails. The facility must attempt to use appropriate
alternatives before installing a side or bed rail. If a bed or side rail is
used, the facility must ensure correct installation, use, and maintenance
of bed rails, including the following elements:

(A) assess the resident for risk of entrapment from bed
rails before installation;

(B) review the risks and benefits of bed rails with the
resident or resident representative and obtain informed consent before
installation;

(C) ensure the bed's dimensions are appropriate for the
resident's size and weight; and

(D) follow the manufactures' recommendations and
specifications for installing and maintaining bed rails.

(6) Mental and psychosocial functioning. Based on the
comprehensive assessment of the resident, the facility must ensure
that:

(A) a resident who displays mental or psychosocial ad-
justment difficulty receives appropriate treatment and services to cor-
tect the assessed problem; and

(B) a resident whose assessment does not reveal a men-
tal or psychosocial adjustment difficulty does not display a pattern of
decreased social interaction and/or increased withdrawn, angry, or de-
pressive behaviors, unless his clinical condition demonstrates that such
a pattern is unavoidable.

(7) Naso-gastric tube. Based on the comprehensive as-
essment of the resident, the facility must ensure that:

(A) a resident who has been able to eat enough alone
or with assistance is not fed by naso-gastric tube unless his clinical
condition demonstrates that use of a naso-gastric tube is unavoidable; and

(B) a resident who is fed by a naso-gastric or gastro-
stomy tube receives the appropriate treatment and services to prevent
aspiration pneumonia, diarrhea, vomiting, dehydration, metabolic ab-
normalities, and nasal-pharyngeal ulcers, and to restore, if possible,
normal eating skills.

(14) (8) Accidents. The facility must ensure that:

(A) the resident environment remains as free of acci-
dent hazards as possible; and

(B) each resident receives adequate supervision and as-
sistive devices to prevent accidents.

(9) Nutrition. Based on the comprehensive assessment of
the resident, the facility must ensure that a resident:

(A) maintains acceptable parameters of nutritional sta-
tus, such as body weight and protein levels, unless his clinical condition
demonstrates that this is not possible; and

(B) receives a therapeutic diet when there is a nutri-
tional problem.

(10) Hydration. The facility must ensure that the resident
is provided with sufficient fluid intake to maintain proper hydration and
health.

(11) Special needs. The facility must ensure that residents
receive proper treatment and care for the following special services:

(A) injections;

(B) parenteral or enteral fluids;

(C) colostomy, ureterostomy, or ileostomy care;

(D) tracheostomy care;

(E) tracheal suctioning;

(F) respiratory care;

(G) foot care; and

(H) prostheses.

(12) Unnecessary drugs.

(A) General. Each resident's drug regimen must be
free from unnecessary drugs. An unnecessary drug is any drug when
used:

(ii) in excessive dose (including duplicate drug ther-
    apy); or

(ii) for excessive duration; or

(iii) without adequate monitoring; or

(iv) without adequate indications for its use; or

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in the presence of adverse consequences which indicate the dose should be reduced or discontinued; or

(iii) any combination of the circumstances in clauses (i)-(ii) of this subparagraph.

(13) [13] Antipsychotic drugs. Based on the comprehensive assessment of the resident, the facility must ensure that:

(iv) residents who have not used antipsychotic drugs are not given these drugs unless antipsychotic drug therapy is necessary to treat a specific condition as diagnosed and documented in the clinical record; and

(v) residents who use antipsychotic drugs receive gradual dose reductions, and behavioral interventions, unless clinically contraindicated, in an effort to discontinue use of these drugs.

(14) Medication errors. The facility must ensure that:

(A) it is free of medication error rates of 5.0% or greater; and

(B) residents are free of significant medication errors.

(15) [14] Pediatric care.

(A) Licensed nursing care of children. A facility caring for children must have 24 hour a day on-site licensed nursing staff in numbers sufficient to provide safe care. For any facility with five or more children under 26 pounds, at least one nurse must be assigned solely to the care of those children.

(B) Fewer than five pediatric residents. Facilities with fewer than five pediatric residents must assure that the children's rooms are in close proximity to the nurses' station.

(C) Respiratory care of children.

(i) To facilitate the care of ventilator-dependent children or children with tracheostomies, a facility must group those children in rooms contiguous or in close proximity to each other. An exception to this rule is children who are able to be schooled off-site.

(ii) Facilities must assure that alarms on ventilators, apnea monitors, and any other such equipment uniquely identify the child or the child's room.

(iii) A facility caring for children with tracheostomies requiring daily care (including ventilator-dependent children with tracheostomies) must have 24 hour a day on-site respiratory therapy staff in numbers sufficient to provide a safe ratio of respiratory therapist per these residents. For the purposes of this rule, respiratory therapy staff is defined as a registered respiratory therapist (RRT), a certified respiratory therapy technician (CRT), or a licensed nurse whose primary function is respiratory care.

(I) If the facility cares for nine or more children with tracheostomies requiring daily care (including ventilator-dependent children with tracheostomies), the facility must maintain a ratio of no less than one respiratory therapy staff per nine tracheostomy residents 24 hours a day.

(II) If the facility cares for six or more ventilator dependent children, the facility must:

(a) designate a respiratory therapy supervisor, either on staff or contracted who must be credentialed by the National Board for Respiratory Care (either CRT or RRT).

(b) provide and document that all respiratory therapy staff is trained in the care of children who are ventilator dependent. This training must be reviewed annually.

(-c-) assure that appropriate care, maintenance, and disinfection of all ventilator equipment and accessories occurs.


Each resident must receive and the facility must provide the necessary behavioral health care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and care plan.

(1) The facility must have sufficient staff who provide direct services to a resident with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and maintain the highest practicable mental, and psychosocial well-being of each resident. This is determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with §19.1931 of this chapter (relating to Facility Assessment). These competencies and skills sets include knowledge of and appropriate training and supervision for:

(A) caring for a resident with mental and psychosocial disorders, as well as a resident with a history of trauma or post-traumatic stress disorder, that have been identified in the facility assessment conducted pursuant to §19.1931 of this chapter; and

(B) implementing non-pharmacological interventions.

(2) Based on the comprehensive assessment of a resident, the facility must ensure that:

(A) a resident who displays or is diagnosed with mental disorder or psychosocial adjustment difficulty, or who has a history of trauma or posttraumatic stress disorder, receives appropriate treatment and services to correct the assessed problem or to attain the highest practicable mental and psychosocial well-being;

(B) a resident whose assessment did not reveal or who does not have a diagnosis of a mental or psychosocial adjustment difficulty or a documented history of trauma or post-traumatic stress disorder does not display a pattern of decreased social interaction or increased withdrawn, angry, or depressive behaviors, unless the resident's clinical condition demonstrates that development of such a pattern was unavoidable; and

(C) a resident who displays or is diagnosed with dementia, receives the appropriate treatment and services to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being.

(3) If rehabilitative services such as physical therapy, speech-language pathology, occupational therapy, and rehabilitative services for mental disorders and intellectual disability, are required in the resident's comprehensive care plan, the facility must:

(A) provide the required services, including specialized rehabilitation services as required in §19.802 of this chapter (relating to Comprehensive Person-Centered Care Planning).

(B) obtain the required services from an outside resource in accordance with §19.1906 of this chapter (relating to Use of Outside Resources), from a Medicare or Medicaid provider of specialized rehabilitative services.

(4) The facility must provide medically-related social services to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.
For Earliest Department Filed to HHSC physical, which Health have dent [must demonstrated care as needs, the described resident ing, responding (5)]

Care). [Graph care to nursing provide specific care to mental, §19.1001, §19.1010]

STATUTORY AUTHORITY
The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter. The amendments affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326. §19.1001. Nursing Services.

(a) The facility must have sufficient staff with the appropriate competencies and skill sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident. This is [as ] determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with the facility assessment required at §19.1931 of this chapter (relating to Facility Assessment). Staff who have been instructed and who have demonstrated competence in the care of children must provide nursing [Nursing] services to children [must be provided by staff who have been instructed and have demonstrated competence in the care of children]. Care and services are to be provided as specified in §19.901 of this chapter (relating to Quality of Care).

(1) Sufficient staff.
(A) The facility must provide services by sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans:
   (i) licensed nurses, except when waived under paragraph (5) [(3)] of this subsection; and
   (ii) other nursing personnel, including nurse aides.

(B) The facility must designate a licensed nurse to serve as a charge nurse on each shift, except when waived under paragraph (5) [(3)] of this subsection.

(C) The facility must ensure that licensed nurses have the specific competencies and skill sets necessary to care for a resident's needs, as identified through resident assessments, and described in the care plan.

(D) The facility must provide care that includes assessing, evaluating, planning, and implementing resident care plans and responding to a resident's needs.

(2) Registered nurse.

(A) The facility must use the services of a registered nurse for at least eight consecutive hours a day, seven days a week, except when waived under paragraph [(5) [(3)] or (6) [(4)] of this subsection.

(B) The facility must designate a registered nurse to serve as the director of nursing on a full-time basis, 40 hours per week, except when waived under paragraph [(6) [(4)] of this subsection.

(C) The director of nursing may serve as a charge nurse only when the facility has an average daily occupancy of 60 or fewer residents.

(3) Proficiency of nurse aides. The facility must ensure that nurse aides are able to demonstrate competency in skills and techniques necessary to care for a resident's needs, as identified through resident assessments, and described in the resident's care plan.

(4) Requirements for facility hiring and use of nurse aides.
(A) General rule. A facility must not use any individual working in the facility as a nurse aide for more than four months, on a full-time basis, unless:
   (i) the individual is competent to provide nursing and nursing related services; and
   (ii) the individual:
      (I) has completed a training and competency evaluation program, or a competency evaluation program approved by the state as meeting the requirements of 42 CFR §§483.151-483.154; or
      (II) has been deemed or determined competent as provided in 42 CFR §483.150(a) and (b).

(B) Nonpermanent employees. A facility must not use on a temporary, per diem, leased, or any basis other than a permanent employee any individual who does not meet the requirements in subparagraph (A)(i) and (ii) of this paragraph.

(C) Competency. A facility must not use any individual who has worked less than four months as a nurse aide in that facility unless the individual:
   (i) is a full-time employee in a state-approved training and competency evaluation program;
   (ii) has demonstrated competence through satisfactory participation in a state-approved nurse aide training and competency evaluation program, or competency evaluation program; or
   (iii) has been deemed or determined competent as provided in 42 CFR §483.150(a) and (b).

(D) Registry Verification. Before allowing an individual to serve as a nurse aide, a facility must receive registry verification that the individual has met competency evaluation requirements and is not designated in the registry as having a finding concerning abuse, neglect or mistreatment of a resident, or misappropriation of a resident's property, unless:
   (i) the individual is a full-time employee in a training and competency evaluation program approved by the state; or
   (ii) the individual can prove that the individual has recently successfully completed a training and competency evaluation program, or competency evaluation program approved by the state and has not yet been included in the registry. A facility must follow up to ensure that such an individual actually becomes registered.
Multi-state registry verification. Before allowing an individual to serve as a nurse aide, a facility must seek information from every state registry, established under §1819(c)(2)(A) or §1919(c)(2)(A) of the Social Security Act, that the facility believes will include information about the individual.

Required retraining. If, since an individual's most recent completion of a training and competency evaluation program, there has been a continuous period of 24 consecutive months during none of which the individual provided nursing or nursing-related services for monetary compensation, the individual must complete a new training and competency evaluation program or a new competency evaluation program.

Regular in-service education. The facility must complete a performance review of every nurse aide at least once every 12 months, and must provide regular in-service education based on the outcome of these reviews. The in-service training must:

(i) be sufficient to ensure the continuing competence of a nurse aide, but must be no less than 12 hours per year;

(ii) address areas of weakness as determined in nurse aides' performance reviews and facility assessment at §19.1931 of this chapter, and may address the special needs of a resident as determined by the facility staff;

(iii) for a nurse aide providing services to an individual with cognitive impairments, address the care of the cognitively impaired; and

(iv) include dementia management training and resident abuse prevention training.

The facility must comply with the nurse aide training and registry rules found in Chapter 94 of this title (relating to Nurse Aides).

(5) [44] Waiver of requirement to provide licensed nurses on a 24-hour basis.

(A) To the extent that a facility is unable to meet the requirements of paragraphs (1)(B) and (2)(A) of this subsection, the state may waive these requirements with respect to the facility, if:

(i) the facility demonstrates to the satisfaction of HHSC that the facility has been unable, despite diligent efforts (including offering wages at the community prevailing rate for nursing facilities), to recruit appropriate personnel;

(ii) HHSC determines that a waiver of the requirement will not endanger the health or safety of individuals staying in the facility;

(iii) the state finds that, for any periods in which licensed nursing services are not available, a registered nurse or a physician is obligated to respond immediately to telephone calls from the facility; and

(iv) the waivered facility has a full-time registered or licensed vocational nurse on the day shift seven days a week. For purposes of this requirement, the starting time for the day shift must be between 6 a.m. and 9 a.m. The facility must specify in writing the schedule that it follows.

(B) A waiver granted under the conditions listed in this paragraph is subject to annual state review.

(C) In granting or renewing a waiver, a facility may be required by the state to use other qualified, licensed personnel.

(D) The state agency granting a waiver of these requirements provides notice of the waiver to the State Ombudsman and the protection and advocacy systems [system] in the state for individuals with mental illness established under the Protection and Advocacy for Mentally Ill Individuals Act (42 USC Chapter 114, Subchapter I) and [or] individuals with intellectual or developmental disabilities established under the Developmental Disabilities Assistance and Bill of Rights Act (42 USC Chapter 144, Subchapter I, Part C).

(E) The facility that is granted a waiver by the state notifies residents of the facility and the resident representatives [for, when appropriate, the guardians or legal representatives of the residents and members of their immediate families] of the waiver.

(6) [44] Waiver of the requirement to provide services of a registered nurse for more than 40 hours a week in a Medicare skilled nursing facility (SNF).

(A) The secretary of the U.S. Department of Health and Human Services (secretary) may waive the requirement that a Medicare SNF provide the services of a registered nurse for more than 40 hours a week, including a director of nursing specified in paragraph (2) of this subsection, if the secretary finds that:

(i) the facility is located in a rural area and the supply of Medicare SNF services in the area is not sufficient to meet the needs of individuals residing in the area;

(ii) the facility has one full-time registered nurse who is regularly on duty at the facility 40 hours a week; and

(iii) the facility either has:

(I) only residents whose physicians have indicated (through physician's orders or admission notes) that they do not require the services of a registered nurse or a physician for a 48-hour period; or

(II) made arrangements for a registered nurse or a physician to spend time at the facility, as determined necessary by the physician, to provide necessary skilled nursing services on days when the regular full-time registered nurse is not on duty.

(B) The secretary provides notice of the waiver to the State Ombudsman and the protection and advocacy systems [system] in the state for individuals with mental illness established under the Protection and Advocacy for Mentally Ill Individuals Act (42 USC Chapter 114, Subchapter I) and [or] individuals with intellectual or developmental disabilities established under the Developmental Disabilities Assistance and Bill of Rights Act (42 USC Chapter 144, Subchapter I, Part C).

(C) The SNF that is granted a waiver [by the state] notifies residents of the facility and the resident representatives [for, when appropriate, the guardians or legal representatives of the residents and members of their immediate families] of the waiver.

(D) A waiver of the registered nurse requirement under subparagraph (A) of this paragraph is subject to annual renewal by the secretary.

