PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

The Texas Health and Human Services Commission (HHSC) proposes amendments to §355.102, concerning General Principles of Allowable and Unallowable Costs, §355.105, concerning General Reporting and Documentation Requirements, Methods, and Procedures, §355.112, concerning Attendant Compensation Rate Enhancement, and §355.306, concerning Cost Finding Methodology.

Background and Purpose

Cost Report Training Requirements

HHSC is extending its Long-term Services and Supports (LTSS) cost report reform initiative by requiring preparers of most LTSS cost reports and accountability reports to attend state-sponsored cost report training in the same year that a cost report is required to be submitted to HHSC. Currently, the rule requires preparers of LTSS cost reports to attend cost report training for the odd-year cost report. This rule amendment will require preparers of LTSS cost reports and accountability reports to attend training on a schedule that is related to their cost reporting deadlines. HHSC will begin collecting cost reports from most LTSS providers on a biennial rather than an annual basis. These changes will be accomplished by reorganizing the rule, including the subparagraphs that relate to School Health and Related Services (SHARS) providers. There are no substantive changes to the SHARS cost report, Department of Family Protective Services (DFPS) 24-hour Residential Child Care program, and the Deaf-Blind with Multiple Disabilities (DBMD) training requirements.

Cost Allocation Methods for State Supported Living Centers and Bond Homes

In response to Senate Bill 547 (85th Legislature, Regular Session, 2017), which requires the HHSC Executive Commissioner to establish rules in order to implement the delivery of nonresidential services by state-operated Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions (ICF/IID), HHSC would allow the use of cost allocation methods beyond those currently identified in the rule for cost reporting purposes by State Supported Living Centers (SSLCs) and Bond Homes. This rule amendment will allow flexibility in the reporting of expenses by SSLCs and Bond Homes in order to ensure the most accurate representation of the SSLCs' and Bond Homes' costs to deliver the nonresidential services.

Technical Correction to Cost Determination Process

HHSC plans to remove all references to Integrated Care Management (ICM-HCSS) and Integrated Care Management Assisted Living/Residential Care (ICM AL/RC) programs by amending the Cost Determination Process rules. The ICM program no longer exists.

Cost Report Submission Requirements

HHSC is extending its LTSS cost report reform initiative by requiring providers to submit cost reports on a biennial basis. Primary Home Care (PHC), Day Activity and Health Services (DAHS), and Community Living Assistance and Support Services (CLASS)--Direct Service Agency (DSA) and CLASS Case Management Agency (CPA) providers will be required to submit cost reports to HHSC's Rate Analysis Department in odd-numbered years. Nursing Facility (NF) and Residential Care (RC) providers will be required to submit cost reports in even years. NF providers who are members of the Pediatric Care Facility class and DFPS 24-Hour Residential Child Care (24-HR RCC) providers will be required to submit their cost reports every year. HHSC is also changing the NF cost finding methodology to comply with proposed changes to the cost report submission requirements.

Section-by-Section Summary

The proposed amendment of §355.102(d) adds "and accountability" to the title of the subsection and deletes the specific training requirements for new preparers. The proposed amendment also states that preparers that participate in cost report training may be assessed a convenience fee and that convenience fees are allowable costs. A statement that "applicable federal and state accessibility standards apply to cost report training" has been moved to this subsection from subsequent subparagraphs.

The proposed amendment of §355.102(d)(1) revises the training requirements for new preparers of cost reports and/or accountability reports. These changes alter the training requirements for all programs except for SHARS.

The proposed amendment of §355.102(d)(2) replaces language about completion certificates with language previously in §355.102(d)(3)-(5) that outlines the consequences of failing to complete the required cost report or accountability report training.

The proposed amendment of §355.102(g)(2) defines acronyms used in the paragraph and referred to later in the section.

The proposed amendment of §355.102(j) adds a new subparagraph (E) to allow SSLCs and Bond Homes to use allocation methods other than the ones designated in the rule as long as the allocation method adheres to Generally Accepted Accounting Principles. The proposed amendment also uses acronyms previously defined in §355.102(g)(2).

The proposed amendment of §355.105(c) broadens language about cost report due dates and directs providers to the HHSC website to find cost report due dates per program.

The proposed amendment of §355.112 removes from subsections (a), (c), (f) - (h), (l), (p), (t), and (ee) references to Integrated Care Management (ICM-HCSS) and Integrated Care Management Assisted Living/Residential Care (ICM AL/RC) programs. The ICM program no longer exists.

The proposed amendment of §355.306 removes the word "year's" from subsection (e).

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for the Financial Services Division for HHSC, has determined that for each year of the first five years the proposed rule amendments will be in effect, there will be no fiscal implications to costs and revenues of state and local governments as a result of enforcing and administering the rules as amended.

Government Growth Impact Statement

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

(1) The amendments will not create or eliminate a government program;

(2) Implementation of the amendments will not affect the number of employee positions;

(3) Implementation of the amendments will not require an increase or decrease in future legislative appropriations;

(4) The amendments will not affect fees paid to the agency;

(5) The amendments will not create a new rule;

(6) The amendments will expand an existing rule;

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

(8) The amendments will not affect the state's economy.

Small Business and Micro-Business Impact Analysis

Greta Rymal has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The amendments do not impose any additional costs on service providers.

Economic Costs to Persons and Impact on Local Employment

There are no anticipated economic costs to persons who are required to comply with the amendments as proposed.

There is no anticipated negative impact on local employment.

Costs to Regulated Persons

Texas Government Code, §2001.0045 does not apply to this proposal because the amendments do not impose a cost on regulated persons, the rules are amended to reduce the burden or responsibilities imposed on regulated persons, and the rules are amended to decrease a person's costs of compliance with the rule.

Public Benefit

Greta Rymal has also determined that, for the rule amendment regarding cost report training, for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the section will be increased efficacy of the cost report training by timing the training as close as possible to the due date of the cost or accountability report.

Regarding the cost allocation methods rule amendment, the public benefit anticipated as a result of enforcing or administering the section will be more efficient use of state and federal tax dollars due to more accurate interim reimbursement rates and annual settlement figures being developed for SSLCs and Bond Homes.

Takings Impact Assessment

HHSC has determined that this 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

Questions about this proposal may be directed to the HHSC Rate Analysis Customer Information Center at (512) 424-6637.

Written comments on this proposal may be submitted to the HHSC Rate Analysis Department, Mail Code H-400, P.O. Box 85200, Austin, Texas 78705-5200, by fax to (512) 730-7475, or by e-mail to RAD-LTSS@hhsc.state.tx.us within 30 days after publication of this proposal in the *Texas Register.*

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; or (2) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Cost Allocation Rule 18R072" in the subject line.

SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §§355.102, 355.105, 355.112

Statutory Authority

The amendments are proposed under Texas Government Code §531.033, which provide the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establish HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for Medicaid payments under Texas Human Resources Code, Chapter 32.

The proposed amendments implement Texas Government Code, Chapter 531 and Texas Human Resources Code, Chapter 32.

§355.102. General Principles of Allowable and Unallowable Costs.

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

(d) Cost and accountability report training. It is the responsibility of the provider to ensure that each cost or accountability report preparer has completed the required state-sponsored [~~cost report~~] training. Preparers may be employees of the provider or persons who have been contracted by the provider for the purpose of cost or accountability report preparation. Preparers must complete [~~cost report~~] training for each program for which a cost or accountability report is submitted, as applicable. [~~Beginning with providers' 2018 cost reports, preparers must complete cost report training every other year for the even-year cost report in order to receive a certificate to complete both~~

that even-year cost report and the following odd-year cost report, if applicable. If a new preparer wishes to complete an odd-year cost report and has not completed the previous even-year cost report training, to receive a certificate to complete the odd-year cost report, he/she must complete an odd-year cost report training. A copy of the most recent cost report training certificate for each preparer of the cost report must be submitted with each cost report, except for cost reports submitted through the State of Texas Automated Information and Reporting System (STAIRS).] Contracted preparer's fees to complete [state-sponsored cost report] training are considered allowable expenses for cost reporting purposes. Preparers that participate in training may be assessed a convenience fee, which will be determined by HHSC. Convenience fees assessed for training are allowable costs. Applicable federal and state accessibility standards apply to training. Beginning with the 2018 cost reports and 2019 accountability reports, reporting schedules per program are determined by HHSC and are published on the HHSC website.

(1) Training schedules. [New preparers. Preparers, who have not previously completed the required state-sponsored cost report training and received a completion certificate, must complete the state-sponsored cost report training as follows:]

(A) For programs with odd-year and even-year cost reports. Preparers must complete state-sponsored cost report training every other year in order to be eligible to complete both that odd-year cost report and the following even-year cost report. If a new preparer wishes to complete an even-year cost report and has not completed the previous odd-year cost report training, the preparer must complete an even-year cost report training. [For School Health and Related Services (SHARS) providers, new preparers must complete state-sponsored online cost report training and receive a certificate of completion. Failure to complete the required training may result in an administrative contract violation as specified in §355.8443 of this title (relating to Reimbursement Methodology for School Health and Related Services (SHARS)). Applicable federal and state accessibility standards apply to online training.]

(B) For programs with odd-year and even-year accountability reports. Preparers must complete state-sponsored accountability report training every other year in order to be eligible to complete both that odd-year accountability report and the following even-year accountability report. If a new preparer wishes to complete an even-year accountability report and has not completed the previous odd-year accountability report training, the preparer must complete an even-year accountability report training.

(C) [(B)] For all other programs. Preparers must complete the state-sponsored training for each program for which a cost or accountability report is submitted. Beginning with the 2018 cost reports, new preparers must complete cost report training every other year for each program cost or accountability report being prepared in order to be eligible to complete both that year's cost report and the following year's accountability report, if applicable. If a new preparer wishes to complete an accountability report and has not completed the previous year's cost report training, the preparer must complete an accountability report training for that program for that year. [, new preparers must complete the state-sponsored online cost report training designed for new preparers and receive a certificate of completion for each program for which a cost report is submitted. Applicable federal and state accessibility standards apply to online training.]

(2) Failure to complete the required cost or accountability report training. [All other preparers. Preparers who are not new preparers as defined in paragraph (1) of this subsection must complete state-sponsored online cost report training and receive a certificate of completion for each program for which a cost report is submitted. Preparers that participate in online training may be assessed a convenience fee, which will be determined by HHSC. Convenience fees assessed for state-sponsored online cost report training are allowable costs. Applicable federal and state accessibility standards apply to online training.]

(A) [(3)] For nursing facilities, failure to file a completed cost or accountability report signed by preparers who have completed the required cost report training may result in vendor hold as specified in §355.403 of this title (relating to Vendor Hold).

(B) [(4)] For School Health and Related Services (SHARS) [SHARS] providers, failure to complete the required cost report training may result in an administrative contract violation as specified in §355.8443 of this title.

(C) [(5)] For all other programs, failure to file a completed cost or accountability report signed by preparers who have completed the required cost report training constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title (relating to Administrative Contract Violations).

(e) - (f) (No change.)

(g) Unallowable costs. Unallowable costs are expenses that are not reasonable or necessary, according to the criteria specified in subsection (f)(1) - (2) of this section and which do not meet the requirements as specified in subsections (i), (j), and (k) of this section or which are specifically enumerated in §355.103 of this title or program-specific reimbursement methodology. Providers must not report as an allowable cost on a cost report a cost that has been determined to be unallowable. Such reporting may constitute fraud. (Refer to §355.106(a) of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports)).

(1) (No change.)

(2) For Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions (ICF/IID) [ICF/IID], Home and Community-based Services (HCS) [HSC], Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living (TxHmL) [TxHmL] programs, placement as an allowable cost on a cost report a cost, which has been determined to be unallowable, constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title.

(3) - (4) (No change.)

(h) - (i) (No change.)

(j) Cost allocation. Direct costing must be used whenever reasonably possible. Direct costing means that allowable costs, direct or indirect, (as defined in subsection (f)(3) - (4) of this section) incurred for the benefit of, or directly attributable to, a specific business component must be directly charged to that particular business component. For example, the payroll costs of a direct care employee who works across cost areas within one contracted program would be directly charged to each cost area of that program based upon that employee's continuous daily time sheets and the costs of a direct care employee who works across more than one service delivery area would also be directly charged to each service delivery area based upon that employee's continuous daily time sheets. Health insurance premiums, life insurance premiums, and other employee benefits must be direct costed.

(1) If cost allocation is necessary for cost-reporting purposes, contracted providers must use reasonable methods of allocation

and must be consistent in their use of allocation methods for cost-reporting purposes across all program areas and business entities.

(A) - (C) (No change.)

(D) Providers must use an allocation method approved or required by HHSC. Any change in cost-reporting allocation methods from one year to the next must be fully disclosed by the contracted provider on its cost report and must be accompanied by a written explanation of the reasons and justification for such change. If the provider wishes to use an allocation method that is not in compliance with the cost-reporting allocation methods in paragraphs (3) - (4) of this subsection, the contracted provider must obtain written prior approval from HHSC's Rate Analysis Department.

(i) - (ii) (No change.)

(iii) Failure to use an allocation method approved or required by HHSC or to disclose a change in an allocation to HHSC will result in the following.

(I) (No change.)

(II) For ICF/IID [~~Intermediate Care Facilities for Persons with Intellectual Disabilities (formerly known as Intermediate Care Facilities for Persons with Mental Retardation)~~], HCS [~~Home and Community-based Services~~], Service Coordination/Targeted Case Management, Rehabilitative Services, and TxHmL [~~Texas Home Living~~] programs, failure to use the allocation method approved or required by HHSC constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title.

(III) - (IV) (No change.)

(E) For small and large state-operated ICF/IID, designated as Bond Homes and State Supported Living Centers for cost reporting purposes, these facility types may use an allocation method other than those identified in paragraphs (3) - (4) of this subsection in order to represent indirect costs that are a reasonable reflection of the actual business operations. If an allocation method other than those identified in paragraphs (3) - (4) of this subsection is used for indirect costs, the allocation method must adhere to Generally Accepted Accounting Principles.

(2) - (4) (No change.)

(k) (No change.)

§355.105. General Reporting and Documentation Requirements, Methods, and Procedures.

(a) - (b) (No change.)

(c) Cost report due dates. [~~date.~~]

(1) Providers must submit cost reports to HHSC Rate Analysis no later than 90 days following the end of the provider entity's fiscal year or 90 days from the transmittal date of the cost report forms, whichever due date is later. Beginning with the 2018 cost reports, due dates per program are determined by HHSC and are published on the HHSC website. [~~For ICF/IID, providers must submit cost reports to HHSC Rate Analysis only in even years, beginning with the provider's 2018 cost report.~~]

(2) - (4) (No change.)

(d) - (i) (No change.)

§355.112. Attendant Compensation Rate Enhancement.

(a) Eligible programs. Providers contracted in the Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions (ICF/IID) ("Related Conditions" has the same meaning as in 40 TAC §9.203 (relating to Definitions)), Home and Community-based Services (HCS), Texas Home Living (TxHmL), Primary Home Care (PHC); Day Activity and Health Services (DAHS); Residential Care (RC); Community Living Assistance and Support Services (CLASS)--Direct Service Agency (DSA); Community Based Alternatives (CBA)--Home and Community Support Services (HCSS); [~~Integrated Care Management (ICM)-HCSS;~~] Deaf-Blind with Multiple Disabilities Waiver (DBMD); and CBA--Assisted Living/Residential Care (AL/RC) programs[~~; and ICM AL/RC~~] are eligible to participate in the attendant compensation rate enhancement. [~~References in this section to CBA program services also apply to the parallel services offered under the ICM program.~~]

(b) (No change.)

(c) Attendant compensation cost center. This cost center will include employee compensation, contract labor costs, and personal vehicle mileage reimbursement for attendants as defined in subsection (b) of this section.

(1) (No change.)

(2) Contract labor refers to personnel for whom the contracted provider is not responsible for the payment of payroll taxes, such as FICA, Medicare, and federal and state unemployment insurance, and who perform tasks routinely performed by employees where allowed by program rules. [~~Allowable contract labor costs are defined in §355.103(b)(2)(C) of this title.~~]

(3) (No change.)

(d) - (e) (No change.)

(f) Enrollment contract amendment.

(1) For CBA--HCSS and AL/RC, CLASS--DSA, DBMD, DAHS, [~~ICM--HCSS and AL/RC,~~] RC and PHC, an initial enrollment contract amendment is required from each provider choosing to participate in the attendant compensation rate enhancement. On the initial enrollment contract amendment, the provider must specify for each contract a desire to participate or not to participate and a preferred participation level.

(A) - (B) (No change.)

(2) - (5) (No change.)

(6) To be acceptable, an enrollment contract amendment must be completed according to instructions, signed by an authorized representative as per HHSC's [~~the Texas Department of Aging and Disability Services' (DADS')~~] signature authority designation form applicable to the provider's contract or ownership type, and legible.

(g) New contracts. For the purposes of this section, for each rate year a new contract is defined as a contract or component code whose effective date is on or after the first day of the open enrollment period, as defined in subsection (e) of this section, for that rate year. Contracts that underwent a contract assignment or change of ownership and new contracts that are part of an existing component code are not considered new contracts. For purposes of this subsection, an acceptable contract amendment is defined as a legible enrollment contract amendment that has been completed according to instructions, signed by an authorized representative as per HHSC's [~~the DADS'~~] signature authority designation form applicable to the provider's contract or ownership type, and received by HHSC Rate Analysis within 30 days of notification to the provider that such an enrollment contract amendment must be submitted. If the 30th day is on a weekend day, state holiday, or national holiday, the next business day will be considered the last day requests will be accepted. New contracts will receive the nonpar-

ticipant attendant compensation rate as specified in subsection (l) of this section with no enhancements. For new contracts specifying their desire to participate in the attendant compensation rate enhancement on an acceptable enrollment contract amendment, the attendant compensation rate is adjusted as specified in subsection (r) of this section, effective on the first day of the month following receipt by HHSC of an acceptable enrollment contract amendment. If the granting of newly requested enhancements was limited by subsection (p)(2)(B) of this section during the most recent enrollment, enrollment for new contracts will be subject to that same limitation. If the most recent enrollment was cancelled by subsection (e) of this section, new contracts will not be permitted to be enrolled.

(h) Attendant Compensation Report submittal requirements.

(1) Annual Attendant Compensation Report. For services delivered on or before August 31, 2009, providers must file Attendant Compensation Reports as follows. All participating contracted providers will provide HHSC Rate Analysis, in a method specified by HHSC Rate Analysis, an annual Attendant Compensation Report reflecting the activities of the provider while delivering contracted services from the first day of the rate year through the last day of the rate year. This report must be submitted for each participating contract if the provider requested participation individually for each contract; or, if the provider requested participation as a group, the report must be submitted as a single aggregate report covering all contracts participating at the end of the rate year within one program of the provider. A participating contract that has been terminated in accordance with subsection (v) of this section or that has undergone a contract assignment in accordance with subsection (w) of this section will be considered to have participated on an individual basis for compliance with reporting requirements for the owner prior to the termination or contract assignment. This report will be used as the basis for determining compliance with the spending requirements and recoupment amounts as described in subsection (s) of this section. Contracted providers failing to submit an acceptable annual Attendant Compensation Report within 60 days of the end of the rate year will be placed on vendor hold until such time as an acceptable report is received and processed by HHSC Rate Analysis.

(A) - (C) (No change.)

(D) Participating providers whose cost report year, as defined in §355.105(b)(5) of this title, coincides with the state of Texas fiscal year, are exempt from the requirement to submit a separate [~~annual~~] Attendant Compensation Report. For these contracts, their cost report will be considered their [~~annual~~] Attendant Compensation Report.

(2) For services delivered on September 1, 2009, and thereafter, cost reports as described in §355.105(b)-(c) [~~§355.105(b)~~] of this title will replace the Attendant Compensation Report with the following exceptions:

(A) (No change.)

(B) [~~For ICF/IID, HCS, and TxHmL programs, providers must submit an Attendant Compensation Report for odd years beginning with the rate year that starts September 1, 2017. The report must reflect the activities of the provider while delivering contracted services from the first day of the rate year through the last day of the rate year. The report is due to HHSC Rate Analysis no later than 90 days following the end of the provider entity's fiscal year or 90 days from the transmittal date of the Attendant Compensation Report forms, whichever due date is later.~~]

[~~(C)~~] ~~When a participating provider changes ownership through a contract assignment or change of ownership, the previous owner must submit an Attendant Compensation Report covering the period from the beginning of the provider's cost reporting period to the date recognized by HHSC, or its designee, as the contract-assignment or ownership-change effective date. This report will be used as the basis for determining any recoupment amounts as described in subsection (s) of this section. The new owner will be required to submit a cost report covering the period from the day after the date recognized by HHSC or its designee as the contract-assignment or ownership-change effective date to the end of the provider's fiscal year.~~

(C) [~~(D)~~] When one or more contracts or, for the ICF/IID, HCS and TxHmL programs, component codes of a participating provider are terminated, either voluntarily or involuntarily, the provider must submit an Attendant Compensation Report for the terminated contract(s) or component code(s) covering the period from the beginning of the provider's cost reporting period to the date recognized by HHSC, or its designee, as the contract or component code termination date. This report will be used as the basis for determining any recoupment amounts as described in subsection (s) of this section.

(D) [~~(E)~~] When one or more contracts or, for the ICF/IID, HCS and TxHmL programs, component codes of a participating provider are voluntarily withdrawn from participation as per subsection (x) of this section, the provider must submit an Attendant Compensation Report within 60 days of the date of withdrawal as determined by HHSC, covering the period from the beginning of the provider's cost reporting period to the date of withdrawal as determined by HHSC. This report will be used as the basis for determining any recoupment amounts as described in subsection (s) of this section. These providers must still submit a cost report covering the entire cost reporting period. The cost report will not be used for determining any recoupment amounts.

(E) [~~(F)~~] For new contracts as defined in subsection (g) of this section, the cost reporting period will begin with the effective date of participation in the enhancement.

(F) [~~(G)~~] Existing providers who become participants in the enhancement as a result of the open enrollment process described in subsection (e) of this section on any day other than the first day of their fiscal year are required to submit an Attendant Compensation Report with a reporting period that begins on their first day of participation in the enhancement and ends on the last day of the provider's fiscal year. This report will be used as the basis for determining any recoupment amounts as described in subsection (s) of this section. These providers must still submit a cost report covering the entire cost reporting period. The cost report will not be used for determining any recoupment amounts.

(G) [~~(H)~~] A participating provider that is required to submit a cost report or Attendant Compensation Report under this paragraph will be excused from the requirement to submit a report if the provider did not provide any billable attendant services to HHSC [~~DADS~~] recipients during the reporting period.

(3) - (5) (No change.)

(i) - (k) (No change.)

(l) Determination of attendant compensation rate component for nonparticipating contracts.

(1) For the PHC; DAHS; RC; CLASS--DSA; CBA--HCSS; [~~ICM-HCSS;~~] DBMD; and CBA--AL/RC [~~; and ICM AL/RC~~] programs, HHSC will calculate an attendant compensation rate component for nonparticipating contracts as follows.

(A) - (B) (No change.)

(C) For each contract included in the cost report database used to determine rates in effect on September 1, 1999, divide the result from subparagraph (B) of this paragraph by the corresponding units of service. Provider projected costs per unit of service are rank-ordered from low to high, along with the provider's corresponding units of service. For DAHS, the median cost per unit of service is selected. For all other programs, the units of service are summed until the median unit of service is reached. The corresponding projected cost per unit of service is the weighted median cost component. The result is multiplied by 1.044 for PHC; DAHS; CLASS--DSA; CBA--HCSS; [~~ICM-HCSS;~~] DBMD and by 1.07 for RC; and CBA--AL/RC[~~; and ICM AL/RC~~]. The result is the attendant compensation rate component for nonparticipating contracts.

(D) (No change.)

(2) (No change.)

(m) - (o) (No change.)

(p) Granting attendant compensation rate enhancements. Eligible programs are divided into two populations for purposes of granting attendant compensation rate enhancements. The first population includes the PHC; DAHS; RC; CLASS--DSA; CBA--HCSS; [~~ICM-HCSS;~~] DBMD; CBA--AL/RC; and ICM AL/RC programs and the second population includes the ICF/IID; HCS; and TxHmL programs. Enhancements for the two populations are funded separately; funds intended for enhancements for the first population of programs will never be used for enhancements for the second population and funds intended for enhancements for the second population of programs will never be used for enhancements for the first population. For each population of programs, HHSC divides all requested enhancements, after applying any enrollment limitations from subsection (u) of this section, into two groups: pre-existing enhancements, which providers request to carry over from the prior year, and newly-requested enhancements. Newly-requested enhancements may be enhancements requested by providers who were nonparticipants in the prior year or by providers who were participants in the prior year who seek additional enhancements. Using the process described herein separately for each population of programs, HHSC first determines the distribution of carry-over enhancements. If funds are available after the distribution of carry-over enhancements, HHSC determines the distribution of newly-requested enhancements. HHSC may not distribute newly-requested enhancements to providers owing funds identified for recoupment under subsection (s) of this section.

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

(q) - (s) (No change.)

(t) Notification of recoupment and request for recalculation.

(1) Notification of recoupment. The estimated amount to be recouped is indicated in the State of Texas Automated Information Reporting System (STAIRS), the online application for submitting cost reports and Attendant Compensation [~~accountability~~] reports. STAIRS will generate an e-mail to the entity contact, indicating that the provider's estimated recoupment is available for review. The entity contact is the provider's authorized representative per the signature authority designation form applicable to the provider's contract or ownership type. If a subsequent review by HHSC or audit results in adjustments to the [~~annual~~] Attendant Compensation Report or cost reporting, as described in subsection (h) of this section, that change the amount to be repaid, the provider will be notified by e-mail to the entity contact that the adjustments and the adjusted amount to be repaid are available in STAIRS for review. HHSC, or its designee, will recoup any amount owed from a provider's vendor payment(s) following the date of the initial or subsequent notification. For the HCS and TxHmL programs, if HHSC, or its designee, is unable to recoup owed funds in an automated fashion, the requirements detailed under subsection (dd) of this section apply.

(2) (No change.)

(u) - (dd) (No change).

(ee) Determination of compliance with spending requirements in the aggregate.

(1) (No change.)