(7) [44] Request for waiver concerning staffing levels. The facility must request a waiver through the local HHSC Regulatory Services Division, in writing, at any time the administrator determines that staffing will fall, or has fallen, below that required in paragraphs (1) and (2) of this subsection for a period of 30 days or more out of any 45 days.

(A) The following information must be included in the request [request/notification]:
(i) beginning date when facility was or is unable to meet staffing requirements;
(ii) type waiver requested (24-hour licensed nurse or seven-day-per-week R. N.);
(iii) projected number of hours per month staffing reduced for 24-hour licensed nurse waiver or seven-day-per-week R.N. waiver; and
(iv) staffing adjustments made due to inability to meet staffing requirements.

(B) Waivers for licensed-only or certified facilities will be granted by HHSC Regulatory Services Division staff. Waivers for a Medicare SNF receive final approval from the CMS [Centers for Medicare and Medicaid Services].

(C) If a facility, after requesting a waiver, is later able to meet the staffing requirements of paragraphs (1) and (2) of this subsection, HHSC [Long Term Care] Regulatory Services Division staff must be notified, in writing, of the effective date that staffing meets requirements.

(D) Verification that the facility appropriately made a request and notification will be done at the time of survey.

(E) Amounts paid to Medicaid-certified facilities in the per diem payment to meet the staffing requirements of paragraphs (1) and (2) of this subsection may be adjusted if staffing requirements are not met.

(8) [66] Duration of waiver. Approved waivers are valid throughout the facility licensure or certification period, unless approval is withdrawn. During the relicensure or recertification survey, the determination is made for approval or denial for the next facility licensure or certification period if a waiver continues to be necessary. The facility requests a redetermination for a waiver from HHSC [Long Term Care] Regulatory Services Division staff at the time the survey is scheduled. At other times if a request is made, HHSC staff may schedule a visit for waiver determination.

(9) [67] Requirements for waiver approval. To be approved for a waiver, the nursing facility must meet all of the requirements stated in this subsection and the requirements specified throughout this chapter. In some instances, the survey agency may require additional conditions or arrangements such as:

(A) an additional licensed vocational nurse on day-shift duty when the registered nurse is absent;
(B) modification of nursing services operations; and
(C) modification of the physical environment relating to nursing services.

(10) [68] Denial or withdrawal of a waiver. Denial or withdrawal of a waiver may be made at any time if any of the following conditions exist:

(A) requirements for a waiver are not met on a continuing basis;
(B) the quality of resident care is not acceptable; or
(C) justified complaints are found in areas affecting resident care.

(11) [69] Requirement that SNFs be in a rural area. A SNF (Medicare) must be in a rural area for waiver consideration, as specified in paragraph (6) [64] of this subsection. A rural area is any area outside the boundaries of a standard metropolitan statistical area. Rural areas are defined and designated by the federal Office of Management and Budget; are determined by population, economic, and social requirements; and are subject to revisions.

(b) Nurse staffing information.

(1) Data requirements. The facility must post the following information:

(A) on a daily basis:
   (i) the facility name;
   (ii) the current date;
   (iii) the resident census; and
   (iv) the specific shifts for the day; and
(B) at the beginning of each shift, the total number of hours and actual time of day to be worked by the following licensed and unlicensed nursing staff, including relief personnel directly responsible for resident care:
   (i) RNs;
   (ii) LVNs; and
   (iii) CNAs.

(2) Posting requirements. The nursing facility must post the data described in paragraph (1) of this subsection:

(A) in a clear and readable format; and
(B) in a prominent place readily accessible to residents and visitors.

(3) Public access to posted nurse staffing data. The facility must, upon oral or written request, make copies of nurse staffing data available to the public for review at a cost not to exceed the community standard rate.

(4) Facility data retention requirements. The facility must maintain the posted daily nurse staffing data for the period of time specified by written facility policy or for at least two years following the last day in the schedule, whichever is longer.


(a) A licensed [Licensed] nurse [Nurse] must practice within the constraints of applicable state laws and regulations governing their practice, including the Nurse Practice Act, and must follow the guidelines contained in the facility's written policies and procedures.

(b) A nurse [Nurses] must enter, or approve and sign, nurses' notes in the following instances:

(1) at least monthly; and
(2) at the time of any physical complaints, accidents, incidents, and change in condition or diagnosis, and progress. All of these situations must be promptly recorded as exceptions and included in the clinical record.

(c) If permitted by written policies of the nursing facility, an RN or a physician's assistant may determine and pronounce a resident dead unless a resident is being supported by artificial means that preclude a determination that the resident's spontaneous respiratory and circulatory functions have ceased. The facility's nursing staff and the medical staff or consultant must have jointly developed and approved the policies. The policies must include the following requirements:

(1) The apparent death of a resident must be reported immediately to the attending physician, relatives, and any guardian or legal representatives.
(2) The body of a deceased resident must not be removed from the facility without a physician's or registered nurse's authorization. Telephone authorization is acceptable, if not in conflict with local regulations. Authorization by a justice of the peace, acting as a coroner, is sufficient when the attending or consulting physician or registered nurse is not available.

(3) A death that involves trauma, or unusual or suspicious circumstances, must be reported immediately, in accordance with local regulations, and to HHSC [DADS], in accordance with §19.602(g)(2) [§19.602(e)(2)] of this chapter (relating to Incidents of Abuse, [and] Neglect, and Exploitation Reportable to the Texas Health and Human Services Commission [Department of Aging and Disability (DADS)] and Law Enforcement Agencies by Facilities). Deaths must also be reported to HHSC [DADS] monthly, in accordance with §19.606 of this chapter (relating to Reporting of Resident Death Information).

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

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Karen Ray
Chief Counsel
Department of Aging and Disability Services
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SUBCHAPTER L. FOOD AND NUTRITION SERVICES

STATUTORY AUTHORITY

The new sections and amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The new sections and amendments affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

§19.1101. Food and Nutrition Services [Dietary Service].

The facility must provide each resident with a nourishing, palatable, well-balanced diet that meets each resident's daily nutritional and special dietary needs, taking into consideration the preferences of each resident.

§19.1102. Staffing.

The facility must employ sufficient staff with the appropriate competencies and skill sets to carry out the functions of the food and nutrition services, taking into consideration resident assessments, individual plans of care, and the number, acuity, and diagnoses of the facility's resident population in accordance with the facility assessment required at §19.1931 of this chapter (relating to Facility Assessment). This includes:

(1) a qualified dietitian, either full-time, part-time, or on a consultant basis. A qualified dietitian:

(A) holds a bachelor's or higher degree granted by a regionally accredited college or university in the United States, or an equivalent foreign degree, with completion of the academic requirements of a program in nutrition or dietetics accredited by an appropriate national accreditation organization recognized for this purpose;

(B) has completed at least 900 hours of supervised dietetic practice under the supervision of a registered dietitian or nutrition professional; and

(C) is licensed as a dietitian by the state of Texas;

(2) a dietitian hired or contracted with before November 28, 2016, that does not meet the requirements in paragraph (1)(A) - (C) of this section must:

(A) be either:

(i) registered by the Commission on Dietetic Registration or:

(ii) licensed, or provisionally licensed, by the Texas Department of Licensing and Regulation with at least one year of supervisory experience in dietetic service of a health care facility; and

(B) meet the requirements in paragraph (1)(A) - (C) of this section by November 28, 2021;

(3) if a qualified dietitian is not employed full-time, the facility must designate a person to serve as the director of food and nutrition services who receives frequent scheduled consultations from a qualified dietitian and who:

(A) is a certified dietary manager;

(B) is a certified food service manager;

(C) has similar national certification for food service management and safety from a national certifying body; or

(D) has an associate's or higher degree in food service management or in hospitality, if the course study includes food service or restaurant management, from an accredited institution of higher learning;

(4) a director of food and nutrition services who is not a qualified dietitian and does not meet the requirements in paragraph (3)(A) - (D) of this section, and who was designated before November 28, 2016, must:

(A) be at least:

(i) an associate-in-arts graduate in nutrition and food service management;

(ii) a graduate of a dietetic technician or dietetic assistant training program approved by the Academy of Nutrition and Dietetics or the Association of Nutrition & Foodservice Professionals;

(iii) a person who has completed a state-agency-approved 90-hour course in food service supervision; or

(iv) a person who has training and experience in food service supervision and management in a military service equivalent in content to the programs in paragraph (3) of this section or clauses (i) - (iii) of this subparagraph and has had the person's training credentials evaluated and approved by the nutrition program specialist of the HHSC Regulatory Services Division; and

(B) meet one of the requirements in paragraph (3)(A) - (D) of this subsection by November 28, 2021.
(5) Support staff. The facility must provide sufficient support personnel to carry out the functions of the food and nutrition service.

§19.1104. Dietary Consultant Requirements.

(a) The facility must ensure a qualified dietitian is available as frequently and for such time as is necessary to assure each resident a diet that meets the daily nutritional and special dietary needs of each resident, based upon the acuity and clinical needs of the resident. The facility must ensure that monthly dietary consultant hours are provided, at a minimum, as follows:

(1) facility population: 60 residents or under - eight hours;
(2) facility population: each additional 30 residents or fraction thereof - additional four hours.

(b) To meet the consultant-hour requirement, time is accrued and counted exactly as rendered.

(c) The qualified dietitian must be a part of the interdisciplinary team conducting assessment and care planning where indicated by the individual resident's needs.

(d) The facility must outline consultant services in a signed contract. This requirement does not apply to a facility that employs a qualified dietitian on the facility's [their] staff.


(a) Menus must:

(1) meet the nutritional needs of residents in accordance with established national guidelines [the recommended dietary allowances of the Food and Nutrition Board of the National Research Council, National Academy of Sciences];
(2) be prepared at least one week in advance;
(3) be written for each type of diet ordered in the facility, in accordance with the facility's diet manual;
(4) be written or completely evaluated for nutritional adequacy by the facility's [qualified] dietitian [or consultant dietitian];
(5) vary from week to week, taking the general age-group of residents into consideration; [and]
(6) be followed unless [Any] substitutions are [must be] documented as required in subsection (d) of this section [7];
(7) reflect, based on a facility's reasonable effort, the religious, cultural, and ethnic needs of the resident population, as well as input received from residents and resident groups; and
(8) be updated periodically.

(b) A qualified dietitian may accept diet orders and changes from the physician.

(c) The facility must ensure that a current diet manual, approved by the qualified dietitian [facility dietitian or the consultant dietitian], is readily available to dietary service personnel and the supervisor of nursing service. To be current, the diet manual must be more than five years old.

(d) The facility must retain records of menus served, including substitutions, and food purchased for 30 days. A list of residents receiving special diets and a record of their diets must be kept in the dietary area for at least 30 days.

(e) The facility must post the current week's menu:

(1) in the dietary department, including therapeutic diet menus, so employees responsible for purchasing, preparing, and serving foods can use it; and
(2) in a convenient location so the residents may see it.

(f) The dietary department must keep a seven-day supply of staple foods and a two-day supply of perishable foods at all times. The facility is allowed the flexibility to use food on hand to make substitutions at any interval as long as comparable nutritional value is maintained. Any substitution of menu items must be recorded on the day of use. [See also §19.1719(o)(1) of this title (relating to Other Rooms and Areas) for information concerning storage areas.]

(g) Accommodation of each resident's [resident] needs. The facility must provide:

(1) table service for all who can and will eat at the table, including a resident who uses a wheelchair [residents];
(2) firm supports, such as over-bed tables, for serving trays to a resident who is bedfast [residents];
(3) sturdy tray stands of proper height to a resident [residents] able to be out of bed for the resident's [their] meals;
(4) special eating equipment and utensils for a resident [residents] who needs [need] them and appropriate assistance to ensure that the resident can use the assistive devices when consuming meals and snacks; and
(5) prompt assistance for a resident [residents] who needs [need] help eating.

(h) An identification system, such as tray cards, must be available to ensure that all diets are served in accordance with physician's orders.

(i) Nothing in this section limits a resident's right to make personal dietary choices.

§19.1108. Food and Drink.

Each resident must receive and the facility must provide:

(1) food prepared in accordance with established professional food preparation practices and by methods that conserve nutritious value, flavor, and appearance;
(2) adequate amounts of food and drink that is palatable, attractive, and at a safe and appetizing [the proper] temperature;
(3) food prepared in a form designed to meet individual needs;
(4) appealing options [substitutes] of similar nutritive value to a resident [residents] who chooses not to eat food that is initially served or who requests a different meal choice; [refuse food served; and]
(5) food that is prepared and served on schedule; [7]
(6) food that accommodates resident allergies, intolerances, and preferences; and
(7) drinks, including water and other liquids, consistent with a resident's needs and preferences, and sufficient to maintain resident hydration.

§19.1109. Food Intake.

Food intake of a resident [residents] must be monitored and recorded as follows:

(1) Deviations from normal food and fluid intake must be recorded in the clinical records in accordance with
§19.1911(b)(16)(E). See also §19.1911(b)(21) of this chapter [title] (relating to Contents of the Clinical Record) for information concerning dietary intake and clinical records.

(2) In-between meals and bedtime snacks, and supplementary feedings, either as a part of the overall care plan or as ordered by a physician, including caloric-restricted diets, must be documented using the point, percentage, or other system consistently facility-wide. [See also §19.1911(b)(21) of this title (relating to Contents of the Clinical Record) for information concerning dietary intake and clinical records.]

§19.1110. Frequency of Meals.

(a) Each resident must receive [receives] and the facility must provide [provides] at least three meals daily, at regular times comparable to normal mealtimes in the community or in accordance with a resident's needs, preferences, requests, and care plan.

(b) There must be no more than 14 hours between a substantial evening meal and breakfast the following day, except when a nourishing snack is served at bedtime, up to 16 hours may elapse between a substantial evening meal and breakfast the following day if a resident group agrees to this meal span [as provided in subsection (d) of this section].

(c) Suitable, nourishing alternative meals and snacks must be provided to a resident who wants to eat at non-traditional times or outside of scheduled meal service times, consistent with the resident's plans of care.

[ce] The facility must offer snacks at bedtime daily. Routine snacks that are not ordered by the physician and are not part of the care plan do not have to be documented as accepted or rejected.

[cd] When a nourishing snack is provided at bedtime, up to 16 hours may elapse between a substantial evening meal and the following day, if a resident group agrees to this meal span and a nourishing snack is served.

§19.1111. Food Safety Requirements [Sanitary Conditions].

(a) The facility must[1]

[cd] procure food from sources approved or considered satisfactory by federal, state, and local authorities, [1]

(1) The facility may include food items obtained directly from local producers, subject to applicable State and local laws or regulations.

(2) This section does not prohibit or prevent a facility from using produce grown in facility gardens, subject to compliance with applicable safe growing and food handling practices.

(3) This section does not preclude a resident from consuming foods not procured by the facility.

[ce] The facility must store, prepare, and serve food under sanitary conditions, as required by the Texas Department of State Health Services food service sanitation requirements, [2 and]

[cd] The facility must dispose of garbage and refuse properly. [See also §19.318(f) of this title (relating to Other Rooms and Areas) for information concerning dietary physical plant.]

(d) The facility must have a written policy regarding use and storage of foods brought to a resident by family and other visitors to ensure safe and sanitary storage, handling, and consumption.

[ce] Dietary service personnel must be in good health and practice hygienic food-handling techniques. Persons with symptoms of communicable diseases or open, infected wounds may not work.

(f) [ce] Dietary service personnel must wear clean, washable garments, wear hair coverings or clean caps, and have clean hands and fingernails.