(2) Aggregation. For an entity, for two or more commonly owned corporations, or for a combined entity that controls more than one participating contract or component code in a program (with RC and CBA AL/RC considered a single program, and HCS and TxHmL considered a single program), compliance with the spending requirements detailed in subsection (s) of this section can be determined in the aggregate for all participating contracts or component codes in the program controlled by the entity, commonly owned corporations, or combined entity at the end of the rate year, the effective date of the change of ownership of its last participating contract or component code in the program, or the effective date of the termination of its last participating contract or component code in the program rather than requiring each contract or component code to meet its spending requirement individually. Corporations that do not meet the definitions under paragraph (1)(A) - (C) of this subsection are not eligible for aggregation to meet spending requirements.

(A) - (B) (No change.)

(C) Ownership changes or terminations. For the ICF/IID, HCS, TxHmL, DAHS, RC, DBMD, CBA--AL/RC [~~and ICM AL/RC~~] programs, contracts or component codes that change ownership or terminate effective after the end of the applicable reporting period, but prior to the determination of compliance with spending requirements as per subsection (s) of this section, are excluded from all aggregate spending calculations. These contracts' or component codes' compliance with spending requirements will be determined on an individual basis and the costs and revenues will not be included in the aggregate spending calculation.

(ff) - (hh) (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
Texas Health and Human Services Commission
Earliest possible date of adoption: November 18, 2018
For further information, please call: (512) 424-6637

SUBCHAPTER C. REIMBURSEMENT METHODOLOGY FOR NURSING FACILITIES

1 TAC §355.306

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code

§32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for Medicaid payments under Texas Human Resources Code, Chapter 32.

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

§355.306. Cost Finding Methodology.

(a) - (d) (No change.)

(e) Final cost reports for change of ownership. When a facility changes ownership, for a provider who participates in the rate enhancement program, the prior owner must submit a final Staffing and Compensation Report as described in §355.308 of this title. When a facility changes ownership, for a provider not participating in the rate enhancement program, the prior owner is excused from submitting a final cost report and, if its prior [~~year's~~] cost report is pending audit completion, the audit will be suspended and the cost report excluded from the final cost report database.

(f) - (h) (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) 424-6637

CHAPTER 391. PURCHASE OF GOODS AND SERVICES BY THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION

The Texas Health and Human Services Commission (HHSC) proposes the amendment of §391.103, concerning Definitions, in Subchapter A; the amendment of §391.401, concerning Purpose, §391.405, concerning Filing of a Protest, and §391.409, concerning Contract Awards during Protest, and the repeal of and new §391.407, concerning Review and Disposition of Protests, in Subchapter D, Chapter 391, Part 15, Title 1 of the Texas Administrative Code.

BACKGROUND AND PURPOSE

Government Code Chapter 2155 requires each state agency to adopt rules concerning vendor protests. Specifically, §2155.076 requires each state agency to adopt rule protest procedures for resolving vendor protests relating to purchasing issues. Section 2155.076 further requires an agency's rules to be consistent with the rules of the Comptroller of Public Accounts (CPA). HHSC has determined that changes to the bid protest rule procedures are needed to ensure that HHSC's rules reflect the current agency procedures and that the rules are consistent with the rules of the CPA, which are found in Title 34, Chapter 20, Subchapter F, Division 3 of the Texas Administrative Code.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §391.103, concerning Definitions, updates the definition of "Protestant" to align the definition with the CPA's rules.

The proposed amendment to §391.401, concerning Purpose, clarifies that the purpose of Subchapter D is to provide a formal protest procedure. Currently, §391.401 states that the purpose is to provide an internal protest procedure, and because the protest procedure is available to entities outside HHSC, "internal" is not an accurate term.

The proposed amendment to §391.405, concerning Filing of a Protest, clarifies the requirements necessary to file a protest with the agency. The subsections are relabeled to account for the addition of subsection (c). In addition, a new subsection (e) is added to define the term "interested parties" for purposes of Chapter 391, Subchapter D.

The proposed repeal of §391.407, concerning Review and Disposition of Protests, deletes the current section because it provides for only one level of administrative review. The new section sets out the process that the Deputy Executive Commissioner of Procurement and Contracting Services will follow in determining the administrative action to be taken concerning the protest as well as providing the process for a second level appeal process, to be conducted by the Executive Commissioner of HHSC.

The proposed amendment of §391.409, concerning Contract Awards during Protest, changes the title to "Contract Awards During Protest" and makes it clear that the Executive Commissioner makes the determination whether to waive §391.409.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the new and repealed rules are in effect, there is no anticipated impact to costs and revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the sections 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 employee positions;

3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;

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

5) the proposed rules will not create a new rule under Government Code §2155.076;

6) the proposed rules will expand, limit, or repeal an existing rule;

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

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

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

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that the proposed rules will not have an adverse economic effect on small and micro-businesses; or rural communities. Consequently, an economic impact statement

and regulatory flexibility analysis, pursuant to Government Code §2006.002, are not required.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the rules as proposed.

There is no anticipated negative impact on local employment.

COSTS TO REGULATED PERSONS

Government Code §2001.0045 does not apply to these rules because the rules do not impose a cost on regulated persons, including another state agency, a special district, or a local government.

PUBLIC BENEFIT

Katherine Molina, Associate Commissioner of the Office of Compliance and Quality Control, has determined that for each year of the first five years the rules are in effect, the public will benefit from clarifying the bid protest procedures.

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 concerning the proposed rules may be directed to Katherine Molina at (512) 406-2451.

Written comments on the proposed rules may be submitted to Katherine Molina, Associate Commissioner of Compliance and Quality Control, Procurement and Contracting Services, Texas Health and Human Services Commission, 1100 W. 49th Street, Mail Code 2020, Austin, Texas 78756; or emailed to Katherine.Molina@hhsc.state.tx.us.

Comments must be received no later than 30 days from the date of publication of the proposed rules in the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, 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 by midnight on the last day of the comment period. When emailing comments, please indicate "Comments on Proposed Rule 18R073" in the subject line.

SUBCHAPTER A. INTRODUCTION

1 TAC §391.103

STATUTORY AUTHORITY

The amendment is proposed under Government Code §531.0055(e) and §531.033, which provides the Executive Commissioner of HHSC with rulemaking authority, and under Government Code §2155.076, which requires state agencies to adopt protest procedures by rule.

The proposed amendment affects Government Code §531.00553 and §2155.076.

§391.103. Definitions.

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

(1) "Benefit" means anything reasonably regarded as pecuniary gain or pecuniary advantage.

(2) "Best value" means the optimum combination of economy and quality that is the result of fair, efficient, and practical procurement decision-making and which achieves HHSC procurement objectives. Best value may consist of a combination of:

(A) purchase price;

(B) meeting required specifications;

(C) installation costs;

(D) life cycle costs;

(E) anticipated quality and reliability of the goods/services;

(F) delivery terms;

(G) respondent's performance under past contracts and ratings in the Comptroller's Vendor Performance Tracking System;

(H) cost of any required training for employees; and

(I) other relevant factors for that specific contract.

(3) "Competition" means a contract or purchasing action in which HHSC posts a solicitation, inviting proposals, offers, or bids from qualified vendors.

(4) "Contract" means a written agreement, including a purchase order, to purchase goods or services between HHSC and a vendor.

(5) "Contracting personnel" means all HHSC personnel involved in a procurement, contract administration, contract management, contract monitoring, and contract oversight.

(6) "Contractor" means an individual, firm, or entity that contracts with HHSC to provide goods or services.

(7) "Emergency purchase" means a purchase for which delay would create a hazard to life, health, safety, welfare, or property or would cause undue additional cost to the state.

(8) "Enrollment contract" means the contracting of vendors that meet qualifications or criteria for participation specified by HHSC and agree to provide the contracted goods or services in accordance with specific terms and conditions including for a standard rate or cost reimbursement.

(9) "HHSC" means the Texas Health and Human Services Commission or its designee.

(10) "Parceling" means the artificial division or intentional division of a purchase of same, like, or related goods, services, or construction into several purchases of smaller quantities, in order to circumvent competitive procurement.

(11) "Preferred supplier" means a provider of goods or services that state or federal law requires HHSC to provide a preference in the procurement of goods or services.

(12) "Procurement method" means the procedure employed by HHSC to acquire goods and services in accordance with this chapter.

(13) "Procurement file" means written documentation pertaining to the management of a procurement, including evidence of the decisions made by HHSC regarding the method, selection, and justification of a procurement.

(14) "Proprietary purchase" is the purchase of a product or service that is proprietary to one vendor and the proprietary nature of that good or service does not permit an equivalent good or service to be obtained.

(15) "Protestant" means any [actual or potential] respondent that files a protest in connection with a solicitation, evaluation or award of a contract, in accordance with Subchapter D of this Chapter (relating to Protests)[§391.403 of this subchapter (relating to Applicability)].

(16) "Respondent" means a person or entity that submits a written or electronic response to a solicitation.

(17) "Sole source" means a type of proprietary purchase where the good or service is only available through a single vendor.

(18) "Solicitation" means the written invitation for bids, request for offers, request for proposals, or similar instrument that is posted on the HHSC Website and/or Electronic State Business Daily, seeking responses from qualified vendors for needed goods and services. This term includes "price requests" and "pricing requests" sent to Department of Information Resources vendors to get pricing, based on a specific scope of work, through a Cooperative Contract or DBITS contract.

(19) "Specifications" means the written statement or description and enumeration of particulars of goods to be purchased or services to be performed.

(20) "Vendor" means an individual or entity that is organized for the purpose of offering goods or services for sale, lease, lease-purchase, or contract.

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
Texas Health and Human Services Commission
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For further information, please call: (512) 406-2451

SUBCHAPTER D. PROTESTS.

1 TAC §§391.401, 391.405, 391.407, 391.409

STATUTORY AUTHORITY

The amendments and new section are proposed under Government Code §531.0055(e) and §531.033, which provide the Executive Commissioner of HHSC with rulemaking authority, and under Government Code §2155.076, which require state agencies to adopt protest procedures by rule.

The proposed amendments and new section affect Government Code §531.00553 and §2155.076.

§391.401. Purpose.

The purpose of this subchapter is to provide a formal[an internal] protest procedure to be used by any respondent who is allegedly aggrieved in connection with the solicitation, evaluation, or award of a contract by HHSC.

§391.405. Filing of a Protest.

(a) To be considered timely, the protest must be filed: [HHSC must receive a protest, in writing, no later than ten working days after the protestant knows, or should have known, of the occurrence of the act or omission by HHSC that is the basis for the protest.]

(1) no later than the date that responses to a solicitation are due, if the protest concerns the solicitation; or

(2) no later than 10 business days after the notice of award, if the protest concerns the evaluation or award.

(b) A protestant must file [submit] a protest with[to] the[:] Deputy Executive Commissioner of Procurement and Contracting Services,[for Enterprise Contracting Operations;] Texas Health and Human Services Commission,[;] Brown-Heatly Building,[;] 4900 N. Lamar Blvd.,[;] Austin, TX 78751-2316.

(c) The protestant also must mail or deliver copies of the protest to other interested parties known to the protestant.

(d) [(c)]A protest must be sworn and must contain:

(1) a specific identification of the statutory or regulatory provision that the protestant alleges has been violated;

(2) a specific description of each act alleged to have violated the statutory or regulatory provision identified in the protest;

(3) a precise statement of the relevant facts, including sufficient documentation that the protest has been timely filed and a description of the resulting adverse impact to the protestant;

(4) a statement of any issues of law or fact that the protestant contends must be resolved;

(5) a statement of the argument and authorities that the protestant offers in support of the protest; and

(6) a statement that copies of the protest have been mailed or delivered to any other interested party known to the protestant.

(e) For the purpose of this subchapter, "interested parties" means respondents in connection to the solicitation, response evaluation, or contract award that is being protested.

§391.407. Review and Disposition of Protests.

(a) Upon receipt of a protest, the Deputy Executive Commissioner of Procurement and Contracting Services may:

(1) dismiss the protest if:

(A) it is not timely; or

(B) it does not meet the requirements of §391.405 of this subchapter (relating to Filing of a Protest);

(2) solicit written responses to the protest from other interested parties; or

(3) attempt to resolve the protest by mutual agreement.

(b) If the protest is not dismissed or resolved by mutual agreement, the Deputy Executive Commissioner of Procurement and Contracting Services will issue a written determination on the protest.

(1) If the Deputy Executive Commissioner of Procurement and Contracting Services determines that no violation of the specific statutory or regulatory provision cited by the protestant has occurred, he or she shall so inform the protestant and other interested parties by letter that sets forth the reasons for the determination.

(2) If the Deputy Executive Commissioner of Procurement and Contracting Services determines that HHSC violated the specific statutory or regulatory provision cited by the protestant in a case where HHSC has not awarded a contract, he or she shall so inform the protes-

tant and other interested parties by letter that sets forth the reasons for the determination and any appropriate remedial action.

(3) If the Deputy Executive Commissioner of Procurement and Contracting Services determines that HHSC violated the specific statutory or regulatory provision cited by the protestant in a case where HHSC awarded a contract, he or she shall so inform the protestant and other interested parties by letter that sets forth the reasons for the determination, which may include ordering the contract void.

(4) The Deputy Executive Commissioner of Procurement and Contracting Services' written determination is the final administrative action by HHSC on a protest filed under this subchapter unless the protestant files an appeal of the determination under subsection (c) of this section.

(c) The protestant may appeal the Deputy Executive Commissioner of Procurement and Contracting Services' determination on a protest to the Executive Commissioner. The appeal must be in writing and received in the Executive Commissioner's office no later than 10 business days after the date of the Deputy Executive Commissioner of Procurement and Contracting Services' determination. The appeal shall be limited to review of the Deputy Executive Commissioner of Procurement and Contracting Services' determination. The protestant must mail or deliver copies of the appeal to other interested parties, and each copy must contain a certified statement that such copies have been provided.

(1) A protest or appeal that is not timely filed shall not be considered unless good cause for delay is shown or the Executive Commissioner determines that an appeal raises issues that are significant to HHSC's procurement practices or procedures in general.

(2) The Executive Commissioner may confer with the HHSC Chief Counsel in his or her review of the appeal.

(3) The Executive Commissioner will review the appeal of the Deputy Executive Commissioner of Procurement and Contracting Services' determination and render a final decision on the protest issues.

(4) A decision issued in writing by the Executive Commissioner shall be the final administrative action of HHSC on a protest determination that is appealed under this subchapter.

§391.409. Contract Awards During[~~during~~] Protest.

HHSC will not award a contract that is subject to a properly filed protest until HHSC provides a final written disposition of the protest in accordance with §391.407 of this subchapter (relating to Review and Disposition of Protests). The Executive Commissioner may waive this requirement if the Executive Commissioner determines[~~it is determined~~] that HHSC must award a contract [~~must be awarded~~], without delay, to protect the best interests of the 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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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 406-2451

1 TAC §391.407

STATUTORY AUTHORITY

The repeal is proposed under Government Code §531.0055(e) and §531.033, which provides the Executive Commissioner of HHSC with rulemaking authority, and under Government Code §2155.076, which requires state agencies to adopt protest procedures by rule.

The proposed repeal affects Government Code §531.00553 and §2155.076.

§391.407. Review and Disposition of Protests.

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 G. HISTORICALLY UNDERUTILIZED BUSINESSES

1 TAC §391.711

The Texas Health and Human Services Commission (HHSC) proposes an amendment to §391.711, concerning Historically Underutilized Businesses.

BACKGROUND AND PURPOSE

Texas Government Code Chapter 2161, which applies to state agency construction contracts and purchases of goods and services paid for with appropriated money, requires each state agency to adopt rules concerning historically underutilized businesses. Specifically, §2161.003 requires each state agency to adopt the Comptroller of Public Accounts (CPA) rules under §2161.002 as the agency's own rules. In 2017, the CPA adopted new rules under 34 Texas Administrative Code (TAC) Chapter 20, Subchapter D, Division 1, and, therefore, §391.711 needs to be amended to adopt the new CPA rules. See the January 20, 2017, issue of the *Texas Register* (42 TexReg 235).

SECTION-BY-SECTION SUMMARY

The purpose of the amendment to §391.711 is to correct the citation of the historically underutilized business rules that HHSC adopts by reference. Currently, §391.711 incorporates 34 TAC Chapter 20, Subchapter B, which has been repealed. The amendment replaces the obsolete cite with the newly adopted Chapter 20, Subchapter D, Division 1 (relating to Historically Underutilized Businesses). The amendment also corrects the statutory reference to Texas Government Code §2161.003.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the rule will be in effect, there is no anticipated impact to costs and revenues of state or local governments because of enforcing or administering the proposed rule.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the section 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 employee positions;

(3) implementation of the proposed rule will not require an increase or decrease in future legislative appropriations;

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

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

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

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

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

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

Greta Rymal, Deputy Executive Commissioner for Financial Services, has also determined that the proposed rule will not have an adverse economic effect small and micro-businesses or rural communities. Consequently, an economic impact statement and regulatory flexibility analysis, pursuant to Texas Government Code §2006.002, are not required.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT IMPACT STATEMENT

There are no anticipated economic costs to persons who are required to comply with the proposed rule.

There is no anticipated negative impact on local employment.

COSTS TO REGULATED PERSONS

HHSC has determined that the proposed rule does not impose a cost on regulated persons, including another state agency, a special district, or a local government. Accordingly, Texas Government Code §2001.0045 does not apply to this rule.

PUBLIC BENEFIT

Katherine Molina, Associate Commissioner of the Office of Compliance and Quality Control, has determined that for each year of the first five-year period the rule is in effect the public benefit will be correctly referencing the statutory authority and citation of the current CPA rules.

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

Questions concerning the proposed rules may be directed to Katherine Molina, at (512) 406-2451.

Written comments on the proposed rule may be submitted to Katherine Molina, Associate Commissioner of Compliance and Quality Control, Procurement and Contracting Services, Texas Health and Human Services Commission, 1100 W. 49th Street, Mail Code 2020, Austin, Texas 78756; or emailed to HHSRulesCoordinationOffice@hhsc.state.tx.us. Comments must be received no later than 30 days from the date of publication of the proposed rules in the *Texas Register.*

The last day to submit comments falls on a Sunday; therefore, 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 by midnight on the last day of the comment period. When emailing comments, please indicate "Comments on Proposed Rule 19R004, Section 391.711" in the subject line.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code §531.0055(e) and §531.033, which provides the Executive Commissioner of HHSC with rulemaking authority, and under Texas Government Code §2161.003, which requires state agencies to adopt by reference the historically underutilized business rules of the Comptroller of Public Accounts.

The amendment affects Texas Government Code §531.00553 and Texas Government Code Chapter 2161.

§391.711. Historically Underutilized Business Program.

In compliance with Texas Government Code §2161.003[, §2161.033], HHSC adopts by reference the Texas Comptroller of Public Accounts rules at 34 TAC Chapter 20, Subchapter D, Division 1[B] (relating to Historically Underutilized Businesses[Business Program]).

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 October 8, 2018.

TRD-201804352

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: November 18, 2018

For further information, please call: (512) 406-2451

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 15. EGG LAW

4 TAC §15.5

The Texas Department of Agriculture (the Department) proposes amendments to Title 4, Part 1, Chapter 15, §15.5 of the Texas Administrative Code, concerning special fees for the egg law program. The amendments to §15.5 decrease the monthly egg law special fees.

Pursuant to §15.5, the Department collects special fees from regulated entities on a monthly basis. As a result of the economic expansion and population growth in Texas, Texas is experiencing additional demand for eggs produced in this state. Additionally, due to external factors out of state, such as increased governmental regulation, the export market for Texas eggs has increased and production has grown to meet in state and out of state demand for Texas eggs.

The Legislature requires that all of the costs of administering the Texas egg law program, codified at Chapter 132 of the Texas Agriculture Code, be entirely offset by revenue generated for the program and has authorized the agency to collect fees for such cost recovery efforts. The Department has been engaged in an ongoing review of programs for cost savings and efficiencies, and, as a result of such review, the Department has determined that the reduction in special fees set out in this proposal will allow TDA to meet cost recovery requirements and provide a benefit to industry and consumers through lower regulatory costs. Assuming this proposal is implemented after receipt and consideration of comments by industry and the public, the Department is confident that it will continue to effectively offer consumer protection required by the egg law program while operating the program.

Philip Wright, Administrator for Agriculture Consumer Protection, has determined that for the first five-year period the proposed amendments are in effect, there will be no negative fiscal implications for state government due to the decrease in fees collected. The egg program is operated entirely on a cost recovery basis and the decrease in fees will not have an adverse impact affecting the revenue of the Department. Although the Department expects this proposed reduction to be revenue neutral because of increased demand for Texas eggs, the Department is also in a position to reduce its operating costs for this program to meet the total revenue collected from egg producers, if necessary.

Mr. Wright has also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of administering the proposed amendment will be more efficient administration of the egg program, while reducing fees for licensees. There will be no anticipated increased costs to micro-businesses, small businesses or individuals required to comply with the amendments, as the fees will decrease for those licensed under this chapter. There will be no adverse impact on rural communities. Additionally, based on recent and long term historical volume of egg production in this state, the Department expects this proposal to result in a 20% reduction of special fees collected from egg producers subject to regulation under the Texas egg law.

Mr. Wright has provided the following information related to the government growth impact statement, as required pursuant to Texas Government Code, §2001.021. As a result of implementing the proposal, for the first five years the proposed rules are in effect:

(1) no new or current government or Department programs will be created or eliminated;

(2) no employee positions will be created, nor will any existing Department staff positions be eliminated; and

(3) there will not be an increase or decrease in future legislative appropriations to the Department.

Additionally, Mr. Wright has determined that for the first five years the proposed rules are in effect:

(1) there will be a decrease in fees paid to the Department;

(2) there will be no new regulations created by the proposal;

(3) there will be no expansion, limit or repeal of current regulations;

(4) there will be no increase or decrease to the number of individuals subject to the proposal; and

(5) the proposal will positively affect the Texas economy and Texas consumers by reducing the amount of special egg fees that licensees and processors must pay.

Comments on the proposal may be submitted to Philip Wright, Administrator for Agriculture Consumer Protection, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711, or by email to *Philip.Wright@TexasAgriculture.gov.* Comments must be received no later than November 16, 2018.

The amendments are proposed under Texas Agriculture Code, §132.003 which designates the Department as the agency for egg law regulation and §§132.026, 132.027, 132.028, and 132.043 which require the Department to charge fees for each egg law licenses.

The code affected by the proposal is Chapter 132 of the Agriculture Code.

§15.5. Special Fees.

(a) A person licensed under this chapter who first establishes the grade, size, and classification of eggs offered for sale or sold in this state shall collect a fee of $0.04 [~~$0.05~~] per case of eggs on the first sale of the eggs.

(b) A processor licensed under this chapter shall pay a fee of $0.04 [~~$0.05~~] per case of eggs on the processor's first use or change in form of the eggs processed.

(c) - (d) (No change.)

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

Filed with the Office of the Secretary of State on October 5, 2018.

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Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 27. FIELDS OF STUDY

SUBCHAPTER II. HEALTH SERVICES FIELD OF STUDY ADVISORY COMMITTEE

19 TAC §§27.781 - 27.787

The Texas Higher Education Coordinating Board proposes new Chapter 27, Subchapter II, §§27.781 - 27.787, concerning the Health Services Field of Study Advisory Committee. The proposed new rules authorize the Board to create an advisory committee to develop a Health Services field of study. The newly added rules will affect students when the Health Services field of study is adopted by the Board.

Dr. Rex C. Peebles, Assistant Commissioner for Academic Quality and Workforce, has determined that for the first five years there will be no fiscal implications for state or local gov-

ernments as a result of adding the new sections. There would be minimal costs to public institutions of higher education to support the expenses of committee members who may travel to the Coordinating Board in Austin for meetings.

Dr. Peebles has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the clarification of which lower division courses are required in a Health Services degree and the improved transferability and applicability of courses. There would be minimal costs to public institutions of higher education to support travel and other expenses of committee members who may travel to the Coordinating Board in Austin for meetings. There is no impact on local employment. There is no impact on small businesses, micro businesses, and rural communities.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will create a new rule;

(6) the rules will not limit an existing rule; and

(7) the rules will not change the number of individuals subject to the rule.

Comments on the proposal may be submitted to Rex C. Peebles, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas, 78711 or via email at AQWComments@THECB.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The new sections are proposed under the Texas Education Code, §61.823(a), which provides the Coordinating Board with the authority to develop fields of study curricula with the assistance of advisory committees and Texas Government Code, §2110.005, which requires a state agency that establishes an advisory committee to adopt rules that state the purpose and tasks of the committee and describe the manner in which the committee will report to the agency.

The new sections affect the implementation of Texas Education Code, Chapter 61.

§27.781. Authority and Specific Purposes of the Health Services Field of Study Advisory Committee.

(a) Authority. Statutory authority for this subchapter is provided in the Texas Education Code, §61.823(a).

(b) Purpose. The Health Services Field of Study Advisory Committee is created to provide the Commissioner and the Board with guidance regarding the Health Services field of study curricula.

§27.782. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings:

(1) Board--The Texas Higher Education Coordinating Board.

(2) Commissioner--The Commissioner of Higher Education, the Chief Executive Officer of the Board.

(3) Field of Study Curricula--The block of courses which may be transferred to a general academic teaching institution and must be substituted for that institution's lower division requirements for the degree program into which the student transfers, and the student shall receive full academic credit toward the degree program for the block of courses transferred.

(4) Institutions of Higher Education--As defined in Texas Education Code, Chapter 61.003(8).

§27.783. Committee Membership and Officers.

(a) The advisory committee shall be equitably composed of representatives of institutions of higher education.

(b) Each university system or institution of higher education which offers a degree program for which a field of study curriculum is proposed shall be offered participation on the advisory committee.

(c) At least a majority of the members of the advisory committee named under this section shall be faculty members of an institution of higher education. An institution shall consult with the faculty of the institution before nominating or recommending a person to the board as the institution's representative on an advisory committee.

(d) Board staff will recommend for Board appointment individuals who are nominated by institutions of higher education.

(e) Members of the committee shall select co-chairs, who will be responsible for conducting meetings and conveying committee recommendations to the Board.

(f) The number of committee members shall not exceed twenty-four (24).

(g) Members shall serve staggered terms of up to three years. The terms of chairs and co-chairs (if applicable) will be two years dating from their election.

§27.784. Duration.

The Committee shall be abolished no later than January 31, 2023, in accordance with Texas Government Code, Chapter 2110. It may be reestablished by the Board.

§27.785. Meetings.