(g) [cd] The facility and all food service personnel must meet the standards imposed by local, state, and federal codes regarding food and food handling. [Routine health examinations must meet all local, state, and federal codes for food service personnel.]

§19.1113. Paid Feeding Assistants.

(a) State-approved training course. The facility may use a paid feeding assistant, if the paid feeding assistant has successfully completed a state-approved training course that meets the requirements of §19.1115 of this subchapter [chapter] (relating to Requirements for Training of Paid Feeding Assistants) before feeding a resident. [Residents. The facility must not use any individual working in the facility as paid feeding assistant unless that individual has successfully completed the state-approved training course for paid feeding assistants.]

(b) Supervision. A paid feeding assistant must work under the supervision of an RN or an LVN [a registered nurse or a licensed vocational nurse]. In an emergency, a paid feeding assistant must call a supervisory nurse for help. A paid feeding assistant can only feed a resident [residents] in the dining room.

(c) Resident selection criteria.

(1) The facility must ensure that a paid feeding assistant provides dining assistance only for a resident [only fed residents] who has [have] no complicated feeding problems, which include difficulty swallowing, recurrent lung aspirations, and tube or parenteral/IV feedings.

(2) The facility must base resident selection on the interdisciplinary team's [charge nurse's] assessment and the resident's latest assessment and care plan [of care]. A resident's comprehensive care plan must reflect the resident's appropriateness for a paid feeding assistant.

§19.1116. Therapeutic Diets.

If a resident requires a therapeutic diet, the attending physician must prescribe the therapeutic diet, unless the physician delegates this task to a qualified dietitian, to the extent allowed by Texas law.

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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Karen Ray
Chief Counsel
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SUBCHAPTER L. DIETARY SERVICES

40 TAC §19.1102, §19.1103

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and
Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.


§19.1102. Staffing.


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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SUBCHAPTER M. PHYSICIAN SERVICES


STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.


A physician must personally approve in writing a recommendation that an individual be admitted to a facility. Each resident must remain under the care of a physician. A physician, physician assistant, or advanced practice registered nurse must provide orders for the resident's immediate care and needs. The facility must ensure that:

1. the medical care and other health care of each resident is supervised by an attending physician. Any consultations must be ordered by the attending physician;

2. another physician supervises the medical care and other health care of a resident when the resident's attending physician is unavailable; and

3. if a child is admitted to the facility:

   A. appropriate pediatric consultative services are utilized, in accordance with the comprehensive assessment and care plan of care; and

   B. a pediatrician or other physician with training or expertise in the clinical care of children with complex medical needs participates in all aspects of the medical care.


The physician must:

1. review, revise, if necessary, [and/or revise] and sign orders relating to the resident's total program of care, including medications and treatments, according to the visit schedule required by §19.1203(2) of this subchapter [title] (relating to Frequency of Physician Visits);

2. write, sign, and date progress notes at each visit;

3. sign and date all orders, with the exception of influenza and pneumococcal vaccines, which may be administered per physician's standing order after an assessment for contraindications;

4. write, sign, and date a physician's discharge summary within 20 working days of being notified by the facility of the discharge, except as specified in §19.1912(e) of this chapter [title] (relating to Additional Clinical Record Service Requirements), if the resident has been temporarily discharged for 30 days or less, and readmitted to the same facility; and

5. provide documentation in the clinical record as specified in §19.1911 and §19.1912 of this chapter [title] (relating to Contents of the Clinical Record and Additional Clinical Record Service Requirements).


Physician visits must conform to the following schedule:

1. Licensed-only facility. Each resident must have a medical examination at least annually by the resident's [his] physician and as necessary to meet the needs of the resident. Physician orders must be reviewed and revised as necessary at least once every 60 days, unless the resident's physician specifies, in writing in the resident's clinical record, a different schedule for each review and revision.

2. Medicaid-certified facilities and Medicare skilled nursing facilities.

   A. The resident must be seen by a physician at least once every 30 days for the first 90 days after admission, and at least once every 60 days thereafter.

   B. A physician visit is considered timely if it occurs not later than ten days after the date the visit was required.

   C. Except as provided in paragraph (3) of this section and §19.1205(c) of this subchapter [title] (relating to Physician Delegation of Tasks), all required visits must be made by the physician personally.

3. Medicare skilled nursing facilities. At the option of the physician, required visits in Medicare skilled nursing facilities after the initial visit may alternate between personal visits by the physician and visits by a physician assistant or an advanced practice registered nurse, nurse practitioner, or clinical nurse specialist in accordance with §19.1205 of this subchapter [title relating to Physician Delegation of Tasks].


(a) In a Medicare skilled nursing facility (SNF), except as specified in subsection (b) of this section, a physician may delegate tasks to a physician assistant, or an advanced practice registered nurse, nurse practitioner, or clinical nurse specialist who:

   1. meets the applicable definition in 42 Code of Federal Regulations §481.2 (see §10.101 of this title (relating to Definitions)) or in the case of a clinical nurse specialist, is licensed as such by the state;

   2. is acting within the scope of practice as defined by state law; and

   3. is under the supervision of the physician.
(b) In a Medicare SNF, a physician may not delegate a task when the regulations specify that the physician must perform it personally, or when the delegation is prohibited under state law or by the facility's own policies.

(c) In a Medicaid nursing facility, any required physician task may also be satisfied when performed by an advanced practice registered nurse [nurse practitioner, clinical nurse specialist] or physician assistant who is not an employee of the facility but who is working in collaboration with a physician. Services must be provided in the context of applicable state laws, rules, and regulations governing the practice of an advanced practice registered nurse [nurse practitioners, clinical nurse specialists] and physician assistants.

(d) A physician may delegate the task of writing dietary orders to a qualified dietitian who:

1. is acting within the scope of practice; and
2. is under the supervision of the physician.

(e) A physician may delegate the task of writing therapy orders to a qualified therapist who:

1. is acting within the scope of practice; and
2. is under the supervision of the physician.

(f) [deleted] The physician assistant or advanced practice registered nurse [enhancer] providing care to a pediatric resident must have training and expertise in the care of children with complex medical needs.

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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SUBCHAPTER O. DENTAL SERVICES

40 TAC §19.1401

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 agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.


(a) The facility must assist a resident [residents] in obtaining routine and 24-hour emergency dental care.

(1) At the time of admission, the facility must obtain the name of the resident's preferred dentist and record the name in the clinical record.

(2) At least annually, the facility must ask each resident and resident representative [and/or responsible party] if the resident desires [they desire] a dental examination at the resident's expense.

(3) The facility must make all reasonable efforts to arrange for a dental examination for each resident who desires one.

(4) The facility is not liable for the cost of the resident's dental care.

(5) Licensed-only facilities must maintain a list of local dentists for a resident [residents] who requires a dentist [require one].

(b) Medicaid-certified facilities also must provide or obtain from an outside resource, in accordance with §19.1906 of this chapter [title] (relating to Use of Outside Resources), the following dental services to meet the needs of each resident:

1. Emergency [emergency] dental services, which are limited to procedures necessary to control bleeding, relieve pain, and eliminate acute infection; operative procedures which are required to prevent the imminent loss of teeth; treatment of injuries to the teeth or supporting structures.

   (A) Covered emergency dental procedures include[, but are not limited to]:

   (i) alleviation of extreme pain in oral cavity associated with serious infection or swelling;
   (ii) repair of damage from loss of tooth due to trauma (acute care only, no restoration);
   (iii) open or closed reduction of fracture of the maxilla or mandible;
   (iv) repair of laceration in or around oral cavity;
   (v) excision of neoplasms, including benign, malignant and premalignant lesions, tumors and cysts;
   (vi) incision and drainage of cellulitis;
   (vii) root canal therapy, for which payment[, payment] is subject to dental necessity review and pre- and post-operative x-rays are required; and
   (viii) extractions: single tooth, permanent; single tooth, primary; supernumerary teeth; soft tissue impaction; partial bony impaction; complete bony impaction; surgical extraction of erupted tooth or residual root tip.

   (B) Routine restorative procedures are not considered emergency procedures. Dental services not covered include[, but are not limited to]:

   (i) cleaning;
   (ii) filling teeth with amalgam composite, glass ionomer, or any other restorative material;
   (iii) cast or preformed crowns (capping);
   (iv) restoration of carious or noncarious permanent or primary teeth, including those requiring root canal therapy;
   (v) replacement or repositioning of teeth;
   (vi) services to the alveolar ridges or periodontium of the maxilla and the mandible, except for procedures covered under subparagraph (A) of this paragraph; and
(vii) complete or partial dentures.

(2) Assistance [assistance] to the resident, if necessary:
   (A) in making appointments; and
   (B) by arranging for transportation to and from the dentist’s office.

(3) Prompt [prompt] referral, within three days, of a resident [residents] with lost or damaged dentures for dental services. If a referral does not occur within three days, the facility must provide documentation of what they did to ensure the resident could still eat and drink adequately while awaiting dental services and the extenuating circumstances that led to the delay [to a dentist].

(4) Coordination [coordination] of dental services for pediatric residents age 12 months to 21 years, in accordance with Texas Health Steps (THSteps) [Early and Periodic Screening, Diagnosis, and Treatment (EPSDT)] guidelines.

(c) The facility must have a written policy identifying those circumstances when the loss or damage of dentures is the facility’s responsibility and may not charge a resident for the loss or damage of dentures determined in accordance with facility policy to be the facility’s responsibility.

(d) [see] Medicaid-certified facilities are not required to provide routine dental services.

(e) [464] Payment for services provided on the teeth, gums, alveolar ridges, and supporting structures are not a benefit of the Texas Medicaid Program; however, recipients with applied income may use incurred medical expenses to pay for routine dental services and appliances.

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SUBCHAPTER P. PHARMACY SERVICES

40 TAC §19.1501

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 agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.


A licensed-only facility must assist the resident in obtaining routine drugs and biologicals and make emergency drugs readily available, or obtain them under an agreement described in §19.1906 of this chapter [title] (relating to Use of Outside Resources). A Medicaid-certified facility must provide routine and emergency drugs and biologicals to its residents, or obtain them under an agreement described in §19.1906 of this chapter [title (relating to Use of Outside Resources). See also §19.901(12) and (13) of this title (relating to Quality of Care) for information concerning drug therapy and medication errors].

(1) Methods and procedures. The facility may permit unlicensed personnel to administer drugs, but only under the general supervision of a licensed nurse. The unlicensed individual must be a nursing student, a medication aide student, or a medication aide with a current permit issued by HHSC [the Texas Department of Human Services].

(2) Accuracy in service delivery. A facility must provide pharmaceutical services (including procedures that assure the accurate acquiring, receiving, dispensing, and administering of all drugs and biologicals) to meet the needs of each resident.

(3) Service consultation. The facility must employ or obtain the services of a pharmacist, currently licensed by the Texas State Board of Pharmacy and in good standing, who:
   (A) provides consultation on all aspects of the provision of pharmacy services in the facility;
   (B) establishes a system of records of receipt and disposition of all controlled drugs in sufficient detail to enable an accurate reconciliation;
   (C) determines that drug records are in order and that an account of all controlled drugs is maintained and periodically reconciled; and
   (D) adheres to requirements in §19.1503 of this subchapter [title] (relating to Additional Supervision and Consultation Requirements).

(4) Drug regimen review.
   (A) The drug regimen of each resident must be reviewed at least once a month by a licensed pharmacist. The consultant pharmacist’s drug regimen review must be maintained in the resident’s clinical record. This review must include a review of the resident’s medical chart.
   (B) A psychotropic drug is any drug that affects brain activities associated with mental processes and behavior. Psychotropic drugs include psychoactive medications as defined in §19.1207 of this chapter (relating to Prescription of Psychoactive Medication). These drugs include drugs in the following categories:
      (i) anti-psychotic;
      (ii) anti-depressant;
      (iii) anti-anxiety; and
      (iv) hypnotic.
   (C) [464] The pharmacist must report any irregularities to the attending physician and the director of nursing, and these reports must be acted upon.
      (i) Irregularities include any drug that meets the criteria set forth in paragraph (5) of this subsection.
      (ii) Any irregularities noted by the pharmacist during this review must be documented on a separate, written report that is sent to the attending physician and the facility’s medical director and director of nursing and lists the resident’s name, the relevant drug, and the irregularity the pharmacist identified.
(iii) The attending physician must document in the resident's clinical record that the identified irregularity has been reviewed and what, if any, action has been taken to address it. If there is to be no change in the medication, the attending physician must document the physician's rationale in the resident's clinical record.

(D) The facility must develop and maintain written policies and procedures for the monthly drug regimen review that include time frames for the different steps in the process and steps the pharmacist must take when the pharmacist identifies an irregularity that requires urgent action to protect the resident.

(5) Unnecessary Drugs. Each resident's drug regimen must be free from unnecessary drugs. An unnecessary drug is any drug when used:

(A) in excessive dose (including duplicate drug therapy);

(B) for excessive duration;

(C) without adequate monitoring;

(D) without adequate indications for its use;

(E) in the presence of adverse consequences which indicate the dose should be reduced or discontinued; or

(F) in any combination of the reasons stated in subparagraphs (A) - (E) of the paragraph.

(6) Psychotropic drugs. Based on a comprehensive assessment of a resident, the facility must ensure that:

(A) a resident who has not used psychotropic drugs is not given these drugs unless the medication is necessary to treat a specific condition as diagnosed and documented in the resident's clinical record;

(B) a resident who uses psychotropic drugs receives gradual dose reductions and behavioral interventions, unless clinically contraindicated, in an effort to discontinue use of these drugs;

(C) a resident does not receive psychotropic drugs pursuant to a PRN order unless that medication is necessary to treat a diagnosed specific condition that is documented in the resident's clinical record; and

(D) PRN orders for psychotropic drugs are limited to 14 days. Except as provided in subparagraph (E) of this paragraph, if the attending physician or prescribing practitioner believes that it is appropriate for the PRN order to be extended beyond 14 days, the physician must document the rationale in the resident's clinical record and indicate the duration for the PRN order.

(E) PRN orders for anti-psychotic drugs are limited to 14 days and cannot be renewed unless the attending physician or prescribing practitioner evaluates the resident for the appropriateness of the medication.

(7) Medication errors. The facility must ensure that:

(A) the medication error rates are not 5 percent or greater; and

(B) the residents are free of any significant medication errors.

(8) (5) Labeling of drugs and biologicals. Drugs and biologicals used in the facility must be labeled in accordance with currently accepted professional principals and in compliance with the state laws and regulations [Texas State Board of Pharmacy Laws and Regulations, §291], including the appropriate accessory and cautionary instructions and the expiration date when applicable.

(9) (6) Storage of drugs and biologicals.

(A) In accordance with state and federal laws, the facility must store all drugs and biologicals in locked compartments under proper temperature controls and permit only authorized personnel to have access to the keys.

(B) The facility must provide separately locked, permanently affixed compartments for storage of controlled drugs, listed in Schedule II of the Comprehensive Drug Abuse Prevention and Control Act of 1976, and of other drugs subject to abuse, except when the facility uses single-unit-package drug distribution systems in which the quantity stored is minimal and a missing dose can be readily detected [(see §19.1509 of this title (relating to Controlled Substances)].

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SUBCHAPTER Q. INFECTION CONTROL

40 TAC §19.1601

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 agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.


§19.1601. Infection Control.