The Committee shall meet as necessary. Special meetings may be called as deemed appropriate by the presiding officer. Meetings shall be open to the public and broadcast via the web, unless prevented by technical difficulties, and minutes shall be available to the public after they have been prepared by the Board staff and reviewed by members of the Committee.

§27.786. Tasks Assigned to the Committee.

Tasks assigned to the Committee include:

(1) advise the Board regarding the Health Services Field of Study Curricula;

(2) provide Board staff with feedback about processes and procedures related to the Health Services Field of Study Curricula; and

(3) any other issues related to the Health Services Field of Study Curricula as determined by the Board.

§27.787. Report to the Board; Evaluation of Committee Costs and Effectiveness.

The Committee shall report recommendations to the Board. The Committee shall also report Committee activities to the Board to allow the Board to properly evaluate the Committee work, usefulness, and the costs related to the Committee existence. The Board shall report its evaluation to the Legislative Budget Board in its biennial Legislative Appropriations 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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SUBCHAPTER JJ. HOSPITALITY ADMINISTRATION FIELD OF STUDY ADVISORY COMMITTEE

19 TAC §§27.801 - 27.807

The Texas Higher Education Coordinating Board proposes new Chapter 27, Subchapter JJ, §§27.801 - 27.807, concerning the Hospitality Administration Field of Study Advisory Committee. The proposed new rules authorize the Board to create an advisory committee to develop a Hospitality Administration field of study. The newly added rules will affect students when the Hospitality Administration field of study is adopted by the Board.

Dr. Rex C. Peebles, Assistant Commissioner for Academic Quality and Workforce, has determined that for the first five years there will be no fiscal implications for state or local governments as a result of adding the new sections. There would be minimal costs to public institutions of higher education to support the expenses of committee members who may travel to the Coordinating Board in Austin for meetings.

Dr. Peebles as also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be the clarification of which lower division courses are required in a Hospitality Administration degree and the improved transferability and applicability of courses. There would be minimal costs to public institutions of higher education to support travel and other expenses of committee members who may travel to the Coordinating Board in Austin for meetings. There is no impact on local employment. There is no impact on small businesses, micro businesses, and rural communities.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will create a new rule;

(6) the rules will not limit an existing rule; and

(7) the rules will not change the number of individuals subject to the rule.

Comments on the proposal may be submitted to Rex C. Peebles, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas, 78711 or via email at AQWComments@THECB.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The new sections are proposed under the Texas Education Code, §61.823(a), which provides the Coordinating Board with the authority to develop fields of study curricula with the assistance of advisory committees and Texas Government Code, §2110.005, which requires a state agency that establishes an advisory committee to adopt rules that state the purpose and tasks of the committee and describe the manner in which the committee will report to the agency.

The new sections affect the implementation of Texas Education Code, Chapter 61.

§27.801. Authority and Specific Purposes of the Hospitality Administration Field of Study Advisory Committee.

(a) Authority. Statutory authority for this subchapter is provided in the Texas Education Code, §61.823(a).

(b) Purpose. The Hospitality Administration Field of Study Advisory Committee is created to provide the Commissioner and the Board with guidance regarding the Hospitality Administration field of study curricula.

§27.802. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings:

(1) Board--The Texas Higher Education Coordinating Board.

(2) Commissioner--The Commissioner of Higher Education, the Chief Executive Officer of the Board.

(3) Field of Study Curricula--The block of courses which may be transferred to a general academic teaching institution and must be substituted for that institution's lower division requirements for the degree program into which the student transfers, and the student shall receive full academic credit toward the degree program for the block of courses transferred.

(4) Institutions of Higher Education--As defined in Texas Education Code, Chapter 61.003(8).

§27.803. Committee Membership and Officers.

(a) The advisory committee shall be equitably composed of representatives of institutions of higher education.

(b) Each university system or institution of higher education which offers a degree program for which a field of study curriculum is proposed shall be offered participation on the advisory committee.

(c) At least a majority of the members of the advisory committee named under this section shall be faculty members of an institution of higher education. An institution shall consult with the faculty of the institution before nominating or recommending a person to the board as the institution's representative on an advisory committee.

(d) Board staff will recommend for Board appointment individuals who are nominated by institutions of higher education.

(e) Members of the committee shall select co-chairs, who will be responsible for conducting meetings and conveying committee recommendations to the Board.

(f) The number of committee members shall not exceed twenty-four (24).

(g) Members shall serve staggered terms of up to three years. The terms of chairs and co-chairs (if applicable) will be two years dating from their election.

§27.804. Duration.
The Committee shall be abolished no later than January 31, 2023, in accordance with Texas Government Code, Chapter 2110. It may be reestablished by the Board.

§27.805. Meetings.
The Committee shall meet as necessary. Special meetings may be called as deemed appropriate by the presiding officer. Meetings shall be open to the public and broadcast via the web, unless prevented by technical difficulties, and minutes shall be available to the public after they have been prepared by the Board staff and reviewed by members of the Committee.

§27.806. Tasks Assigned to the Committee.
Tasks assigned to the Committee include:

(1) advise the Board regarding the Hospitality Administration Field of Study Curricula;

(2) provide Board staff with feedback about processes and procedures related to the Hospitality Administration Field of Study Curricula; and

(3) any other issues related to the Hospitality Administration Field of Study Curricula as determined by the Board.

§27.807. Report to the Board; Evaluation of Committee Costs and Effectiveness.
The Committee shall report recommendations to the Board. The Committee shall also report Committee activities to the Board to allow the Board to properly evaluate the Committee's work, usefulness, and the costs related to the Committee existence. The Board shall report its evaluation to the Legislative Budget Board in its biennial Legislative Appropriations 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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SUBCHAPTER KK. NATURAL RESOURCES CONSERVATION & RESEARCH FIELD OF STUDY ADVISORY COMMITTEE

19 TAC §§27.821 - 27.827

The Texas Higher Education Coordinating Board proposes new Chapter 27, Subchapter KK, §§27.821 - 27.827 concerning the Natural Resources Conservation & Research Field of Study Advisory Committee. The proposed new rules authorize the Board to create an advisory committee to develop a Natural Resources Conservation & Research field of study. The newly added rules will affect students when the Natural Resources Conservation & Research field of study is adopted by the Board.

Dr. Rex C. Peebles, Assistant Commissioner for Academic Quality and Workforce, has determined that for the first five years there will be no fiscal implications for state or local governments as a result of adding the new sections. There would be minimal costs to public institutions of higher education to support the expenses of committee members who may travel to the Coordinating Board in Austin for meetings.

Dr. Peebles as also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be the clarification of which lower division courses are required in a Natural Resources Conservation & Research degree and the improved transferability and applicability of courses. There would be minimal costs to public institutions of higher education to support travel and other expenses of committee members who may travel to the Coordinating Board in Austin for meetings. There is no impact on local employment. There is no impact on small businesses, micro-businesses, and rural communities.

Government Growth Impact Statement

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

(2) implementation of the rules will not require the creation or elimination of employee positions;

(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not require an increase or decrease in fees paid to the agency;

(5) the rules will create a new rule;

(6) the rules will not limit an existing rule; and

(7) the rules will not change the number of individuals subject to the rule.

Comments on the proposal may be submitted to Rex C. Peebles, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas, 78711 or via email at AQWComments@THECB.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The new sections are proposed under the Texas Education Code, §61.823(a), which provides the Coordinating Board with the authority to develop fields of study curricula with the assistance of advisory committees and Texas Government Code, §2110.005, which requires a state agency that establishes an advisory committee to adopt rules that state the purpose and tasks of the committee and describe the manner in which the committee will report to the agency.

The new sections affect the implementation of Texas Education Code, Chapter 61.

§27.821. Authority and Specific Purposes of the Natural Resources Conservation & Research Field of Study Advisory Committee.

(a) Authority. Statutory authority for this subchapter is provided in the Texas Education Code, §61.823(a).

(b) Purpose. The Natural Resources Conservation & Research Field of Study Advisory Committee is created to provide the Commissioner and the Board with guidance regarding the Natural Resources Conservation & Research field of study curricula.

§27.822. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings:

(1) Board--The Texas Higher Education Coordinating Board.

(2) Commissioner--The Commissioner of Higher Education, the Chief Executive Officer of the Board.

(3) Field of Study Curricula--The block of courses which may be transferred to a general academic teaching institution and must be substituted for that institution's lower division requirements for the degree program into which the student transfers, and the student shall receive full academic credit toward the degree program for the block of courses transferred.

(4) Institutions of Higher Education--As defined in Texas Education Code, Chapter 61.003(8).

§27.823. Committee Membership and Officers.

(a) The advisory committee shall be equitably composed of representatives of institutions of higher education.

(b) Each university system or institution of higher education which offers a degree program for which a field of study curriculum is proposed shall be offered participation on the advisory committee.

(c) At least a majority of the members of the advisory committee named under this section shall be faculty members of an institution of higher education. An institution shall consult with the faculty of the institution before nominating or recommending a person to the board as the institution's representative on an advisory committee.

(d) Board staff will recommend for Board appointment individuals who are nominated by institutions of higher education.

(e) Members of the committee shall select co-chairs, who will be responsible for conducting meetings and conveying committee recommendations to the Board.

(f) The number of committee members shall not exceed twenty-four (24).

(g) Members shall serve staggered terms of up to three years. The terms of chairs and co-chairs (if applicable) will be two years dating from their election.

§27.824. Duration.

The Committee shall be abolished no later than January 31, 2023, in accordance with Texas Government Code, Chapter 2110. It may be reestablished by the Board.

§27.825. Meetings.

The Committee shall meet as necessary. Special meetings may be called as deemed appropriate by the presiding officer. Meetings shall be open to the public and broadcast via the web, unless prevented by technical difficulties, and minutes shall be available to the public after they have been prepared by the Board staff and reviewed by members of the Committee.

§27.826. Tasks Assigned to the Committee.

Tasks assigned to the Committee include:

(1) Advise the Board regarding the Natural Resources Conservation & Research Field of Study Curricula;

(2) Provide Board staff with feedback about processes and procedures related to the Natural Resources Conservation & Research Field of Study Curricula; and

(3) Any other issues related to the Natural Resources Conservation & Research Field of Study Curricula as determined by the Board.

§27.827. Report to the Board; Evaluation of Committee Costs and Effectiveness.

The Committee shall report recommendations to the Board. The Committee shall also report Committee activities to the Board to allow the Board to properly evaluate the Committee work, usefulness, and the costs related to the Committee existence. The Board shall report its evaluation to the Legislative Budget Board in its biennial Legislative Appropriations 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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PART 2. TEXAS EDUCATION AGENCY

CHAPTER 101. ASSESSMENT
SUBCHAPTER DD. COMMISSIONER'S RULES CONCERNING SUBSTITUTE ASSESSMENTS FOR GRADUATION

19 TAC §101.4002

The Texas Education Agency (TEA) proposes an amendment to §101.4002, concerning substitute assessments for graduation. The proposed amendment would clarify and update the language and satisfactory scores used for substitute assessments to satisfy the state's end-of-course (EOC) graduation requirements.

Section 101.4002, State of Texas Assessments of Academic Readiness End-of-Course Substitute Assessments, specifies the assessments the commissioner of education recommends as substitute assessments that a student may use in place of a corresponding EOC assessment and establishes the cut scores needed for a student to use a substitute assessment for graduation purposes. The proposed amendment would clarify and update the language and satisfactory scores in this section as follows.

The proposed amendment would clarify the language in subsection (b) to allow a student to use qualifying scores on separate sections of a substitute assessment in place of specific EOC assessments. For example, a student can use a qualifying score

on SAT mathematics as a substitute for Algebra I, and a qualifying score on SAT evidence-based reading and writing can be used as a substitute for English I.

The proposed amendment would also amend the figure in subsection (b) by adding and adjusting passing scores for the Texas Success Initiative (TSI) assessment to align with performance standards adopted in 19 TAC §4.57(a), College Ready Standards. All other approved substitute assessments and their corresponding cut scores would be unchanged. The footnotes in the figure would be modified to specify that satisfactory scores must be achieved on substitute assessments and clarify which EOC requirements the TSI English language arts assessment may fulfill.

The proposed amendment would clarify the language in subsection (c) to allow a student at any grade level to use a substitute assessment when he or she is enrolled in the corresponding course.

The proposed amendment would clarify the language in subsection (d) to allow a student to use the TSI assessment as a substitute assessment if he or she meets the requirements under paragraph (1) or (2) of the subsection. It would also explain that the requirements under paragraph (1)(A) indicate that a student must meet the qualifying scores on all three sections of the TSI English language arts assessment. Additionally, the proposed language in paragraph (2) would clarify that a student would have to have taken an EOC assessment and failed two times before he or she could qualify to use the TSI assessment as a substitute under the paragraph. Finally, paragraph (2)(B) would be amended to implement the requirements of Senate Bill 463, 85th Texas Legislature, Regular Session, 2017, by extending the expiration date for paragraph (2) from 2017 to 2019.

The proposed amendment would add language in subsection (e) to prohibit a district from discounting a student's responses to an EOC assessment in lieu of a substitute assessment.

The proposed amendment would clarify the language in subsection (f) to allow a student to use qualifying scores on pre-SAT or pre-ACT tests if he or she has taken a corresponding pre-SAT or pre-ACT test and a corresponding EOC assessment and failed both.

The proposed amendment would have no procedural and reporting implications beyond those that apply to all Texas students with respect to implementation of the State of Texas Assessments of Academic Readiness (STAAR®) program.

The proposed amendment would have no new locally maintained paperwork requirements.

FISCAL NOTE. Penny Schwinn, chief deputy commissioner for academics, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for state and local government as a result of enforcing or administering the amendment.

There is no effect on local economy for the first five years that the proposed amendment is in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022. The proposed amendment does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

GOVERNMENT GROWTH IMPACT. TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not expand, limit, or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT/COST NOTE. Ms. Schwinn has determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the proposed amendment would be continuing to allow students the opportunity to substitute appropriate tests for a STAAR® EOC assessment for graduation purposes. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. There is no direct adverse economic impact for small businesses, microbusinesses, and rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins October 19, 2018, and ends November 19, 2018. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/. Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on October 19, 2018.

STATUTORY AUTHORITY. The amendment is proposed under Texas Education Code (TEC), §39.025, which establishes the secondary-level performance required to receive a Texas high school diploma; TEC, §39.025(a), which requires the commissioner of education to adopt rules requiring students to achieve satisfactory performance on each EOC assessment listed under TEC, §39.023(c), in order to receive a Texas high school diploma; and TEC, §39.025(a-2), which requires the commissioner to determine a method by which a student's score on certain national assessments may be used to satisfy the EOC assessment graduation requirements.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §39.025.

§101.4002. State of Texas Assessments of Academic Readiness End-of-Course Substitute Assessments.

(a) For purposes of this subchapter, "equivalent course" is defined as a course having sufficient content overlap with the essential knowledge and skills of a similar course in the same content area listed under §74.1(b)(1)-(4) of this title (relating to Essential Knowledge and Skills).

(b) Effective beginning with the 2011-2012 school year, in accordance with the Texas Education Code (TEC), §39.025(a-1), (a-2), and (a-3), the commissioner of education adopts certain assessments as provided in the chart in this subsection as substitute assessments that a student may use in place of a corresponding end-of-course (EOC) assessment under the TEC, §39.023(c), to meet the student's assessment graduation requirements. A satisfactory score on an[~~An~~] approved substitute assessment may be used in place of only one specific EOC assessment, except in those cases described by subsection (d)(1) of this section.

Figure: 19 TAC §101.4002(b)
[~~Figure: 19 TAC §101.4002(b)~~]

(c) A student at any grade level is eligible to use a substitute assessment as provided in the chart in subsection (b) of this section if:

(1) a student was administered an approved substitute assessment for an equivalent course in which the student was enrolled;

(2) a student received a satisfactory score on the substitute assessment as determined by the commissioner and provided in the chart in subsection (b) of this section; and

(3) a student using a Texas Success Initiative (TSI) assessment also meets the requirements of subsection (d) of this section.

(d) Effective beginning with the 2014-2015 school year, a student must meet criteria established in paragraph (1) or (2) of this subsection in order to qualify to use TSI as a substitute assessment.

(1) A student must have been enrolled in a college preparatory course for English language arts (PEIMS code CP110100) or mathematics (PEIMS code CP111200) and, in accordance with the TEC, §39.025(a-1), have been administered an appropriate TSI assessment at the end of that course.

(A) A student under this paragraph who meets all three TSI English language arts score requirements provided in the chart in subsection (b) of this section satisfies both the English I and English II EOC assessment graduation requirements.

(B) A student under this paragraph may satisfy an assessment graduation requirement in such a manner regardless of previous performance on an Algebra I, English I, or English II EOC assessment.

(2) In accordance with the TEC, §39.025(a-3), a student who has not been successful[~~did not meet satisfactory performance~~] on the Algebra I or English II EOC assessment after taking[~~retaking~~] the assessment at least two times may use the corresponding TSI assessment in place of that EOC assessment.

(A) For a student under this paragraph who took separate reading and writing assessments for the English II EOC assessment and who did not meet the English II assessment graduation requirement using those tests as specified in §101.3022(b) of this title (relating to Assessment Requirements for Graduation), the separate TSI reading or writing assessment may not be used to substitute for the corresponding English II reading or writing EOC assessment.

(B) The provisions of this paragraph expire September 1, 2019[~~2017~~]. A student may meet the assessment graduation requirements under this paragraph using TSI if the student has met the necessary score requirements as specified in subsection (b) of this section prior to September 1, 2019[~~2017~~].

(e) A student electing to substitute an assessment for graduation purposes must still take the corresponding EOC assessment required under the TEC, §39.023(c), unless the student met the requirements specified in subsection (c) of this section. If a student sits for an EOC assessment, a school district may not mark the substitute assessment bubble for that administration.

(f) A student who fails to perform satisfactorily on a pre-SAT or pre-ACT test (or any versions of these tests)[~~the PSAT or the ACT-PLAN~~] as indicated in the chart in subsection (b) of this section must take the appropriate EOC[~~end-of-course~~] assessment required under the TEC, §39.023(c). However, a student who does not receive a passing score on the EOC assessment and retakes a pre-SAT or pre-ACT test (or any versions of these tests) is eligible to meet the requirements specified in subsection (c) of this section[~~, to meet the assessment graduation requirements for that subject~~].

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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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER A. EXAMINATION AND FINANCIAL ANALYSIS

28 TAC §7.83, §7.84

The Texas Department of Insurance proposes amendments to 28 TAC §7.83 and §7.84, concerning appeal of examination reports and examination frequency.

EXPLANATION. The proposed amendments to §7.83 are necessary under Insurance Code §401.056 to clarify examination appeal procedures and allow each entity that the department examines to appeal those findings to the department when there is not another examination appeals process in the Insurance Code that applies to that entity. The department must conduct a financial examination of carriers at least once every five years. At the end of the financial examination, the examiner prepares an examination report. Section 7.83 provides an appeal process to preserve company rights and determine if there is any error or bias in an examination report. This rule describes the department's practice for filing, and who may file, an appeal of an examination report.

The proposed amendments to §7.84 are necessary to implement Senate Bill 1253, 80th Legislature, Regular Session (2007), Insurance Code §401.052, to explain how often a company organized in Texas for less than five years should be examined. The amendments will add an exception for captive insurance companies organized in Texas and those captive insurance companies that move to Texas. SB 734, 83rd Legislature, Regular Session (2013), Insurance Code Chapter 964, regarding captive insur-

ance companies, was enacted after the examination frequency statute and rule. A captive insurance company insures the operational risks of its affiliates or certain unaffiliated business. There is no need to examine a captive insurance company within the first five years it is organized in or redomesticated to Texas because of the limited risk to the public, unless it becomes necessary to examine a captive insurance company based on solvency or other concerns.

The department proposes amendments throughout §7.83 to update old Insurance Code citations to reflect that Insurance Code Article 1.15 was re-codified in 2005 as Insurance Code Chapter 401. The department also proposes amendments throughout §7.83 to replace references to specific department management titles with the term "designee."

The department proposes amendments throughout §7.83 to replace references to the associate commissioner and deputy commissioner for quality of care examinations reports in the HMO/URA division, and associate commissioner life, health, managed care in the regulation and safety program, because those examination functions are now performed under the chief examiner and deputy commissioner of the Financial Regulation Division.

The department proposes an amendment in §7.83(a) to clarify that the section applies to examinations conducted of any entity examined under the Insurance Code, except for entities that are subject to another examination appeals process under the Insurance Code.

The department proposes an amendment in §7.83(b)(2) to add a definition for the term "Appeal." "Appeal" is the process by which a company requests that the department review a final examination report for error or bias before adoption of the final examination report. The remaining paragraphs in the subsection are renumbered as appropriate.

The department proposes an amendment in §7.83(d) to clarify that at the end of an examination the examiner-in-charge will provide company management the opportunity to participate in an exit conference, instead of requiring company management to participate.

The department proposes amendments in §7.83(f)(1)(C) and (f)(3)(C) to clarify that a request for a hearing must be in writing.

The department proposes an amendment in §7.83(f)(4) to add the words "second level" to the heading to clarify that the appeal before the deputy commissioner is a second level appeal.

The department proposes amendments in §7.84(e)(1) to add a reference to new subsection (h) to provide that captive insurance companies are not subject to department examination of Texas domestic carriers incorporated or organized for less than five years in the carrier's first, third, and fifth years. The paragraph adds the words "After the fifth year," to clarify that after five years, Insurance Code §401.052(a) applies to examination frequency.

The department proposes amendments in §7.84(e)(2) to delete text that is repeated in (e)(2)(A).

The department proposes new §7.84(h) to add that the section does not apply to captive insurance companies under Insurance Code Chapter 964 unless the department determines that an examination is necessary. The remaining subsections are redesignated as appropriate.

In addition, the proposed amendments to both sections include nonsubstantive editorial and formatting changes to conform the proposal to the department's current style and to improve the rule's clarity.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Shawn Frederick, Assistant Chief Examiner of the Examinations Section, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section, and there will be no effect on local employment or the local economy.

PUBLIC BENEFIT AND COST NOTE. Mr. Frederick also has determined that for each year of the first five years the proposed amendments are in effect, the public benefit expected as a result of enforcing the sections will be ensuring that department rules conform to Insurance Code Chapter 401.

Mr. Frederick has determined that the proposed amendments will not increase the cost of compliance with Insurance Code Chapter 401 because it does not impose requirements beyond those in the statute. The costs of complying with statute are not a result of the administration or enforcement of this proposal.

There are no expected costs under §7.83 for companies that appeal an examination report because an appeal is part of the examinations process under Insurance Code Chapter 401, and the department's practice has allowed each company examined by the department an opportunity to review the findings and conclusions of the examination, if requested, regardless of the size of the business.

There are no expected costs under §7.84 for captive insurance companies, regardless of the size of the business, that are organized in Texas or that move to Texas within the first five years because the department will not examine captive insurance companies within the first five years.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. The department has determined that the proposed amendments will not have an adverse economic effect or a disproportionate economic impact on small or micro businesses, or on rural communities because the proposed amendments do not impose a cost on regulated persons. As a result, and in accordance with Government Code §2006.002(c), the department is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. The department has determined that the proposed amendments do not impose a cost on regulated persons. In addition, no additional rule amendments or repeals are required under Government Code §2001.0045 because the proposed amendments are necessary to implement legislation.

GOVERNMENT GROWTH IMPACT STATEMENT. During the first five years that the proposed rule will be in effect, the proposed rule or its implementation:

--will not create or eliminate a government program;

--will not require the creation of new employee positions or the elimination of existing employee positions;

--will not require an increase or decrease in future legislative appropriations to the department;

--will not require an increase or decrease in fees paid to the department;

--will not create a new regulation;

--will expand and limit but not repeal existing regulations;

--will increase and decrease the number of individuals subject to the rule's applicability; and

--will not positively nor adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. The department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. The department will consider any written comments on the proposal received by the department no later than 5:00 p.m., Central time, on November 19, 2018. Send one copy of your comments to chiefclerk@tdi.texas.gov; or to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. The department will consider requests for a public hearing on the proposal received by the department no later than 5:00 p.m., Central time, on November 19, 2018. Submit the request separate from any comments to chiefclerk@tdi.texas.gov; or to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

STATUTORY AUTHORITY. The amended sections are proposed under Insurance Code §§401.051(a) and (b), 401.052(a) and (b), 401.056, 401.151(a), 401.152(a), 964.002(a)(3) and 36.001.

Insurance Code §401.051(a) states that the department or an examiner appointed by the department will visit each carrier organized under the laws of Texas and each carrier authorized to engage in business in Texas at the carrier's principal office. Section 401.051(b) provides that the department or an examiner appointed by the department may visit the carrier to investigate the carrier's affairs and condition. The department or an examiner appointed by the department will examine the carrier's financial condition and ability to meet the carrier's liabilities and compliance with the laws of Texas that affect the conduct of the carrier's business.

Insurance Code §401.052(a) provides that under §401.052(b) and except as provided by the rules adopted under §401.052(b), the department will visit and examine a carrier as frequently as the department considers necessary and at a minimum, the department will examine a carrier at least once every five years. Section 401.052(b) states that the Commissioner will adopt rules governing the frequency of examinations of carriers that have been organized or incorporated for less than five years.

Insurance Code §401.056 states that the Commissioner by rule will adopt procedures governing the filing and adoption of an examination report; procedures governing a hearing to be held under Chapter 401, Subchapter B; and guidelines governing an order issued under Chapter 401, Subchapter B.

Insurance Code §401.151(a) provides that a domestic insurer examined on behalf of Texas by the department or under the department's authority must pay the expenses of the examination in an amount the Commissioner certifies as just and reasonable.

Insurance Code §401.152(a) provides that an insurer not organized under the laws of Texas must reimburse the department for the salary and expenses of each examiner participating in an examination of the insurer and for other department expenses that are properly allocable to the department's participation in the examination.

Insurance Code §964.002(a)(3) states that except as otherwise provided by Chapter 964, the Insurance Code does not apply to a captive insurance company except under Chapter 401.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of Texas.

CROSS REFERENCE TO STATUTE. Amendments in this proposal to §7.83 and §7.84 affect Insurance Code §401.052, §401.056 and Chapter 964.

§7.83. Appeal of Examination Reports.