(a) General. [Infection Control Program.] The facility must establish and maintain an infection prevention and control program designed to provide a safe, sanitary, and comfortable environment and to help prevent the development and transmission of communicable diseases [disease] and infections, [infection, including influenza, pneumococcal pneumonia, and tuberculosis. Under the program, the facility must:]

[(1) investigate, control, and prevent infections in the facility;]

[(2) decide what procedures, such as isolation, should be applied to an individual resident; and]

[(3) maintain a record of incidents and corrective actions related to infections.]

(b) Infection prevention and control program (IPCP). The facility must establish an IPCP and conduct an annual review, effective
November 28, 2019, of the IPCP and update the program, as necessary. The Quality Assessment and Assurance Committee, as described in §19.1917 of this chapter (relating to Quality Assessment and Assurance) monitors the IPCP. The IPCP must include:

(1) a system for preventing, identifying, reporting, investigating, and controlling infections and communicable diseases for all residents, staff, volunteers, visitors, and other individuals providing services under a contractual arrangement based upon the facility assessment conducted according to §19.1931 of this chapter (relating to Facility Assessment), and following accepted national standards;

(2) written standards, policies, and procedures for the program, which must include:

(A) a system of surveillance designed to identify possible communicable diseases or infections before they can spread to other persons in the facility;

(B) when and to whom possible incidents of communicable diseases or infections should be reported;

(C) standard and transmission-based precautions to be followed to prevent spread of infections;

(D) when and how isolation should be used for a resident, including:

(i) the type and duration of the isolation, depending upon the infectious agent or organism involved; and

(ii) a requirement that the isolation should be the least restrictive possible for the resident under the circumstances;

(E) the circumstances under which the facility must prohibit employees with a communicable disease or infected skin lesions from direct contact with a resident or a resident’s food, if direct contact will transmit the disease; and

(F) the hand hygiene procedures to be followed by staff involved in direct resident contact;

(3) an antibiotic stewardship program that includes antibiotic use protocols and a system to monitor antibiotic use;

(4) a system for recording incidents identified under the facility’s IPCP and the corrective actions taken by the facility; and

(5) acceptable accommodations for a resident with a communicable disease according to current practices and policies for infection control.

(c) Infection preventionist. Effective November 28, 2019, the facility must designate one or more individuals as the infection preventionist (IP) who is responsible for the facility’s IPCP. The individual designated as the IP, or at least one of the individuals if there is more than one IP, must be a member of the facility’s Quality Assessment and Assurance Committee and report to the committee on the IPCP on a regular basis. The IP must:

(1) have primary professional training in nursing, medical technology, microbiology, epidemiology, or other related field;

(2) be qualified by education, training, experience or certification;

(3) work at least part-time at the facility; and

(4) have completed specialized training in infection prevention and control.

[b) Preventing spread of infection.]
ative screening, the facility must respond according to the current CDC guidelines and attending physician’s recommendations, and keep documentation of the response.

(e) Vaccinations.

(1) A [Effective September 1, 2012; a] facility must develop and implement a written policy to protect a resident from vaccine preventable diseases in accordance with Texas Health and Safety Code, Chapter 224.

(A) The policy must:

(i) require an employee, contractor, or other individual with privileges providing direct care to a resident to receive vaccines for the vaccine preventable diseases specified by the facility based on the level of risk the employee, contractor, or other individual presents to residents by the employee's, contractor's, or other individual's routine and direct exposure to residents;

(ii) specify the vaccines an employee, contractor, or other individual with privileges to provide direct resident care is required to receive in accordance with clause (i) of this subparagraph;

(iii) include procedures for the facility to verify that an employee, contractor, or other individual with privileges to provide direct resident care has complied with the policy;

(iv) include procedures for the facility to ensure an employee, contractor, or other individual with privileges to provide direct resident care from the required vaccines for the medical conditions identified as contraindications or precautions by the CDC;

(v) for an employee, contractor, or other individual with privileges to provide direct resident care who is exempt from the required vaccines, include procedures the employee, contractor, or other individual must follow to protect residents from exposure to vaccine preventable diseases, such as the use of protective equipment, such as gloves and masks, based on the level of risk the employee, contractor, or other individual presents to residents by the employee's, contractor's, or other individual's routine and direct exposure to residents;

(vi) prohibit discrimination or retaliatory action against an employee, contractor, or other individual with privileges to provide direct resident care who is exempt from the required vaccines for the medical conditions identified as contraindications or precautions by the CDC, except that required use of protective medical equipment, such as gloves and masks, may not be considered retaliatory action;

(vii) require the facility to maintain a written or electronic record of each employee’s, contractor’s, or other individual’s compliance with or exemption from the policy; and

(viii) include disciplinary actions the facility may take against an employee, contractor, or other individual with privileges to provide direct resident care who fails to comply with the policy.

(B) The policy may:

(i) include procedures for an employee, contractor, or other individual with privileges to provide direct resident care to be exempt from the required vaccines based on reasons of conscience, including [a] religious beliefs; and

(ii) prohibit an employee, contractor, or other individual with privileges to provide direct resident care who is exempt from the required vaccines from having contact with residents during a public health disaster, as defined in Texas Health and Safety Code, §81.003 (relating to Definitions).

(2) A facility must offer vaccinations to a resident [residents] in accordance with an immunization schedule adopted by the Advisory Committee on Immunization Practices of the CDC.

(A) Pneumococcal vaccinations for residents. The facility must offer pneumococcal vaccination to a resident 65 years of age or older who has not received the vaccination and to a resident younger than 65 years of age, who has not received the vaccination but is a candidate for it because of chronic illness. A pneumococcal vaccination must be offered to a current resident of a facility and to a new resident at the time of admission. A vaccination must be completed unless a physician has indicated that the vaccination is medically contraindicated or the resident refuses the vaccination. The facility must develop and implement policies and procedures to ensure that:

(i) before offering the pneumococcal immunization, each resident or resident representative receives education regarding the benefits and potential side effects of the pneumococcal vaccination;

(ii) each resident is offered a pneumococcal immunization, unless the immunization is medically contraindicated or the resident has already been immunized;

(iii) the resident or the resident representative has the opportunity to refuse immunization; and

(iv) the resident's clinical record includes documentation that indicates:

(I) that the resident or the resident representative was provided education regarding the benefits and potential side effects of pneumococcal immunization;

(II) that the resident either received the pneumococcal immunization or did not receive the pneumococcal immunization due to medical contraindication or refusal; and

(III) the date of the receipt or refusal of the pneumococcal vaccination.

(ii) The facility must develop and implement policies and procedures to ensure that the resident or resident's legal representative receives education regarding the benefits and potential side effects of the pneumococcal vaccination. When a pneumococcal vaccination is offered, the facility must show in the resident medical record that this was provided.

(v) [(iv)] Based on an assessment and practitioner recommendation, a second pneumococcal vaccination may be given five years after the first pneumococcal vaccination, unless medically contraindicated or the resident or the resident [resident's legal] representative refuses the second vaccination.

(B) Influenza vaccinations for residents and employees. The facility must offer an influenza vaccination [vaccinations] to a resident [residents] and an employee [employees] in contact with residents, unless the vaccination is medically contraindicated by a physician or the employee or resident has refused the vaccination.

(i) Influenza vaccinations for all residents and employees in contact with a resident [residents] must be completed by November 30 of each year. Employees hired or residents admitted after this date and during the influenza season (through March of each year) must receive influenza vaccinations, unless medically contraindicated by a physician or the employee, the resident, or the resident [resident's legal] representative refuses the vaccination.

(ii) The facility must develop and implement policies and procedures that ensure that [the resident or resident's legal representative receives education regarding the benefits and potential side effects of the influenza vaccination. When an influenza vaccina-
tion is offered, the facility must show in the resident medical record that this education was provided.)

(II) before offering the influenza immunization, each resident or resident representative receives education regarding the benefits and potential side effects of the influenza vaccination; and

(III) the resident's clinical record includes documentation that indicates:

(a) that the resident or the resident representative was provided education regarding the benefits and potential side effects of influenza immunization;

(b) that the resident either received the influenza immunization or did not receive the influenza immunization due to medical contraindications or refusal; and

(c) the date of the receipt or refusal of the annual influenza vaccination.

(C) Hepatitis B vaccinations for employees. The facility must develop a method to identify employees at risk of directly contacting blood or potentially infectious materials. The facility must offer an employee identified as being at risk of directly contacting blood or potentially infectious materials a hepatitis B vaccine within 10 days of employment. If the employee initially declines the hepatitis B vaccination but at a later date, while still at risk of directly contacting blood or potentially infectious materials, decides to accept the vaccination, the facility must make the vaccination available within 10 days after the employee decides to accept that vaccination.

[(D): Documentation of receipt, refusal, or contraindication of vaccination.]

(f) Linens. Personnel must handle, store, process, and transport linens so as to prevent the spread of infection and in accordance with §19.325 of this chapter (relating to Linen).

(g) The Quality Assessment and Assurance Committee as described in §19.1917 of this chapter (relating to Quality Assessment and Assurance) will monitor the Infection Prevention and Control Program [infection control program].

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SUBCHAPTER T. ADMINISTRATION

STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.


A nursing facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.

(1) Licensure. A nursing facility (NF) must be licensed by HHSC [the Texas Department of Human Services (DHS)] as described in §19.201 of this chapter [title] (relating to Criteria for Licensing).

(2) Compliance with federal, state, and local laws and professional standards. The facility must operate and provide services in compliance with all applicable federal, state, and local laws, regulations, and codes, and with accepted professional standards and principles that apply to professionals providing services in such a facility.

(3) Medicaid-certified facilities’ relationship to other Health and Human Services regulations.

(A) In addition to compliance with the regulations set forth in this chapter [these Nursing Facility Requirements for Licensure and Certification], as Medicaid providers, facilities are obliged to meet the applicable provisions of other federal regulations, including [but not limited to] those pertaining to:

(i) nondiscrimination on the basis of race, color, or national origin (45 CFR [Code of Federal Regulations], Part 80);]

(ii) nondiscrimination on the basis of disability (handicap) (45 CFR [Code of Federal Regulations], Part 84);]

(iii) nondiscrimination on the basis of age (45 CFR [Code of Federal Regulations], Part 91);]

(iv) nondiscrimination on the basis of race, color, national origin, sex, age, or disability (45 CFR, Part 92);

(v) protection of human subjects of research (45 CFR [Code of Federal Regulations], Part 46);[ and]

(vi) protection from fraud and abuse (42 CFR [Code of Federal Regulations], Part 455); and

(vii) protection of individually identifiable health information (45 CFR, Parts 160 and 164).

(B) Although the [these] regulations listed in subparagraph (A) of this paragraph are not in themselves considered requirements under 42 CFR, Part [Code of Federal Regulations] 483, their violation may result in the termination or suspension of payment with federal funds, or the refusal to grant or continue payment with federal funds.


(a) The facility must have a governing body, or designated persons functioning as a governing body that is legally responsible for establishing and implementing policies regarding the management and operation of the facility. The governing body must have periodically
updated written policies and procedures that are formally adopted and dated, specifying and governing all services. The policies and procedures must be available to all of the facility's governing body's members, staff, residents, family or resident [legal] representatives [of residents], and the public. The governing body must:

(1) designate a person to exercise the administrator's authority when the facility does not have an administrator. The facility must secure a licensed nursing home administrator within 30 days; and

(2) ensure that a person designated as being in authority notifies HHSC [the Texas Department of Human Services] immediately when the facility does not have an administrator.

(b) The governing board appoints and the [The] facility must operate under the supervision of a nursing facility administrator who is:

(1) licensed by the Texas Board of Nursing Facility Administrators;

(2) responsible for management of the facility; [and]

(3) required to work at least 40 hours per week on administrative duties; and [s]

(4) accountable to and who reports to the governing body for the overall management of the facility:

[c] The administrator must be accountable to the governing body for overall management of the nursing facility.]

§19.1908. Laboratory Services.

(a) The facility must provide or obtain clinical laboratory services to meet the needs of its residents. The facility is responsible for the quality and timeliness of the services.

(1) If the facility provides its own laboratory services, the services must meet the applicable requirements [conditions] for laboratories specified in 42 CFR [Code of Federal Regulations], Part 493.

(2) If the facility provides blood bank and transfusion services, it must meet the applicable requirements for laboratories specified in 42 CFR [Code of Federal Regulations], Part 493.

(3) If the laboratory chooses to refer specimens for testing to another laboratory, the referral laboratory must be certified [approved or licensed to test specimens] in the appropriate specialties or [and/or] subspecialties of services in accordance with 42 CFR [Code of Federal Regulations], Part 493.

(4) If the facility does not provide laboratory services on site, it must have an agreement to obtain these services only from a laboratory that meets the applicable requirements of 42 CFR [Code of Federal Regulations], Part 493, or from a physician's office.

(b) The facility must:

(1) provide or obtain laboratory services only when ordered by a physician, physician assistant, or advanced practice registered nurse in accordance with state law, including scope of practice laws [the attending physician;]

(2) promptly notify the ordering [attending] physician, physician assistant, or advanced practice registered nurse of the results that fall outside of clinical reference ranges in accordance with written facility policies and procedures for notification of a practitioner or per the ordering physician's orders [findings];

(3) assist the resident in making transportation arrangements to and from the source of service, if the resident needs assistance; and

(4) file in the resident's clinical record laboratory reports that are dated and contain the name and address of the testing [issuing] laboratory.


(a) The nursing facility must provide or obtain radiology and other diagnostic services to meet the needs of its residents. The facility is responsible for the quality and timeliness of the services.

(1) If the facility provides its own diagnostic services, the services must meet the applicable conditions of participation for hospitals contained in 42 CFR [Code of Federal Regulations] §482.26.

(2) If the facility does not provide its own diagnostic services, it must have an agreement to obtain these services from a provider or supplier that is approved to provide these services under Medicare.

(b) The facility must:

(1) provide or obtain radiology and other diagnostic services only when ordered by a physician, physician assistant, or advanced practice registered nurse in accordance with state law, including scope of practice laws [the attending physician;]

(2) promptly notify the ordering [attending] physician, physician assistant, or advanced practice registered nurse of the results that fall outside of clinical reference ranges in accordance with written facility policies and procedures for notification of a practitioner or per the ordering physician's orders [findings];

(3) assist the resident in making transportation arrangements to and from the source of service, if the resident needs assistance; and

(4) file in the resident's clinical record signed and dated reports of x-ray and other diagnostic services.


(a) The facility must maintain clinical records on each resident, in accordance with accepted professional health information management standards and practices, that are:

(1) complete;

(2) accurately documented;

(3) readily accessible;

(4) systematically organized; and

(5) protected from unauthorized release.

(b) Clinical records must be retained [for]:

(1) five years after medical services end; or

(2) for a minor, for three years after a resident reaches legal age under Texas law.

(c) The facility must safeguard clinical record information against loss, destruction, or unauthorized use.[s]

(d) The facility must keep confidential all information contained in the resident's records, regardless of the form or storage method of the records, except when release is:

(1) required by law or this chapter; [s]

(2) transfer to another health care institution;[s]

(2) law or this chapter;[s]

(3) third party payment contract; or]
(2) [(4)] to the resident or resident representative where permitted by applicable law; [•]

(3) for treatment, payment, or health care operations, as permitted by and in compliance with applicable law; or

(4) for public health activities, reporting of abuse, neglect or domestic violence, health oversight activities, judicial and administrative proceedings, law enforcement purposes, organ donation purposes, research purposes, or to coroners, medical examiners, funeral directors, and to avert a serious threat to health or safety as permitted by and in compliance with applicable law.

§19.1911. Contents of the Clinical Record.

(a) A resident's clinical record must meet all documentation requirements in the HHSC [Texas Health and Human Services Commission] rule at Texas Administrative Code, Title 1, Part 15, Chapter 371, Subchapter C (relating to Utilization Review) [4 TAC §371.214 (relating to Resource Utilization Group Classification System)].

(b) The clinical record of each resident must contain:

(1) a face sheet that contains the attending physician's current mailing address and telephone numbers;

(2) sufficient information to identify and care for the resident, to include at a minimum:

(A) full name of resident;

(B) full home or mailing [home/mailing] address, or both;

(C) social security number;

(D) health insurance claim numbers, if applicable;

(E) date of birth; and

(F) clinical record number, if applicable;

(3) a record of the resident's assessments, including 15 months of MDS records;

(4) the comprehensive care plan[, interdisciplinary plan of care] and services provided [(see also §19.802 of this chapter (relating to Comprehensive Care Plans))];

(5) a permanency plan, for residents younger than 22 years of age;

(6) the results of any Preadmission Screening and Resident Review;

(7) signed and dated clinical documentation from all health care practitioners involved in the resident's care, with each page identifying the name of the resident for whom the clinical care is intended;

(8) any directives or medical powers of attorney as described in §19.419 of this chapter (relating to Advance Directives);

(9) discharge information and a discharge summary, and services provided [(see also §19.803 of this chapter (relating to Discharge Summary (Discharge Plan of Care)) [and a physician discharge summary, to include, at least, dates of admission and discharge, admitting and discharge diagnoses, condition on discharge, and prognosis, if applicable]];

(10) at admission or within 14 days after admission, documentation of an initial medical evaluation, including history, physical examination, diagnoses and an estimate of discharge potential and rehabilitation potential, and documentation of a previous annual medical examination;

(11) authentication of a hospital diagnosis, which may be in the form of a signed hospital discharge summary, a signed report from the resident's hospital or attending physician, or a transfer form signed by the physician;

(12) the physician's signed and dated orders, including medication, treatment, diet, restorative and special medical procedures, and routine care to maintain or improve the resident's functional abilities (required for the safety and well-being of the resident), which must not be changed either on a handwritten or computerized physician's order sheet after the orders have been signed by the physician unless space allows for additional orders below the physician's signature, including space for the physician to sign and date again;

(13) arrangements for the emergency care of the resident in accordance with §19.1204 of this chapter (relating to Availability of Physician for Emergency Care);

(14) observations made by nursing personnel according to the time frames specified in §19.1010 of this chapter (relating to Nursing Practices);

(15) items as specified on the MDS assessment;

(16) current information, including:

(A) PRN medications and results;

(B) treatments and any notable results;

(C) physical complaints, changes in clinical signs and behavior, mental and behavioral status, and all incidents or accidents;

(D) flow sheets, which may include bathing, restraint observation or release documentation, elimination, fluid intake, vital signs, ambulation status, positioning, continence status and care, and weight;

(E) a record of dietary intake, including deviations from normal diet, rejection of substitutions, and physician's ordered snacks or supplemental feedings;

(F) a record of the date and hour a drug or treatment is administered; and

(G) documentation of a special procedure performed for the safety and well-being of the resident; and

(17) laboratory, radiology and other diagnostic services reports, as required by §19.1908 of this subchapter (relating to Laboratory Services) and §19.1909 of this subchapter (relating to Radiology and Other Diagnostic Services).

[(17) a copy of the most recent court order and letters of guardianship appointing a guardian of the resident or the resident's estate received by the facility.]

§19.1912. Additional Clinical Record Service Requirements.

(a) Index of admissions and discharges. The facility must maintain a permanent, master index of all residents admitted to and discharged from the facility. This index must contain at least the following information concerning each resident:

(1) name of resident (first, middle, and last);

(2) date of birth;

(3) date of admission;

(4) date of discharge; and

(5) social security, Medicare, or Medicaid number.

(b) Facility closure. In the event of closure of a facility, change of ownership or change of administrative authority; [•]
(1) the facility must have in place written policies and procedures to ensure that the administrator's duties and responsibilities involve providing the appropriate notices, as required by §19.2310 of this chapter (relating to Nursing Facility Ceases to Participate); and

(2) the new management must maintain documented proof of the medical information required for the continuity of care of all residents. This documentation may be in the form of copies of the resident's clinical record or the original clinical record. In a change of ownership, the two parties will agree and designate in writing who will be responsible for the retention and protection of the inactive and closed clinical records.

(c) Method of recording and correcting [recording/correcting] information. All resident care information must be recorded in ink or permanent print except for the medication, treatment, or [medication/treatment] diet section of the resident's care plan. Correction of errors will be in accordance with accepted health information management standards.

(1) Erasures are not allowed on any part of the clinical record, with the exception of the medication, treatment, or diet [medication/treatment/diet] section of the resident's [resident] care plan.

(2) Correction of errors will be in accordance with accepted health information management standards.

(d) Required record retention. Periodic thinning of active clinical records is permitted; however, the following items must remain in the active clinical record:

(1) current history and physical;
(2) current physician's orders and progress notes;
(3) current RAI [resident assessment instrument (RAI)] and subsequent quarterly reviews; in Medicaid-certified facilities, all RAIs and Quarterly Reviews for the prior 15-month period;
(4) current care plan;
(5) most recent hospital discharge summary or transfer form;
(6) current nursing and therapy notes;
(7) current medication and treatment records;
(8) current lab and x-ray reports;
(9) the admission record; and
(10) the current permanency plan.

(e) Readmissions.

(1) If a resident is discharged for 30 days or less and readmitted to the same facility, upon readmission, to update the clinical record, staff must:
   (A) obtain current, signed physician's orders;
   (B) record a descriptive nurse note, giving a complete assessment of the resident's condition;
   (C) include any changes in diagnoses, etc.;
   (D) obtain signed copies of the hospital or transferring facility history and physical and discharge summary and any [A: A] transfer summary containing this information is acceptable;
   (E) complete a new RAI and update the comprehensive care plan if evaluation of the resident indicates a significant change, which appears to be permanent and if [if] no such change has occurred, then update only the resident comprehensive care plan; and

(F) comply with §19.805 of this chapter [title] (regarding Permanency Planning for a Resident Under 22 Years of Age [Pediatric Residents]).

(2) A new clinical record must be initiated if the resident is a new admission or has been discharged for over 30 days.

(f) Signatures.

(1) The use of faxing [electronic data transmission of facsimiles (faxes)] is acceptable for sending and receiving health care documents, including the transmission of physicians' orders. Long term care facilities may utilize electronic transmission if they adhere to the following requirements:

(A) The facility must implement safeguards to assure that faxed documents are directed to the correct location to protect confidential health information.

(B) All faxed documents must be signed by the author before transmission.

(2) Stamped signatures are acceptable for all health care documents requiring a physician's signature, if the person using the stamp sends a letter of intent which specifies that he will be the only one using the stamp, and then signs the letter with the same signature as the stamp.

(3) The facility must maintain all letters of intent on file and make them available to representatives of HHSC [the Texas Department of Human Services (DHS)] upon request.

(4) Use of a master signature legend in lieu of the legend on each form for nursing staff signatures of medication, treatment, or flow sheet entries is acceptable under the following circumstances.

(A) Each nursing employee documenting on medication, treatment, or flow sheet signs employee's [his] full name, title, and initials on the legend.

(B) The original master legend is kept in the clinical records office or director of nurses' office.

(C) A current copy of the legend is filed at each nurses' station.

(D) When a nursing employee leaves employment with the facility, the employee's [his] name is deleted from the list by lining through it and writing the current date by the name.

(E) The facility updates the master legend as needed for newly hired and terminated employees.

(F) The master signature legend must be retained permanently as a reference to entries made in clinical records.

(g) Destruction of Records. When resident records are destroyed after the retention period is complete, the facility must shred or incinerate the records in a manner which protects confidentiality. At the time of destruction, the facility must document the following for each record destroyed:

(1) resident name;
(2) clinical or medical record number, if used;
(3) social security number, Medicare number, Medicaid number [Medicare/Medicaid number], or the date of birth; and
(4) date and signature of person carrying out disposal.
§19.1915. Transfer Agreement.

(a) The facility must have in effect a written transfer agreement with one or more hospitals that reasonably assures that:

(1) Residents will be transferred from the facility to the hospital and ensured of timely admission to the hospital when transfer is medically appropriate as determined by the attending physician or, in an emergency situation, another practitioner in accordance with written facility policy.

(2) Providers will exchange medical [Medical] and other information, including information required under §19.502(b)(4) of this chapter (relating to Transfer and Discharge in Medicaid-certified Facilities), needed for care and treatment of residents, and when the transferring facility deems it appropriate, for determining whether such residents can receive appropriate services, receive services [be adequately cared for] in a less restrictive [expensive] setting than either the facility or the hospital, or reintegrate into the community [will be exchanged between the institutions].

(3) For Medicaid-certified facilities, the hospitals must be approved for participation under the Medicare and Medicaid programs.

(b) In addition, to ensure continuity of care, the transfer agreement must [should]:

(1) provide for prompt diagnostic and other medical services;

(2) ensure accountability for a resident's personal effects at the time of transfer;

(3) specify the steps needed to transfer a resident in a prompt, safe and efficient manner; and

(4) provide for supplying, at the time of transfer, a summary of administrative, social, medical, and nursing information to the facility to which the resident is transferred.

(c) If the board or [and/or] governing body for a long-term care facility and a hospital are the same, the controlling entity must have written procedures outlining how transfers will occur.

(d) The facility is considered to have a transfer agreement in effect if HHSC [DHS] determines that the facility attempted in good faith to enter into an agreement with a hospital sufficiently close to the facility to make transfer feasible but could not, and it is in the public interest not to enforce this requirement. The facility must document in writing its good faith effort to enter into an agreement.


(a) The facility must maintain a Quality Assessment and Assurance Committee consisting of:

(1) the director of nursing services;

(2) the medical director or designee;

(2) a physician designated by the facility; and

(3) at least three other members of the facility's staff, at least one of whom must be the administrator, a board member or other individual in a leadership role; and

(4) effective November 28, 2019, the infection preventionist.

(b) The Quality Assessment and Assurance Committee reports to the facility's governing body regarding its activities. The committee must:

(1) meet [meets] at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary; [and]

(2) develop [develops] and implement [implements] appropriate plans of action to correct identified quality deficiencies; and []

(3) regularly review and analyze data, including data resulting from drug regimen reviews, and act on available data to make improvements.

(c) The State of Texas or the Secretary of Health and Human Services may not require disclosure of the records of the Quality Assessment and Assurance Committee except as such disclosure is related to the compliance of the committee with the requirements of subsection (b) of this section.

(d) Good faith attempts by the committee to identify and correct quality deficiencies may not be used as a basis for sanctions.

(e) The Quality Assessment and Assurance Committee must adopt and ensure implementation of a written policy to identify, assess, and develop strategies to control risk of injury to residents and nurses associated with the lifting, transferring, repositioning, or moving of a resident. The policy must establish a process that includes:

(1) analysis of the risk of injury to both residents and nurses posed by the resident handling needs of the resident populations served by the nursing facility and the physical environment in which resident handling and moving occurs;

(2) annual in-service education of nurses in the identification, assessment, and control of risk of injury to residents and nurses during resident handling;

(3) evaluation of alternative ways to reduce risks associated with resident handling, including evaluation of equipment and the environment;

(4) restriction, to the extent feasible with existing equipment and aids, of manual resident handling or moving of all or most of a resident's weight to emergency, life-threatening, or otherwise exceptional circumstances;

(5) collaboration with and an annual report to the nurse staffing committee;

(6) specific procedures for nurses to refuse to perform or be involved in resident handling or moving that the nurse believes in good faith will expose a resident or a nurse to an unacceptable risk of injury;

(7) submission of an annual report by the nursing staff to the Quality Assessment and Assurance Committee on activities related to the identification, assessment, and development of strategies to control risk of injury to residents and nurses associated with the lifting, transferring, repositioning, or moving of a resident; and
§19.1929.  Staff Development.

Each facility must develop, implement and maintain effective training programs of orientation, training, and continuing in-service education to develop the skills of its staff, including all new and existing staff, individuals providing services under a contractual arrangement; and volunteers, consistent with their expected roles. Effective November 28, 2019, a facility must determine the amount and types of training necessary based on a facility assessment as specified at §19.1931 of this subchapter (relating to Facility Assessment) and as described in §19.1001 (§19.1903) of this chapter (relating to Nursing Services) [Required Training of Nurse Aides].

(1)  As part of orientation and annually, each employee must receive instruction regarding:

(A)  Human Immunodeficiency Virus (HIV), as outlined in the educational information provided by the Texas Department of State Health Services Model Workplace Guidelines. At a minimum the HIV curriculum must include:

(i) modes of transmission;

(ii) methods of prevention;

(iii) behaviors related to substance abuse;

(iv) occupational precautions;

(v) current laws and regulations concerning the rights of an acquired immune deficiency syndrome/HIV-infected individual; and

(vi) behaviors associated with HIV transmission which are in violation of Texas law; and

(B) restraint reduction and the prevention of falls through competency-based training. Facilities also may choose to train on behavior management, including prevention of aggressive behavior and de-escalation techniques;[ ]

(C) activities that constitute abuse, neglect, exploitation, or misappropriation of resident property as set forth at §19.601 of this chapter (relating to Freedom from Abuse, Neglect and Exploitation);

(D) procedures for reporting incidents of abuse, neglect, exploitation, or misappropriation of resident property; and

(E) dementia management and resident abuse prevention.

(2) Each registered nurse, licensed vocational nurse, and nurse aide (nurse assistant) who provides nursing services must receive at least one hour of training each year in caring for people who have dementia.

(3) Nursing staff, licensed nurses, and nurse aides must receive annual in-service training which includes components, appropriate to their job responsibilities, from one or more of the following categories:

(A) communication techniques and skills useful when providing geriatric care, such as skills for communicating with the hearing impaired, visually impaired and cognitively impaired; therapeutic touch; and recognizing communication that indicates psychological abuse;

(B) assessment and nursing interventions related to the common physical and psychological changes of aging for each body system;

(C) geriatric pharmacology, including treatment for pain management and sleep disorders;

(D) common emergencies of geriatric residents and how to prevent them, for example, falls, choking on food or medicines, injuries from restraint use; recognizing sudden changes in physical condition, such as stroke, heart attack, acute abdomen, and acute glaucoma; and obtaining emergency treatment;

(E) common mental disorders with related nursing implications; and

(F) ethical and legal issues regarding advance directives, abuse and neglect, guardianship, and confidentiality.

(4) Facilities with pediatric residents must comply with the following:

(A) Facility staff must be trained in the use of pediatric equipment and supplies, including emergency equipment and supplies.

(B) Facility staff must receive annual continuing education dealing with pediatric issues, including child growth and development and pediatric assessment.

(5) Minimum continuing in-service education requirements are listed in subparagraphs (A)-(B) of this paragraph. Attendance at relevant outside training may be used to satisfy the in-service education requirement. The facility must keep in-service records for each employee listed. The minimum requirements are:

(A) licensed personnel--two hours per quarter; and

(B) nurse aides--12 hours annually. For the purpose of this paragraph, a medication aide is considered a nurse aide and must receive the same continuing in-service education. This in-service education does not qualify as continuing education units required for renewal of a medication aide permit.