(a) Purpose and scope [~~Scope~~]. This section implements Insurance Code Chapter 401[~~, Article 1.15~~] which directs the Commissioner [~~commissioner of insurance~~] to adopt procedures for filing and adoption of examination reports and for hearings to be held under Insurance Code Chapter 401[~~, Article 1.15~~] and guidelines governing orders issued under Insurance Code Chapter 401[~~, Article 1.15~~]. The section provides an appeals process to preserve both the right of a company to a fair and impartial examination and promote respect for the independence and the importance of the on-site examiner who actually observes the conditions being reported. The purpose of an appeal process is not to replace the examination in the field, nor is it to substitute the judgment of the supervisory or management personnel for that of the examiner. It is to properly weigh the examination report, and to determine whether there is any error or bias which should be corrected. This section applies to all examinations conducted of any entity examined under [~~the authority of~~] Insurance Code Chapter 401, except for entities that are subject to another examination appeals process under the Insurance Code[~~, Article 1.15~~].

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

(1) Adopted examination report--[~~report-~~]An examination report that has been adopted by the department under [~~pursuant to~~] this section.

(2) Appeal--The process by which a company requests that the department review a final examination report for error or bias before adoption of the final examination report.

(3) [~~(2)~~] Company--[~~Company-~~]Any entity examined by the department under [~~the authority of~~] Insurance Code Chapter 401[~~, Article 1.15~~].

(4) [~~(3)~~] Examination report--[~~Examination report-~~]A report prepared by or on behalf of the department as a result of an examination under Insurance Code Chapter 401[~~, Article 1.15~~]. An examination report does not include work papers related to the examination.

(5) [~~(4)~~] Final examination report--[~~Final examination report-~~]An examination report that has been reviewed by the chief examiner or designee, [~~for quality of care examination reports, the deputy commissioner, HMO/URA division,~~] and transmitted to the examined company.

(6) [~~(5)~~] Department--[~~Department-~~]Texas Department of Insurance.

(c) Computation of time [~~Time~~]. A day is a calendar day. In computing any period of time prescribed or allowed by these sections,

by order of the agency, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is [shall] not [be] included, but the last day of the period so computed is [shall be] included, unless it is [be] a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a legal holiday.

(d) Exit conference [Conference]. At the conclusion of an examination, the examiner-in-charge will provide [shall hold an exit conference with] company management the opportunity to participate in an exit conference on the findings and conclusions of the examination. Following the exit conference, the examiner-in-charge will [shall] complete the examination report and file it with the chief examiner[,] or designee [the deputy commissioner, HMO/URA division, as appropriate].

(e) Transmittal of final examination report [Final Examination Report]. After the chief examiner or designee[, for quality of care examinations, the deputy commissioner, HMO/URA,] has reviewed an examination report, the final examination report will [shall] be transmitted to the examined company with a cover letter identifying the report as a final examination report and notifying the company that it has the right to appeal the report under subsection (f) of this section.

(f) Appeal of examination report [Examination Report].

(1) First level appeal [Level Appeal]. The first level of appeal is to the chief examiner or designee[, for quality of care examinations, the deputy commissioner, HMO/URA division]. Within 14 days of the receipt by the company of a final examination report, the company may file with the chief examiner or designee[, for quality of care examinations, the deputy commissioner, HMO/URA division]:

(A) a written rebuttal to the final examination report specifying the error or bias in the examination report,

(B) documentation demonstrating the error or bias, and

(C) a written request for a hearing before the chief examiner or designee [, for quality of care examinations, the deputy commissioner, HMO/URA].

(2) Consideration of first level appeal [First Level Appeal]. The chief examiner or designee will [deputy commissioner, HMO/URA division shall] consider the written rebuttal and documentation submitted by the company and any information received at a first level appeal hearing, if the examined company requests one. No later than 14 days following receipt of a written rebuttal under [pursuant to] paragraph (1) of this subsection or the conclusion of a first level appeal hearing, the chief examiner or designee [deputy commissioner, HMO/URA division] may make changes to the report to correct error or bias. After any [such] changes are made, the chief examiner or designee will [deputy commissioner, HMO/URA division shall] transmit a copy of the amended examination report to the company or notify the company that no changes have been made.

(3) Second level appeal [Level Appeal]. Second level appeals may [shall] be made to the deputy commissioner, Financial Regulation Division, or designee [associate commissioner-financial program or, for quality of care examinations, to the associate commissioner-life, health, managed care (regulation and safety program)] only after a company has completed an appeal under paragraph (2) of this subsection. Within 14 days of the receipt by the company of the amended examination report or notice described in paragraph (2) of this subsection, the company may file with the appropriate deputy [associate] commissioner or designee:

(A) a written rebuttal to the final examination report specifying the error or bias in the examination report,

(B) documentation demonstrating the error or bias, and

(C) a written request for a hearing before the deputy [associate] commissioner or designee.

(4) Consideration of second level appeal [Appeal by Associate Commissioner]. The deputy [associate] commissioner or designee will [shall] consider the written rebuttal and the documentation submitted by the company and any information received at a second level hearing, if the examined company requests one. No later than 14 days following receipt of a written rebuttal to the examination report under paragraph (3) of this subsection or the conclusion of a second level hearing, the deputy [associate] commissioner or designee may make changes to the examination report to correct error or bias. After any [such] changes are made, the deputy [associate] commissioner or designee will transmit [shall cause] a copy of the amended examination report to [be transmitted to] the company or notify the company [shall be notified] that no changes have been made.

(g) Adoption of examination reports [Examination Reports]. An examination report is deemed adopted if no appeal is pursued under subsection (f)(1) or (3) of this section. An examination report appealed to the deputy [associate] commissioner or designee will [shall] be adopted by the deputy [appropriate associate] commissioner or designee under [pursuant to] the provisions of subsection (f)(4) of this section.

(h) Review of report by board of directors [Report by Board of Directors]. The board of directors of the company must [shall] review the adopted examination report. The minutes of the meeting of the board of directors at which the adopted examination report is considered must [shall] reflect that each member of the board of directors has reviewed the adopted examination report.

(i) Examination reports of foreign and alien companies [Reports of Foreign and Alien Companies].

(1) Examination reports of foreign and alien insurance companies authorized to transact business in this state which are prepared by other jurisdictions and filed with the department may be accepted by the department in lieu of examining such foreign or alien company.

(2) Examination reports of foreign or alien insurance companies authorized to transact business in this state which are filed with the department under paragraph (1) of this subsection are deemed adopted when received.

(j) Extensions of time [Time]. Any of the deadlines in this section may be extended by mutual agreement of the company and the department's employee assigned to conduct that portion of the appeal.

(k) Other matters [Matters].

(1) Commissioner's authority. Notwithstanding this section the Commissioner [commissioner] may take regulatory action at any time against a company, using any information obtained during the course of any examination. Nothing contained in this section will [shall] be construed to limit the Commissioner's [commissioner's] authority to use any final or preliminary examination report, any examiner or company work papers [workpapers] or other documents, or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action which the Commissioner [commissioner of insurance] may, in his or her sole discretion deem appropriate.

(2) Disclosure by Commissioner [commissioner]. Nothing contained in this section will [herein shall] be construed to prohibit the Commissioner [commissioner] from disclosing the content of an examination report, preliminary examination report or results, or any related

matter, [~~relating thereto,~~] to the insurance department of any other state or country in which the examined company does business, or to law enforcement officials of this or any other state, or to an agency of the federal government at any time. The Commissioner [~~commissioner~~] may request any recipient of such reports or related matters [~~relating thereto~~] to agree in writing to hold it confidential in a manner consistent with Insurance Code Chapter 401[~~, Article 1.15~~].

§7.84. Examination Frequency.

(a) Purpose. This section governs the frequency of examinations conducted under [~~the~~] Insurance Code §401.052. The section implements [~~the~~] Insurance Code §401.052(b), which directs the Commissioner [~~commissioner~~] to adopt rules governing the frequency of examinations of carriers that have been organized or incorporated for less than five years.

(b) Applicability. This section applies only to examinations commenced after the effective date of this section.

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

(1) Carrier--For the purposes of this section, carrier includes any entity subject to examination under [~~the~~] Insurance Code §401.051. The term does not include a workers' compensation self-insurance group as that term is defined by [~~the~~] Labor Code Chapter 407A.

(2) Commissioner--The Commissioner of Insurance.

(3) Department--The Texas Department of Insurance.

(4) Insurance holding company system [~~Holding Company System~~]--As described in [~~the~~] Insurance Code §823.006.

(5) Redomesticated carrier [~~Carrier~~]--A carrier that redomesticates to this state from another state under [~~the~~] Insurance Code §983.051.

(6) Self-insurance group [~~Self-Insurance Group~~]--An unincorporated association or business trust composed of five or more private employers holding a certificate of approval to act as a workers' compensation self-insurance group issued by the department under the Labor Code Chapter 407A.

(d) Examination of Texas domestic carriers organized or incorporated for five years or more under the laws of this state [~~Domestic Carriers Organized or Incorporated for Five Years or More Under the Laws of This State~~]. Except as provided in subsections (f) and (g) of this section, [~~the~~] Insurance Code §401.052(a) governs the frequency of examinations for Texas domestic carriers organized or incorporated for five years or more under the laws of this state.

(e) Examination of Texas domestic carriers incorporated or organized for less than five years under the laws of this state [~~Domestic Carriers Incorporated or Organized for Less Than Five Years Under the Laws of This State~~].

(1) Except as provided in paragraph (2) of this subsection and subsections (f), [~~and~~] (g), and (h) of this section, the department will [~~shall~~] conduct an examination of a Texas domestic carrier incorporated or organized for less than five years under the laws of this state in the carrier's first, third, and fifth years. For a Texas domestic carrier that receives a certificate of authority or other authorization from the department on or before June 30, the first year to be examined will [~~shall~~] be the calendar year in which the carrier received the certificate of authority or other authorization from the department. For a Texas domestic carrier that receives a certificate of authority or other authorization from the department after June 30, the first year to be examined will [~~shall~~] be the calendar year immediately following the calendar year in which the carrier received the certificate of authority or other authorization from the department and will [~~shall~~] include the first partial year. After the fifth year, [~~Thereafter, the~~] Insurance Code §401.052(a) will [~~shall~~] govern the frequency of examination.

(2) If a Texas domestic carrier incorporated or organized for less than five years under the laws of this state is a member of an insurance holding company system with one or more affiliated Texas domestic carriers, the department may conduct an examination of the Texas domestic carrier at the same time it conducts the examination of the affiliated Texas domestic carrier or carriers, provided one or more of the Texas domestic affiliated carriers has conducted the business of insurance in Texas continuously for 10 or more consecutive calendar years. In making this determination, the department will [~~shall~~] consider whether [~~any affiliated carriers of the Texas domestic carrier are in a hazardous condition or conditions, including the conditions described in §8.3 of this title (relating to Hazardous Conditions); whether~~]:

(A) any affiliated carriers of the Texas domestic carrier are in a hazardous condition or conditions, including the conditions described in §8.3 of this title;

(B) any affiliated carriers of the Texas domestic carrier are the subject of pending administrative action by a regulatory agency of this state, the United States, or another state; and

(C) the department has any financial or other regulatory concerns regarding any affiliated carriers of the Texas domestic carrier.

(f) Examination of redomesticated carriers [~~Redomesticated Carriers~~]. The department will [~~shall~~] conduct an examination of a redomesticated carrier no later than five years from the carrier's last examination by a prior state of domicile or three years from the date the carrier redomesticates to Texas, whichever is less. The department will [~~shall~~] conduct an examination of a redomesticated carrier as often as the department considers necessary.

(g) Examination of self-insurance groups [~~Self-Insurance Groups~~]. This section does not apply to self-insurance groups governed by [~~the~~] Labor Code §407A.252.

(h) Examination of captive insurance companies. This section does not apply to captive insurance companies governed by Insurance Code Chapter 964, unless the department determines an examination of a captive insurance company is necessary.

(i) [~~(h)~~] Commissioner's authority [~~Authority~~]. This section does not in any way limit the Commissioner's [~~commissioner's~~] authority to visit or examine a carrier as often as the Commissioner [~~commissioner~~] considers necessary.

(j) [~~(i)~~] Conflicts. In the event of a conflict between this section and the Insurance Code or the Labor Code, the provisions of the Insurance Code or the Labor Code prevail.

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 October 8, 2018.

TRD-201804354
Norma Garcia
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: November 18, 2018
For further information, please call: (512) 676-6584

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

34 TAC §3.286

The Comptroller of Public Accounts proposes to amend §3.286, concerning seller's and purchaser's responsibilities, including nexus, permits, returns and reporting periods, and collection and exemption rules. In the wake of the United States Supreme Court's substantial nexus analysis in *South Dakota v. Wayfair,* 138 S. Ct. 2080 (June 21, 2018), the proposed amendment restores the permit and collection requirements of the Tax Code that were unconstitutional prior to the *Wayfair* decision and establishes a safe harbor for remote sellers. The proposed amendment also updates other provisions of the section and renames the section.

To streamline the title of this section, the comptroller proposes to replace "Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules" with "Seller's and Purchaser's Responsibilities." Throughout the section, the comptroller proposes to add or amend the titles to statutory references, rules, and forms. The comptroller does not intend to make substantive changes through these additions of and amendments to the statutory references, rules, and forms.