(6) A rural hospital participating in the Medicaid Swing Bed Program as specified in §19.2326 of this chapter [title] (relating to Medicaid Swing Bed Program for Rural Hospitals) is not required to meet the requirements of this section, if the swing beds are used for no more than one 30-day length of stay per year, per resident.

(7) Effective November 28, 2019, the facility must also include as part of its mandatory training the following topics:

(A) effective communications for direct care staff;

(B) rights of the resident and the responsibilities of a facility to properly care for its residents as set forth in Subchapter E of this chapter (relating to Resident Rights);

(C) standards, policies, and procedures for the facility's infection prevention and control program, as set forth in §19.1601 of this chapter (relating to Infection Control); and

(D) behavioral health training, as set forth in §19.904 of this chapter (relating to Behavioral Health Services).


The facility must conduct and document a facility-wide assessment to determine what resources are necessary to care for its residents competently during both day-to-day operations and emergencies. The facility must review and update that assessment, as necessary, and at least annually. The facility must also review and update this assessment whenever there is, or the facility plans for, any change that would require a
substantial modification to any part of this assessment. The facility must address or include:

(1) the facility's resident population, including:
   (A) both the number of residents and the facility's resident capacity;
   (B) the care required by the resident population considering the types of diseases, conditions, physical and cognitive disabilities, overall acuity, and other pertinent facts that are present within that population;
   (C) the staff competencies that are necessary to provide the level and types of care needed for the resident population;
   (D) the physical environment, equipment, services, and other physical plant considerations that are necessary to care for this population; and
   (E) any ethnic, cultural, or religious factors that may potentially affect the care provided by the facility, including activities and food and nutrition services;

(2) the facility's resources, including:
   (A) all buildings and other physical structures and vehicles;
   (B) equipment (medical and non-medical);
   (C) services provided, such as physical therapy, pharmacy, and specific rehabilitation therapies;
   (D) all personnel, including managers, employees, contractors, and volunteers, as well as their education, training and any competencies related to resident care;
   (E) contracts, memorandums of understanding, or other agreements with their parties to provide services or equipment to the facility during both normal operations and emergencies; and
   (F) health information technology resources, such as systems for electronically managing patient records and electronically sharing information with other organizations; and

(3) a facility-based and community-based risk assessment, utilizing an all-hazards approach.

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 28, 2019.

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Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 13, 2019
For further information, please call: (210) 619-8292

40 TAC §19.1903, §19.1904

STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.


§19.1903. Required Training of Nurse Aides.


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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40 TAC §19.2704

STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.


§19.2704. Nursing Facility Responsibilities Related to Preadmission Screening and Resident Review (PASRR)

DIVISION 2. NURSING FACILITY RESPONSIBILITIES

SUBCHAPTER BB. NURSING FACILITY RESPONSIBILITIES RELATED TO PREADMISSION SCREENING AND RESIDENT REVIEW (PASRR)

40 TAC §19.2704

STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.


§19.2704. Nursing Facility Responsibilities Related to PASRR.

(a) If an individual seeks admission to a nursing facility, the nursing facility:

(1) must coordinate with the referring entity to ensure the referring entity conducts a PL1; and

(2) may provide assistance in completing the PL1, if the referring entity is a family member, LAR, other personal representative selected by the individual, or a representative from an emergency placement source and requests assistance in completing the PL1.

(b) A nursing facility must not admit an individual who has not had a PL1 conducted before the individual is admitted to the facility.

(c) If an individual's PL1 indicates the individual is not suspected of having MI, ID, or DD, a nursing facility must enter the PL1 from the referring entity into the LTC Online Portal. The nursing facility may admit the individual into the facility through the routine admission process.
(d) For an individual whose PL1 indicates the individual is suspected of having MI, ID, or DD, a nursing facility:

(1) must enter the PL1 into the LTC Online Portal if the individual's admission category is:
   (A) expedited admission; or
   (B) exempted hospital discharge; and

(2) must not enter the PL1 into the LTC Online Portal if the individual's admission category is pre-admission.

(e) Except as provided by subsection (f) of this section, a nursing facility must not admit an individual whose PL1 indicates a suspicion of MI, ID, or DD without a complete PE and PASRR determination.

(f) A nursing facility may admit an individual whose PL1 indicates a suspicion of MI, ID, or DD without a complete PE and PASRR determination only if the individual:

(1) is admitted as an expedited admission;

(2) is admitted as an exempted hospital discharge; or

(3) has not had an interruption in continuous nursing facility residence other than for acute care lasting fewer than 30 days and is returning to the same nursing facility.

(g) A nursing facility must check the LTC Online Portal daily for messages related to admissions and directives related to the PASRR process.

(h) Within seven calendar days after the LIDDA or LMHA has entered a PE or resident review into the LTC Online Portal for an individual or resident who has MI, ID, or DD, a nursing facility must:

(1) review the recommended list of nursing facility specialized services, LIDDA specialized services, and LMHA specialized services; and

(2) certify in the LTC Online Portal whether the individual's or resident's needs can be met in the nursing facility.

(i) After an individual or resident who is determined to have MI, ID, or DD from a PE or resident review has been admitted to a nursing facility, the facility must:

(1) contact the LIDDA or LMHA within two calendar days after the individual's admission or, for a resident, within two calendar days after the LTC Online Portal generated an automated notification to the LIDDA or LMHA, to schedule an IDT meeting to discuss nursing facility specialized services, LIDDA specialized services, and LMHA specialized services;

(2) convene the IDT meeting within 14 calendar days after admission or, for a resident review, within 14 calendar days after the LTC Online Portal generated an automated notification to the LIDDA or LMHA;

(3) participate in the IDT meeting to:
   (A) identify which of the nursing facility specialized services, LIDDA specialized services, and LMHA specialized services recommended for the resident that the resident, or LAR on the resident's behalf, wants to receive; and
   (B) determine whether the resident is best served in a facility or community setting.

(4) provide staff from the LIDDA and LMHA access to the resident and the resident's clinical facility records upon request from the LIDDA and LMHA;

(5) enter into the LTC Online Portal within 3 business days after the IDT meeting for a resident:
   (A) the date of the IDT meeting;
   (B) the name of the persons who participated in the IDT meeting;
   (C) the nursing facility specialized services, LIDDA specialized services, and LMHA specialized services that were agreed to in the IDT meeting; and

(6) the determination of whether the resident is best served in a facility or community setting;

(7) include in the comprehensive care plan:
   (A) the nursing facility specialized services agreed to by the resident or LAR; and
   (B) the nursing facility PASRR support activities;

(8) submit a complete and accurate request for nursing facility specialized services in the LTC Online Portal within 20 business days after the date of the IDT meeting;

(9) start providing a therapy service within three business days after receiving approval from HHSC in the LTC Online Portal;

(10) order DME or CMWC in accordance with §19.2754(e) of this subchapter (relating to Requesting Authorization to Provide Durable Medical Equipment and Customized Manual Wheelchairs);

(11) for a designated resident, annually document in the LTC Online Portal all nursing facility specialized services, LIDDA specialized services, and LMHA specialized services being provided to the designated resident; and

(12) promptly report a significant change in the mental or physical condition of a resident by submitting a MDS Significant Change in Status Assessment Form in the LTC Online Portal.

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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Karen Ray
Chief Counsel
Department of Aging and Disability Services
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For further information, please call: (210) 619-8292

TITLE 43. TRANSPORTATION
PART 1. TEXAS DEPARTMENT OF TRANSPORTATION
CHAPTER 1. MANAGEMENT
SUBCHAPTER F. ADVISORY COMMITTEES
The Texas Department of Transportation (department) proposes amendments to §1.82, Statutory Advisory Committee Opera-
tions and Procedures, §1.85, Department Advisory Committees, §1.86, Corridor Advisory Committees, and §1.87, Corridor Segment Advisory Committees, the repeal of §1.88, Interim Report, and a new §1.88, Duration of Advisory Committees.

EXPLANATION OF PROPOSED AMENDMENTS

Several rules currently provide, in accordance with Government Code, §2110.008, that each of the Texas Transportation Commission’s (commission) or department’s advisory committees created by statute or by the commission or department is abolished on December 31, 2019. The amendments are the result of the commission’s review of the need to continue the existence of those advisory committees. The amendments remove the existing sunset provisions and combine the substance of those provisions into one section for clarity and ease of understanding. The commission recognizes that the continuation of a few existing advisory committees is necessary for improved communication between the department and the public and the amendments extend the duration of specified advisory committees for that purpose.

Amendments to §1.82, Statutory Advisory Committee Operations and Procedures, remove subsection (i) of that section, relating to the duration of advisory committees created by statute. The substance of that subsection is being combined with the sunset provisions of other advisory committees in new §1.88, Duration of Advisory Committees.

Amendments to §1.85, Department Advisory Committees, remove subsection (c) of that section, relating to the duration of advisory committees created by the commission or the department, and redesignate existing subsection (d) as subsection (c). The substance of current subsection (c) is being combined with the sunset provisions of other advisory committees in new §1.88, Duration of Advisory Committees.

Amendments to §1.86, Corridor Advisory Committees, remove subsection (e) of that section, relating to the duration of corridor advisory committees. The substance of current subsection (e) is being combined with the sunset provisions of other advisory committees in new §1.88, Duration of Advisory Committees.

Amendments to §1.87, Corridor Segment Advisory Committees, provide clarity relating to the composition of a corridor segment advisory committee. Subsection (b) provides the method for the commission to select the members of an advisory committee. The addition of the word “may” in the subsection clarifies that an entity listed in the subsection is not required to participate on an advisory committee. The amendments also remove subsection (e) of the section, relating to the duration of corridor segment advisory committees. The substance of that subsection is being combined with the sunset provisions of other advisory committees in new §1.88, Duration of Advisory Committees.

Section 1.88, Interim Report, is being repealed because its provisions have been executed. That section is being replaced by new §1.88, Duration of Advisory Committees. The new section combines into one section the sunset provisions for advisory committees formerly in other sections in Chapter 1, Subchapter F. The new section continues the current condition that all advisory committees are abolished on December 31, 2019, except for those listed in subsection (b) or described by subsection (b), (c), or (d). New subsection (c) relates to corridor segment advisory committees and restates the substance of former §1.87(e). New subsection (d) continues the existence of the I-69 Corridor Advisory Committee until December 31, 2020. New subsection (e) relates to the Ports-to-Plains Advisory Com-

mittee and segment committees for geographic segments along the Ports-to-Plains Corridor established in accordance with H.B. No. 1079, 86th Legislature, Regular Session, 2019 and abolishes the segment committees on October 31, 2020, and the Ports-to-Plains Advisory Committee on August 31, 2021.

FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined, as required by Government Code, §2001.024(a)(4), that for each of the first five years in which the proposed rules are in effect, there will be no fiscal implications for other state agencies or local governments as a result of enforcing or administering the amendments and an indeterminate, negligible fiscal implication for the department because it is anticipated that the amendments can be accommodated within the agency’s existing resources.

LOCAL EMPLOYMENT IMPACT STATEMENT

Marc Williams, Deputy Executive Director, has certified 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. Williams has also determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the rules will be improved accuracy of the rules and improved communication between the department and the public.

COSTS ON REGULATED PERSONS

Mr. Williams 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. Williams has considered the requirements of Government Code, §2001.0221 and has determined that for the first five years in which the proposed rules are in effect there is no impact on the growth of state government in comparison to the existing levels.

TAKINGS IMPACT ASSESSMENT

Mr. Williams has determined that a written takings impact assessment is not required under Government Code, §2007.043.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§1.82, 1.85, 1.86, and 1.87, the repeal of §1.88, and new §1.88 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 "Advisory Committees." The deadline for receipt of
comments is 5:00 p.m. on October 14, 2019. 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.

43 TAC §§1.82, 1.85 - 1.88

STATUTORY AUTHORITY

The amendments and new rule are 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, Transportation Code, §201.117, which provides the commission with the authority to establish, as it considers necessary, advisory committees on any of the matters under its jurisdiction, and Government Code, §2110.008, which provides that a state agency by rule may designate the date on which an advisory committee will automatically be abolished.

CROSS REFERENCE TO STATUTE

Government Code, Chapter 2110, and Transportation Code, §§55.006 and 201.117.

§1.82. Statutory Advisory Committee Operations and Procedures.

(a) Applicability. This section applies to statutory advisory committees and governs the operation of statutory advisory committees unless it is superseded by a specific provision in §1.84 of this subchapter (relating to Statutory Advisory Committees).

(b) Election of officers and terms of members.

(1) Unless otherwise specified with regard to a particular committee, each committee shall elect a chair and vice-chair by majority vote of the members of the committee. The chair and vice-chair shall each be elected for a term of not less than one year and not more than two years. Once elected, the chair and vice-chair may stand for reelection, without limit on the number of consecutive terms.

(2) Members shall serve on an advisory committee until new members are appointed.

(c) Meetings.

(1) Meeting requirements. The division designated for an advisory committee under subsection (f) of this section shall submit to the Office of the Secretary of State notice of a meeting of the advisory committee at least 10 days before the date of the meeting. The notice must provide the date, time, place, and subject of the meeting. A meeting of an advisory committee must be open to the public. An advisory committee will follow the agenda set for each meeting under paragraph (2) of this subsection. Filing of notice of meetings with the Office of the Secretary of State shall be coordinated through the department's General Counsel Division.

(2) Scheduling of meetings. Meeting dates, times, places, and agendas will be set by the division designated under subsection (f) of this section. Any committee member may suggest the need for a meeting or an agenda item, provided that the committee may only discuss items that are within the committee's and the department's jurisdiction. The division designated under subsection (f) of this section will provide notice of the time, date, place, and purpose of meetings to the members, by mail, email, telephone or any combination of the three, at least 10 calendar days in advance of each meeting. All meetings must take place in Texas and must be held in a location that is readily accessible to the general public.

(3) Quorum. A majority of the membership of an advisory committee, including the chairman, constitutes a quorum. The committee may act only by majority vote of the members present at the meeting.

(4) Removal. A committee member may be removed at any time without cause by the person or entity that appointed the member or by that person's or entity's successor.

(5) Parliamentary procedure. Parliamentary procedures for all committee meetings shall be in accordance with the latest edition of Robert's Rules of Order, except that the chair may vote on any action as any other member of the committee, and except to the extent that Robert's Rules of Order are inconsistent with any statute or this subchapter.

(6) Record. Minutes of all committee meetings shall be prepared and filed with the commission. The complete proceedings of all committee meetings must also be recorded by electronic means.

(7) Public information. All minutes, transcripts, and other records of the advisory committees are records of the commission and as such may be subject to disclosure under the provisions of Government Code, Chapter 552.

(d) Reimbursement. The department may, if authorized by law and the executive director, reimburse a member of a committee for reasonable and necessary travel expenses. Current rules and laws governing reimbursement of expenses for state employees shall govern reimbursement of expenses for advisory committee members.

(e) Conflict of interest. Advisory committee members are subject to the same laws and policies governing ethical standards of conduct as those for commission members and employees of the department.

(f) Administrative support. For each advisory committee, the executive director will designate a division of the department that will be responsible for providing any necessary administrative support essential to the functions of the committee.

(g) Advisory committee recommendations. In developing department policies, the commission will consider the recommendations submitted by advisory committees.

(h) Manner of reporting.

(1) The division designated under subsection (f) of this section shall, in writing, report to the commission an official action of a statutory advisory committee, including any advice and recommendations, prior to commission action on the issue. The chair of the advisory committee or the chair's designee will also be invited by the department to appear before the commission prior to commission action on a posted agenda item to present the committee's advice and recommendations.

(2) In the event a written report cannot be furnished to the commission prior to commission action, the report may be given orally, provided that a written report is furnished within 10 days of commission action.

[(c) Duration. Except as otherwise specified in this subchapter, each statutory advisory committee is abolished December 31, 2019, unless the commission amends its rules to provide for a different date.]
propriate by the district engineer: department staff; affected property owners and business establishments; technical experts; professional consultants representing the department; and representatives of local governmental entities, the general public, chambers of commerce, and the environmental community. A project advisory committee shall serve the purpose of facilitating, evaluating, and achieving support and consensus from the affected community and governmental entities in the initial stages of a transportation project. Advice and recommendations of a committee provide the department with an enhanced understanding of public, business, and private concerns about a project from the development phase through the implementation phase, thus facilitating the department's communications and traffic management objectives, resulting in a greater cooperation between the department and all affected parties during project development and construction.

(B) Duties. A project advisory committee shall:

(i) maintain community and local government communication; and

(ii) respond in a timely fashion to affected parties' concerns about project development and construction.

(C) Manner of reporting. A project advisory committee shall report its advice and recommendations to the district engineer.

(D) Duration. A project advisory committee may be abolished at any stage of project development, but in no event may a committee continue beyond completion of the project.

(2) Rulemaking advisory committees.

A (A) Purpose. The commission, by order, may create ad hoc rulemaking advisory committees pursuant to Government Code, Chapter 2001, §2001.031, for the purpose of receiving advice from experts, interested persons, or the general public with respect to contemplated rulemaking.

(B) Duties. A rulemaking advisory committee shall provide advice and recommendations with respect to a specific contemplated rulemaking.

(C) Manner of reporting. A rulemaking advisory committee shall report its advice and recommendations to the division responsible for the development of the rules.

(D) Duration. A rulemaking committee shall be abolished upon final adoption of rules by the commission.

(3) Bicycle Advisory Committee.

(A) Purpose. The purpose of the Bicycle Advisory Committee is to advise the commission on bicycle issues and matters related to the Safe Routes to School Program. By involving representatives of the public, including bicyclists and other interested parties, the department helps ensure effective communication with the bicycle community, and that the bicyclist's perspective will be considered in the development of departmental policies affecting bicycle use, including the design, construction and maintenance of highways. The committee will also provide recommendations to the department on the Safe Routes to School Program.

(B) Duties. The committee shall:

(i) in accordance with Transportation Code, §201.9025, advise and make recommendations to the commission on the development of bicycle tourism trails;

(ii) provide recommendations on the selection of projects under Chapter 25, Subchapter I of this title (relating to Safe Routes to School Program); and

(iii) review and make recommendations on items of mutual concern between the department and the bicycling community.

(C) Manner of reporting. The committee shall report its advice and recommendations to the commission, except for matters relating to the Safe Routes to School Program. Under the Safe Routes to School Program the committee shall report its recommendations to the director of the division responsible for administering the program.

(4) Freight Advisory Committee.

(A) Purpose. The purpose of the Freight Advisory Committee is to serve as a forum for discussion regarding transportation decisions affecting freight mobility and promote the sharing of information between the private and public sectors on freight issues. The committee's advice and recommendations will provide the department with a broad perspective regarding freight transportation matters and assist in identifying potential freight transportation facilities that are critical to the state's economic growth and global competitiveness.

(B) Duties. The committee shall:

(i) provide advice regarding freight-related priorities, issues, projects and funding needs;

(ii) make recommendations regarding the creation of statewide freight transportation policies and performance measures;

(iii) make recommendations regarding the development of a comprehensive and multimodal statewide freight transportation plan; and

(iv) communicate and coordinate regional priorities with other organizations as requested by the department.

(C) Manner of reporting. The committee shall report its advice and recommendations to the executive director or a department employee designated by the executive director and shall make reports to the commission as requested.

(b) Operating procedures.

(1) Membership. Except as otherwise specified in this section, an advisory committee shall be composed of not more than 24 members to be appointed by the division or official to whom the committee is to report. When applicable to the purpose and duties of the committee, the membership shall provide a balanced representation between:

(A) industries or occupations regulated or directly affected by the department; and

(B) consumers of services provided either by the department or by industries or occupations regulated by the department.

(2) Meetings.

(A) An advisory committee shall meet once a calendar year and at such other times as requested by the division to which it reports.

(B) A majority of the membership of an advisory committee constitutes a quorum. A committee may take formal action only by majority vote of its membership.

(3) Officers. Each committee shall elect a chair and vice-chair by majority vote of the members of the committee.

(c) Duration. Except as otherwise specified in this section, a committee created under this section is abolished December 31, 2019, unless the commission amends its rules to provide for a different date.

(e) Reimbursement. The department may, if authorized by law and the executive director, reimburse a member of a committee.
for reasonable and necessary travel expenses. Current rules and laws governing reimbursement of expenses for state employees shall govern reimbursement of expenses for advisory committee members.

§1.86. Corridor Advisory Committees.

(a) Purpose. The commission by order may create an advisory committee for any other corridor. The purpose of an advisory committee is to facilitate and achieve support and consensus from affected communities, governmental entities, and other interested parties in the planning of transportation improvements in the segment of a corridor for which it is created and in the establishment of development plans for that corridor. An advisory committee's advice and recommendations will provide the department with an enhanced understanding of public, business, and private concerns about the segment for which it is created, facilitating the department's communications and project development objectives and resulting in greater cooperation between the department and all affected parties during project planning and development.

(b) Membership. A corridor segment advisory committee may consist of the following members:

1. one member appointed by the county judge of each county in which the proposed segment may be located, representing the general public within the county;

2. one member appointed by each metropolitan planning organization within whose boundaries all or part of the proposed segment may be located, representing the general public within the metropolitan planning organization;

3. additional members representing the general public within cities designated by the commission, in which all or part of a proposed segment may be located, each of whom will be appointed by the mayor of a designated city; and

4. additional members, each of whom:
   
   A. will represent, and be appointed by the governing body of a, port, chamber of commerce, economic development council or corporation, or other organization that has an interest in transportation, within whose service area all or part of a proposed segment may be located and that is designated by the commission to appoint a member of the committee; or

   B. is an individual who resides or has a business in the area in which the segment may be located, has an interest in transportation, and is appointed to the committee by the commission.

(c) Duties. An advisory committee shall report to the executive director its advice and recommendations on transportation improvements to be made in the corridor for which it is created, including facilities to be included in a development plan for that corridor and upgrades and other improvements to be made to existing facilities located in that corridor, and on other corridor level planning and development matters as requested by the department. The corridor advisory committee may also provide information to, coordinate with, or request information relating to the planning and development of a segment of the corridor from a corridor segment advisory committee established under §1.87 of this subchapter (relating to Corridor Segment Advisory Committees). In developing advice and recommendations, an advisory committee will evaluate economic, political, societal, and demographic population trends affecting transportation, and will consider existing facilities, upgrades to existing facilities, new or planned facilities, multimodal solutions, and available financing options.

(d) Additional requirements. An advisory committee is subject to the requirements for operating procedures and reimbursement of expenses applicable to a department advisory committee under §1.85 of this subchapter (relating to Department Advisory Committees).

[ec] Duration. An advisory committee created under this section is abolished December 31, 2019, unless the commission amends its rules to provide for a different date.

§1.87. Corridor Segment Advisory Committees.

(a) Purpose. The commission by order may create a corridor segment advisory committee to assist the department in the transportation planning process for any highway corridor. The purpose of an advisory committee is to facilitate and achieve support and consensus from affected communities, governmental entities, and other interested parties in the planning of transportation improvements in the segment of a corridor for which it is created and in the establishment of development plans for that segment. An advisory committee's advice and recommendations will provide the department with an enhanced understanding of public, business, and private concerns about the segment for which it is created, facilitating the department's communications and project development objectives and resulting in greater cooperation between the department and all affected parties during project planning and development.

(b) The following advisory committees are abolished on December 31, 2021:
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 29, 2019.
TRD-201902994
Becky Blewett
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 13, 2019
For further information, please call: (512) 463-8630

43 TAC §1.90
The Texas Department of Transportation (department) proposes new §1.90, Advisory Committees for the Ports-to-Plains Corridor.

EXPLANATION OF PROPOSED AMENDMENTS
H.B. No. 1079, Acts of the 86th Legislature, Regular Session, 2019, (HB 1079) requires the Texas Department of Transportation (department) to establish a Ports-to-Plains Advisory Committee to assist the department in conducting a comprehensive study of the Ports-to-Plains Corridor in accordance with that Act. HB 1079 establishes the composition, purpose, and tasks of the advisory committee and provides requirements for its meetings and the manner in which the advisory committee will report to the department.

Further, HB 1079 requires the department to designate geographic segments along the Ports-to-Plains Corridor and to work with the Ports-to-Plains Advisory Committee to establish segment committees for each of those segments. HB 1079 establishes the purpose and tasks of the segment committees and provides guidelines for a segment committee's composition and meetings and the manner in which each segment committee will report to the advisory committee and the department.

Government Code, Chapter 2110, provides requirements generally applicable to state advisory committees, whether the committees are created by statute or by a state agency. Section 2110.005 requires a state agency to adopt rules that state the purpose and tasks of an advisory committee and that describe the manner in which the committee will report to the agency. Section 2110.008 authorizes a state agency to determine the period during which an advisory committee operates.

New §1.90, Advisory Committees for the Ports-to-Plains Corridor, provides the information required by Government Code, Chapter 2110, for the Ports-to-Plains Advisory Committee and segment committees for geographic segments along the Ports-to-Plains Corridor. The section sets out the purpose, tasks, and reporting requirements for the Ports-to-Plains Advisory Committee and segment committees, and provides the sunset dates for the committees.

FISCAL NOTE
Brian Ragland, Chief Financial Officer, has determined, as required by Government Code, §2001.024(a)(4), that for each of the first five years in which the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

LOCAL EMPLOYMENT IMPACT STATEMENT

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43 TAC §1.88
STATUTORY AUTHORITY
The repeal 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, Transportation Code, §201.117, which provides the commission with the authority to establish, as it considers necessary, advisory committees on any of the matters under its jurisdiction, and Government Code, §2110.008, which provides that a state agency by rule may designate the date on which an advisory committee will automatically be abolished.

CROSS REFERENCE TO STATUTE
Government Code, Chapter 2110, and Transportation Code, §§55.006 and 201.117.

§1.88. Interim Report.

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Peter Smith, P.E., Director of the Transportation Planning and Programming Division, has certified 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. Smith has also determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be compliance with statutory requirements relating to advisory committees established as required by HB 1079.

COSTS ON REGULATED PERSONS

Mr. Smith 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. Smith has considered the requirements of Government Code, §2001.0221 and has determined that for the first five years in which the proposed rules are in effect there is no impact on the growth of state government.

TAKINGS IMPACT ASSESSMENT

Mr. Smith has determined that a written takings impact assessment is not required under Government Code, §2007.043.

SUBMITTAL OF COMMENTS

Written comments on new §1.90 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 "Ports-to-Plains Advisory Committees." The deadline for receipt of comments is 5:00 p.m. on October 14, 2019. 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 new rule is 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, and more specifically, Transportation Code, §201.117, which provides the commission with the authority to establish, as it considers necessary, advisory committees on any of the matters under its jurisdiction, Government Code, §2110.005, which requires a state agency by rule to state the purpose and tasks of an advisory committee and to describe the manner in which the committee will report to the agency, and Government Code, §2110.008, which provides that a state agency by rule may designate the date on which an advisory committee will automatically be abolished.

CROSS REFERENCE TO STATUTE


§1.90 Advisory Committees for Ports-to-Plains Corridor

(a) Purpose. This section provides the information required by Government Code, Chapter 2110, for the Ports-to-Plains Advisory Committee (advisory committee) and segment committees for geographic segments along the Ports-to-Plains Corridor, established in accordance with H.B. No. 1079, 86th Legislature, Regular Session, 2019.

(b) The Ports-to-Plains Advisory Committee.

(1) Purpose and duties. The purpose of the Ports-to-Plains Advisory Committee is to assist the department in conducting the study of the Ports-to-Plains Corridor required by H.B. No. 1079. The advisory committee has the duties and responsibilities set forth in that Act.

(2) Manner of reporting. The advisory committee shall review and compile the reports submitted by each segment committee and submit the compiled reports to the department with a summary and recommendations based on those reports, in accordance with H.B. No. 1079.

(c) Segment Committees. The department will determine geographic segments along the Ports-to-Plains Corridor. The department, in conjunction with the advisory committee, will take applications for service on a segment committee and establish a segment committee for each geographic segment.

(1) Purpose and duties. The purpose of a segment committee is to assist the department and the advisory committee in accordance with H.B. No. 1079. A segment committee has the duties and responsibilities set forth in that Act.

(2) Manner of reporting. Each segment committee shall prepare and file a report with the Ports-to-Plains Advisory Committee in accordance with H.B. No. 1079.

(d) Exemption from corridor advisory committee rules. Section 1.86 of this subchapter (relating to Corridor Advisory Committees) does not apply to the Ports-to-Plains Advisory Committee.

(e) Exemption from corridor segment advisory committee rules. Section 1.87 of this subchapter (relating to Corridor Segment Advisory Committees) does not apply to a segment committee established under H.B. No. 1079.

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 29, 2019.

TRD-201902995
Becky Blewett
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 13, 2019
For further information, please call: (512) 463-8630

44 TexReg 5044 September 13, 2019 Texas Register
CHAPTER 15. FINANCING AND CONSTRUCTION OF TRANSPORTATION PROJECTS

SUBCHAPTER E. FEDERAL, STATE, AND LOCAL PARTICIPATION

43 TAC §15.51, §15.55

The Texas Department of Transportation (department) proposes amendments to §15.51 and §15.55, concerning Federal, State, and Local Participation.

EXPLANATION OF PROPOSED AMENDMENTS

The 75th Texas Legislature (1997) created the Economically Disadvantaged Counties Program (program) and gave the Texas Transportation Commission (commission) the authority to adjust minimum local match requirements for eligible local governments. Section 222.053, Transportation Code, previously defined an economically disadvantaged county as a county that has, in comparison to other counties in the state, below average per capita taxable property value, below average per capita income, and above average unemployment. The department identified the counties that met those criteria using data obtained from the Texas Comptroller of Public Accounts on an annual basis. Those counties were eligible for the program during the subsequent fiscal year.

Senate Bill 2168, 86th Legislature, Regular Session, amended §222.053, Transportation Code, to expand the criteria used in determining a county's eligibility to be classified as economically disadvantaged. Senate Bill 2168 was signed June 10, 2019, and effective immediately. Now, a county is considered to be an economically disadvantaged county even if it does not currently meet the standard criteria, as long as it met the standard criteria within any one of the past six years and has been included in no less than five federally declared disasters within the same time period. If a county meets these requirements, the adjustment to the local match shall be equivalent to the highest adjustment rate set in the last year the county was eligible for the program.

Amendments to §15.51, Definitions, modify the definition of the term "economically disadvantaged county" by directly referencing the relevant statutory provisions.

Amendments to §15.55, Construction Cost Participation, update the language related to local match adjustments to align the rule with the statutory provisions as amended. Certain subsections have been renumbered accordingly.

FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined, in accordance with Government Code, §2001.024(a)(4), that for each of the first five years in which the proposed rules are in effect, there will be no fiscal implications for state agencies and an indeterminate, positive impact on a county that will be newly classified as an economically disadvantaged county under these rules, as a result of enforcing or administering the rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Peter Smith, P.E., Director of the Transportation Planning and Programming Division, has determined, in accordance with Government Code, §2001.022, that there will be no negative impact on local economies or overall employment as a result of enforcing or administering the proposed rules and that there may be an indeterminate, positive effect of the rule on employment in each geographic area affected by the rule for each year of the first five years that the rule will be in effect.

PUBLIC BENEFIT

Peter Smith, P.E., Director of the Transportation Planning and Programming Division, 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 the potential relief from local participation costs for counties eligible under the expanded definition of "economically disadvantaged county."

COSTS ON REGULATED PERSONS

Peter Smith, P.E., Director of the Transportation Planning and Programming Division, 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

Peter Smith, P.E., Director of the Transportation Planning and Programming Division, has considered the requirements of Government Code, §2001.0221 and has determined that for the first five years in which the proposed rules are in effect, there is no impact on the growth of state government.

TAKINGS IMPACT ASSESSMENT

Mr. Smith has determined that a written takings impact assessment is not required under Government Code, §2007.043.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §15.51 and §15.55 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 "Economically Disadvantaged Counties Program." The deadline for receipt of comments is 5:00 p.m. on October 14, 2019. 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 amendments are 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, Transportation Code, §222.053, which authorizes the commission to adjust the minimum local matching funds requirement for highway projects in economically disadvantaged counties.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING
Transportation Code, §222.053.

§15.51. Definitions.
The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Commission--The Texas Transportation Commission.

(2) Construction cost--All direct and indirect costs identified by the department's cost accounting system to a highway improvement or other transportation project, other than for right of way acquisition, preliminary engineering, and construction engineering.

(3) Construction engineering cost/expenses--Engineering or project administration costs and expenses incurred, including indirect costs and expenses identified by the department's cost accounting system, on a highway improvement or other transportation project after contract award.

(4) Department--The Texas Department of Transportation.

(5) District office--One of the 25 geographical areas, managed by a district engineer, in which the department conducts its primary work activities.

(6) Economically disadvantaged county--A county described by Transportation Code, §222.053(a) or (a-1), as determined from data provided by the Texas Comptroller of Public Accounts and the Federal Emergency Management Agency as appropriate. [As determined from data provided to the department by the Texas Comptroller of Public Accounts at the beginning of each fiscal year, a county that has, in comparison to other counties in the state:]

{(A) below average per capita taxable property value;]  
{(B) below average per capita income; and}  
{(C) above average unemployment.}

(7) Eligible utilities--Costs of utility adjustments, required by a highway improvement or other transportation project, that are eligible, in accordance with federal and state law, for reimbursement by the department.

(8) Executive director--The executive director of the department, or a designee.

(9) Federal funds--Financial assistance provided by the federal government for highway improvement and other transportation projects.

(10) Highway improvement project--A project which provides for the design, construction, improvement, or enhancement of a public road, including bridges, culverts, or other appurtenances related to public roads, either on or off the state highway system.

(11) Local government--Any county, city, other political subdivision of this state, or special district that has the authority to finance a highway improvement or other transportation project.

(12) Local participation--Financial assistance provided by a local government to participate in costs associated with highway improvement or other transportation projects.

(13) Matching funds/participation ratio--Those portions of funds required or chargeable for the contribution toward a highway improvement or other transportation project's cost by a local government.

(14) National Highway System (NHS)--A part of the National Intermodal Transportation System consisting of the National System of Interstate and Defense Highways and those principal arterial roads which are essential for interstate and regional commerce and travel, national defense, intermodal transfer facilities, and international commerce and border crossings as designated by the United States Congress by criteria set forth in federal law.

(15) Off-State Highway System Bridge Program--A federally mandated program by which federal funds are made available to replace or rehabilitate bridges under the jurisdiction of a local government and not on the state highway system.

(16) Preliminary engineering cost/expenses--Costs and expenses incurred, including indirect costs and any other expenses identified by the department's cost accounting system, on a highway improvement project before construction contract award.

(17) Reconstruction--The primary activities involving the rebuilding of a segment of highway along the existing route as well as those associated with the acquisition of rights of way where necessary to upgrade to current standards.

(18) Rehabilitation--The primary activities to restore, or re-establish in good condition, a segment of highway (not including the construction of additional travel lanes, other than high occupancy vehicle lanes or auxiliary lanes).

(19) Reservoir agency--A public or private agency that has the authority to construct, maintain, or operate a reservoir facility.

(20) Right of way acquisition--That process identified with the procurement of real property, access rights, mineral rights, and easements permitted in accordance with state law for the construction of approved highway improvement or other transportation projects.

(21) Right of way costs--All direct and indirect costs identified by the department's cost accounting system for the acquisition of land or an interest in land necessary for the development of a highway improvement or other transportation project (including access rights to abutting properties, eligible utility relocation/adjustment costs, and other direct expenses when specified in the agreement).

(22) State funds--Money received by the department, other than federal funds, funds in excess of minimum requirements, or local participation, to be expended for highway improvement and other transportation projects.

(23) State highway system--The system of highways in the state included in a comprehensive plan prepared by the department's executive director under the direction and with the approval of the commission in accordance with Transportation Code, §201.103.

(24) State highway system routes--Those state numbered routes designated as a part of the state highway system.

(25) Transportation project--A transportation improvement project or transportation-related program that is not a highway improvement project and that is fully or partially funded with state or federal funds.

(26) Utility relocation/adjustment costs--Costs of work related to the adjustment, relocation, and removal of utility facilities ac-
§15.55. Construction Cost Participation.

(a) Required cost participation. The commission may require, request, or accept from a local government matching or other funds, rights-of-way, utility adjustments, additional participation, planning, documents, or any other local incentives.

(1) Participation ratios. Except as provided in subsections (b) and (d) of this section, the agreement between the local government and the department must include participation ratios as described in subsection (c) of this section.

(2) In-kind contributions. The department will accept in-kind contributions for local government matching or other funds only under agreements that do not include highway construction.

(b) Economically disadvantaged counties. In evaluating a proposal for a highway improvement project with a local government that consists of all or a portion of an economically disadvantaged county, the executive director shall, for those projects in which the commission is authorized by law to provide state cost participation, adjust the minimum local matching funds requirement after receipt of a request for adjustment under paragraph (4) [(4)] of this subsection.

(1) Commission certification. The commission will certify a county as an economically disadvantaged county on an annual basis as soon as possible after the comptroller reports on the economic indicators listed in Transportation Code, §222.053(a) [under §15.54(a) of this chapter (relating to Definitions)].

(2) Local match adjustment for a county described by Transportation Code, §222.053(a). In determining the adjustment to the local matching funds requirement, and a local government's effort and ability to meet the requirement, the commission will consider a local government's:

(A) population level;
(B) bonded indebtedness;
(C) tax base;
(D) tax rate;
(E) extent of in-kind resources available; and
(F) economic development sales tax.

(3) Local match adjustment for a county described by Transportation Code, §222.053(a-1). The adjustment will be equivalent to the highest adjustment rate set in the last year the county was considered to meet the criteria set out in Transportation Code, §222.053(a).

(4) [(4)] Request for adjustment. The city council, county commissioners court, district board, or similar governing body of a local government that represents all or a portion of an economically disadvantaged county, shall submit a request for adjustment to the local district office of the department. The request will include, at a minimum:

(A) the proposed project scope;
(B) the estimated total project cost;
(C) a breakdown of the anticipated total cost by category (e.g., right-of-way, utility adjustment, plan preparation, construction);
(D) the proposed participation rate;

(E) the nature of any in-kind resources to be provided by the local government;
(F) the rationale for adjusting the minimum local matching funds requirement; and
(G) any other information considered necessary to support a request.

(5) [(4)] Timing of determination. The executive director will determine whether to make an adjustment at the time the local government submits a proposal for a highway improvement or other transportation project.

(6) [(5)] Definition. For purposes of this subsection, "executive director" means the executive director or his or her designee, not below the level of district engineer or division or office director.

(c) Participation ratios. The department will establish federal, state, and local cost participation ratios for highway improvement or other transportation projects, subject to the availability of funds to the department. In-kind participation will be valued as described in §15.52(7)(E) of this chapter (relating to Agreements).

(d) Off-state highway system bridge program.

(1) Definitions. The following words and terms, when used in this subsection, shall have the following meanings, unless the context clearly indicates otherwise.

(A) Bridge--For an equivalent-match project, a bridge or other mainline cross-drainage structure, including low water crossings (with or without conduit).
(B) Deficient bridge--A bridge having a structural load capacity or other safety condition that is inadequate.
(C) District engineer--The chief executive officer in each designated district office of the department.
(D) Equivalent-match project--A project in which the local government will improve the structural load capacity or other safety condition of off-state system bridges utilizing 100% local funds.

(E) Participation-waived project--An off-state system bridge project in which the state agrees to pay for local participation for eligible preliminary engineering, construction, and construction engineering costs as shown in subsection (c) of this section. This project must be authorized for development only, or for development and construction, on the department's approved Unified Transportation Program, satisfy minimum standards established by the department for off-state system bridges, and meet the additional requirements of this subsection.

(F) Safety work--Work performed as part of an equivalent-match project that improves the safety of the project. This work may include, but is not limited to, providing improved structural load capacity, improved hydraulic capacity, increased roadway width, adequate bridge rail, and adequate approach guardrail.

(2) Waiver. The district engineer may waive the requirement for a local government to provide the original 10% estimate of direct costs for preliminary engineering, construction engineering, and construction funds on the participation-waived project(s) if the local governmental body commits by written resolution or ordinance, as described in paragraph (4) of this subsection, to spend an equivalent amount of funds for structural improvement or other safety work on another bridge or bridges on the equivalent-match project(s) within its jurisdiction or the jurisdiction of a geographically adjacent or overlapping governmental unit. An equivalent amount includes, but is not limited to, expenditures for direct or indirect costs for structural...
improvement or other safety work on bridge(s) in the equivalent-match project(s). Work on one or more equivalent-match projects may be credited to one or more participation-waived projects.

(3) Eligibility. A local government is eligible for a waiver if:

(A) the construction contract for the participation-waived project has not been awarded;

(B) work on the equivalent-match project has not begun prior to approval of the waiver (approval of the waiver does not guarantee that the participation-waived project agreement will be executed);

(C) the local government is in compliance with load posting and closure regulations as defined in the National Bridge Inspection Standards under 23 C.F.R. §650.303;

(D) the bridge on the proposed equivalent-match project(s) is a deficient bridge, or a bridge that is weight restricted for school buses; and

(E) the equivalent-match project increases the structural load capacity of the existing bridge, replaces the bridge with a new bridge, or otherwise increases safety, with a minimum upgrade to safely carry expected school bus loading.

(4) Request for waiver. To request a waiver, a local government must provide a written request to the district engineer that includes the location(s), description of structural improvement or other safety work proposed, estimated cost for the equivalent-match project(s), and a copy of the local governmental body's resolution or ordinance. The resolution or ordinance must acknowledge assumption of all responsibilities for engineering and construction and complying with all applicable state and federal environmental regulations and permitting requirements for the bridge(s) on the equivalent-match project(s).

(5) Considerations. In approving a request for waiver, the district engineer will consider:

(A) the type of work proposed for the equivalent-match project(s);

(B) regional transportation needs; and

(C) past performance under this subsection.

(6) Approval. The district engineer will submit a letter to the local government indicating the district engineer's approval or disapproval of the waiver. If disapproved, the letter will state the reasons for disapproval. If the waiver is approved, the letter will state that the local government, for the equivalent-match project(s), will assume:

(A) all costs of the work;

(B) responsibility for complying with all applicable state and federal environmental regulations and permitting requirements; and

(C) responsibility for the engineering and construction necessary for completion of the work.

(7) Agreement and conditions.

(A) If the district engineer approves the waiver, the local government and the department will enter into an agreement for the participation-waived project as specified in §15.52 of this subchapter. One or more participation-waived project agreements can utilize one or more common or independent equivalent-match projects if the total equivalent-match project amount equals or exceeds the total remaining local participation amount being waived at the time the agreement is executed, and the common agreements are adequately cross-referenced. Previously executed agreements may be amended to incorporate these participation waiver provisions, or to utilize an additional equivalent-match project(s) for any outstanding amount not previously waived, provided the construction contract for the participation-waived project has not been awarded and the equivalent-match work has not begun.

(B) Local governments will be allowed a maximum of three years after the contract award of the participation-waived project(s) to complete structural or other safety improvements on the equivalent-match project(s). If more than one participation-waived project utilizes a common equivalent-match project, the time period allowed for completion of the equivalent-match project(s) will begin when the first of the participation-waived projects is awarded. The district engineer may specify a period less than three years for completion of equivalent-match projects if project specific conditions warrant. If specified, the shorter allowable work period must be explicitly stated in the agreement(s). No later than 30 days after completion, documentation of completion of the equivalent-match project(s) requirement will be provided by letter to the district engineer. If the local government fails to adequately complete the equivalent-match project(s), it will be excluded from future waivers under this subsection for a minimum of five years. The district engineer may grant an extension to the three-year completion requirement if a contract for the equivalent-match project(s) has been executed within that three years and the contract timeline for completion is reasonable. In the absence of information suggesting that a shorter or longer period is appropriate, two years or less will be presumed to be a reasonable time, for a maximum of five years to complete the equivalent-match project(s) following award of the programmed bridge. The granting of an extension to the three-year time limit must be done in writing in response to a written request to the district engineer from the local government. The extension approval must specify a new required completion date.

(C) With the approval of the district engineer, an equivalent-match project(s) may be substituted by subsequent amendment to the participation-waived project agreement(s). A substitution may be allowed for unforeseen circumstances, including but not limited to, an equivalent-match project that is selected for replacement under another program of work. Work on the substituted equivalent-match project(s) must be completed within a maximum of three years after the award of the construction contract for the original participation-waived project.

(D) The local government is responsible for all of the direct cost of any participation-waived project cost item or portion of a cost item that is not eligible for federal participation under the Federal Highway Bridge Replacement and Rehabilitation Program under 23 U.S.C. §144 and 23 C.F.R. §650 Subpart D. The local government is also responsible for any costs resulting from changes made at the request of the local government.

(E) The local government will be responsible for 100% of right of way and utilities for the participation-waived project.

(F) A local government located in an economically disadvantaged county that receives an adjustment under subsection (b) of this section may participate in the provisions of this subsection in the amount of its reduced matching funds requirement.

(G) The department will not reimburse funds already received by the department under the terms of existing agreements. Funds already received for a specific project(s) may be credited against the local government's required participation for the subsequent participation-waived project agreement(s) for that same project(s).
(H) Any equivalent-match project(s) cost that is in excess of the local government's required participation for a specific participation-waived project agreement(s) cannot be credited for use on a future participation-waived project(s).

(I) Each equivalent-match project(s) must be specifically identified in the participation-waived project agreement(s) at the time of execution.

(J) The local government must pay its funding share of the estimated participation-waived project cost, as provided in §15.52(7)(A) of this subchapter, for any local participation balance that is remaining at the time the project agreement(s) is executed. This balance would include any remaining required local participation amount in excess of the amount waived as a result of credit for equivalent-match work to be performed as part of the agreement.

(8) Projects with neighboring states. Local cost participation is not required for a bridge connecting Texas with a neighboring state.

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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