Current §3.286 omits "all {statutory} definitions of 'engaged in business' except those definitions requiring a 'physical presence' in Texas. This was done in response to a United States Supreme Court Case, *Quill v. North Dakota,* 112 S. Ct. 1094 (1992)." 21 Tex. Reg. 11,800 (Dec. 6, 1996). However, in *South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080, 2099 (June 21, 2018), the United States Supreme Court concluded that "the physical presence rule of *Quill* is unsound and incorrect." The Court further stated that "{substantial} nexus is established when a taxpayer {or collector} 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." *Wayfair,* 138 S. Ct. at 2099 (quoting *Polar Tankers, Inc. v. City of Valdez,* 557 U.S. 1, 11 (2009)). The Court also reiterated that "States may not impose undue burdens on interstate commerce."

In response to the *Wayfair* opinion, the comptroller now proposes to amend the definition of "engaged in business" in subsection (a)(4) to reinsert the omitted "engaged in business" activities described in Tax Code, §151.107 (Retailer Engaged in Business in This State). Omitted Tax Code, §151.107(a)(4) describes the systematic solicitation of sales through various types of communication systems, and omitted Tax Code, §151.107(a)(5) describes the solicitation of orders by mail or other media. These statutory provisions are proposed for incorporation into subsections (a)(4)(I) and (J). The comptroller proposes to reletter the subsequent subparagraphs of subsection (a)(4) and to conform cross-references to the new and renumbered subparagraphs.

The comptroller also proposes to revise subsection (a)(4)(G) of the definition of "engaged in business" to more closely track the wording of Tax Code, §151.107. And the comptroller proposes to add subsection (a)(4)(M) to track the wording of Tax Code, §151.107(b).

The comptroller proposes to delete the phrase "in this state" from the definition of seller in subsection (a)(10) to more closely track the definition of seller in Tax Code, §151.008.

In subsection (a)(10)(C), the comptroller proposes to replace the term "storagemen" with the term "storage facility operators" to make the definition gender neutral.

To conform to current agency practice, the comptroller proposes to amend subsection (b)(1) to require a seller engaged in business in the state to obtain a single permit for its out-of-state places of business in addition to a permit for each place of business operated in this state.

In further response to the *Wayfair* opinion, the comptroller has reexamined the provision for out-of-state sellers in subsection (b)(2). Current subsection (b)(2) refers to each "out-of-state seller who has nexus," and current subsection (a)(8) defines "nexus" as "{s}ufficient contact with or activity within the state, as determined by state and federal law." These nexus statements provide little meaningful guidance to taxpayers. Therefore, the comptroller proposes to delete them and replace them with a safe harbor for remote sellers. References to "nexus" would also be removed from subsections (a)(4)(L) and (d)(6).

In devising a safe harbor, the comptroller has considered whether the statutory "engaged in business" activities constitute substantial nexus based on availment of the substantial privilege of carrying on business in Texas; whether the statutory "engaged in business" activities might constitute an undue burden on interstate commerce; the safe harbor thresholds established to date by other states that are implementing the *Wayfair* opinion; and the extent to which the failure to enforce the obligations associated with the statutory "engaged in business" activities might thwart the use tax statute purpose of leveling the playing field between in-state and out-of-state vendors.

After weighing these considerations, the comptroller is proposing a safe harbor in new subsection (b)(2) for remote sellers - sellers whose activities in the state are limited to the activities described in Tax Code, §151.107(a)(4) and (5) (proposed subsection (a)(4)(I) and (J) in this section). The comptroller will not impose the statutory permit and collection responsibilities on remote sellers whose Texas revenue is below the safe harbor amount. The comptroller intends the safe harbor amount to simplify tax administration for both the agency and taxpayers by eliminating the need to litigate on a case-by-case basis whether the statutory collection obligation is unduly burdensome.

The safe harbor amount uses historical revenue, as was the case with the tax legislation in *Wayfair.* Because the safe harbor uses historical revenue, it is conceivable that taxpayers with similar current revenue below the safe harbor amount will have different collection obligations. The comptroller has determined that there are rational, legitimate reasons for this treatment. Among other reasons, a seller with historically higher revenue has enjoyed a greater benefit from the Texas market. Also, the courts have upheld the use of historical data in other similar contexts, specifically the Texas franchise tax, which bases the current privilege of doing business on prior year activity in the State. *See Rylander v. Palais Royal, Inc.,* 81 S.W.3d 909, 915 (Tex. App. - Austin 2002, pet. denied); *Rylander v. 3 Beall Brothers 3, Inc.,* 2 S.W.3d 562 (Tex. App. - Austin 1999, pet. denied).

In determining Texas revenue for the safe harbor, subsection (b)(2)(C) proposes to use the statutory standards for determining whether the sale of taxable items are considered to be sales for storage, use, or other consumption in Texas. Tax Code,

§151.104(a) (Sale for Storage, Use, or Consumption Presumed) provides that the sale of a taxable item by a person for delivery in this state is presumed to be a sale for storage, use, or consumption in this state. Tax Code, §151.011(b) ("Use" and "Storage") also provides that with respect to a taxable service, "use" means the derivation in this state of direct or indirect benefit from the service. These provisions are incorporated in proposed subsection (b)(2)(C) and extended to cover all sales, including taxable sales, nontaxable sales, and tax-exempt sales.

Subsection (b)(2)(F) gives permitted remote sellers the option to terminate their collection obligations if their Texas sales decline below the specified amount. However, a remote seller must notify the comptroller in order to terminate its collection obligation.

In subsection (b)(2)(H), the comptroller proposes to postpone the permitting and collection requirements for remote sellers until October 1, 2019, to provide additional time for remote sellers to prepare for their collection and reporting obligations.

The comptroller proposes new subsection (b)(3), which allows a permitted seller to withdraw from the state if the seller no longer intends to make sales of taxable items in the state. Subsequent paragraphs are renumbered.

The comptroller proposes to amend subsection (g)(6) to codify current agency policy regarding filing and remittance requirements of state agencies.

The comptroller proposes to adopt these amendments without retroactive effect. §151.022 (Retroactive Effect of Rules). This section will be effective January 1, 2019.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed amendment is in effect, the amendment: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy. This proposal amends a current rule.

Mr. Currah also has determined that for each year of the first five years the rule is in effect, proposed amendment would benefit the public by providing guidance regarding sellers' responsibilities following the US Supreme Court decision in *Wayfair.* This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. The proposed amendment would have no significant fiscal impact on the state government, units of local government, or individuals. There would be no anticipated significant economic costs to the public.

Comments on the proposal may be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The comptroller proposes this amendment under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to amend rules to reflect changes in the constitution or laws of the United States and judicial interpretations thereof.

This amendment implements Tax Code, §151.107(a)(4), (a)(5), and (b) (Retailer Engaged in Business in the State) and *South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080 (June 21, 2018).

§3.286. Seller's and Purchaser's Responsibilities[~~, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules~~].

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

(1) Consignment sale--The sale, lease, or rental of tangible personal property by a seller who, under an agreement with another person, is entrusted with possession of tangible personal property with respect to which the other person has title or another ownership interest, and is authorized to sell, lease, or rent the tangible personal property without additional action by the person having title to or another ownership interest in the tangible personal property.

(2) Direct sales organization--A person that typically sells taxable items directly to purchasers through independent salespersons and not in or through a place of business. The term "independent salespersons" includes, but is not limited to, distributors, representatives, and consultants. Items are typically sold person-to-person through in-home product demonstrations, parties, catalogs, and one-on-one selling. The term includes, but is not limited to, direct marketing and multilevel marketing organizations.

(3) Disaster- or emergency-related work--Repairing, renovating, installing, building, rendering services, or performing other business activities relating to the repair or replacement of equipment and property, including buildings, offices, structures, lines, poles, and pipes, that:

(A) is owned or used by or for:

(i) a telecommunications provider or cable operator;

(ii) communications networks;

(iii) electric generation;

(iv) electric transmissions and distribution systems;

(v) natural gas and natural gas liquids gathering, processing, and storage, transmission and distribution systems; or

(vi) water pipelines and related support facilities, equipment, and property that serve multiple persons; and

(B) is damaged, impaired, or destroyed by a declared state disaster or emergency.

(4) Engaged in business--Except as provided in subparagraphs (L) and (M) of this paragraph, a [A] seller is engaged in business in this state if the seller:

(A) maintains, occupies, or uses in this state, permanently or temporarily, directly or indirectly, or through an agent by whatever name called, a kiosk, office, distribution center, sales or sample room or place, warehouse or storage place, or any other physical location where business is conducted;

(B) has any representative, agent, salesperson, canvasser, or solicitor who operates under the authority of the seller to conduct business in this state, including selling, delivering, or taking orders for taxable items;

(C) promotes a flea market, arts and crafts show, trade day, festival, or other event in this state that involves sales of taxable items;

(D) uses independent salespersons, who may include, but are not limited to, distributors, representatives, or consultants, in this state to make direct sales of taxable items;

(E) derives receipts from the sale, lease, or rental of tangible personal property that is located in this state or owns or uses tangible personal property that is located in this state, including a computer server or software to solicit orders for taxable items, unless the seller uses the server or software as a purchaser of an Internet hosting service;

(F) allows a franchisee or licensee to operate under its trade name in this state if the franchisee or licensee is required to collect sales or use tax in this state;

(G) otherwise conducts business in this state [~~through employees, agents, or independent contractors~~];

(H) is formed, organized, or incorporated under the laws of this state and the seller's internal affairs are governed by the laws of this state, notwithstanding the fact that the seller may not be otherwise engaged in business in this state pursuant to this section; [~~or~~]

(I) engages in regular or systematic solicitation of sales of taxable items in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio, or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting sales of taxable items;

(J) solicits orders for taxable items by mail or through other media including the Internet or other media that may be developed in the future; or

(K) [~~(I)~~] holds a substantial ownership interest in, or is owned in whole or substantial part by, another person who:

(i) maintains a distribution center, warehouse, or similar location in this state and delivers property sold by the seller to purchasers in this state;

(ii) maintains a location in this state from which business is conducted, sells the same or substantially similar lines of products as the seller, and sells such products under a business name that is the same or substantially similar to the business name of the seller; or

(iii) maintains a location in this state from which business is conducted if the person with the location in this state uses its facilities or employees:

(I) to advertise, promote, or facilitate sales by the seller to purchasers; or

(II) to otherwise perform any activity on behalf of the seller that is intended to establish or maintain a marketplace for the seller in this state, including receiving or exchanging returned merchandise.

(iv) For purposes of this subparagraph only, "ownership" includes direct ownership, common ownership, or indirect ownership through a parent entity, subsidiary, or affiliate, and "substantial," with respect to ownership, constitutes an interest, whether direct or indirect, of at least 50% of:

(I) the total combined voting power of all classes of stock of a corporation;

(II) the beneficial ownership interest in the voting stock of the corporation;

(III) the current beneficial interest in the corpus or income of a trust;

(IV) the total membership interest of a limited liability company;

(V) the beneficial ownership interest in the membership interest of a limited liability company; or

(VI) the profits or capital interest of any other entity, including, but not limited to, a partnership, joint venture, or association.

(L) [~~(J)~~] Effective June 16, 2015, a seller is not engaged in business in this state if the seller is an out-of-state business entity whose physical presence in this state is solely from the entity's performance of disaster- or emergency-related work during a disaster response period. An out-of-state business entity that remains in this state after a disaster response period has ended is engaged in business in this state if the entity conducts any of the activities described in subparagraphs (A) - (K) [~~(A)~~ - ~~(I)~~] of this paragraph.

(i) For purposes of this subparagraph only, an "affiliate" is a member of a combined group as that term is described by Tax Code, §171.1014 (Combined Reporting; Affiliated Group Engaged in Unitary Business).

(ii) For purposes of this subparagraph only, a "disaster response period" is:

(I) the period that:

(-a-) begins on the 10th day before the date of the earliest event establishing a declared state of disaster or emergency by the issuance of an executive order or proclamation by the governor or a declaration of the president of the United States; and

(-b-) ends on the earlier of the 120th day after the start date or the 60th day after the ending date of the disaster or emergency period established by the executive order or proclamation or declaration, or on a later date as determined by an executive order or proclamation by the governor; or

(II) the period that, with respect to an out-of-state business entity:

(-a-) begins on the date that the out-of-state business entity enters this state in good faith under a mutual assistance agreement and in anticipation of a state of disaster or emergency, regardless of whether a state of disaster or emergency is actually declared; and

(-b-) ends on the earlier of the date that the work is concluded or the seventh day after the out-of-state business entity enters this state.

(iii) For purposes of this subparagraph only, a "mutual assistance agreement" is an agreement to which one or more business entities are parties and under which a public utility, municipally owned utility, or joint agency owning, operating, or owning and operating critical infrastructure used for electric generation, transmission, or distribution in this state may request that an out-of-state business entity perform work in this state in anticipation of a state of disaster or emergency.

(iv) For purposes of this subparagraph only, an "out-of-state business entity" is a foreign entity that:

(I) enters this state at the request of, or is an affiliate of, an in-state business entity and performs work in Texas under a mutual assistance agreement; or

(II) enters this state at the request of an in-state business entity, under a mutual assistance agreement, or is an affiliate of an in-state business entity and enters this state at the request of an in-state business entity, the state of Texas, or a political subdivision of

this state to perform disaster- or emergency-related work in this state during the disaster response period, and:

(-a-) except with respect to the performance of disaster- or emergency-related work, has no physical presence in this state and is not authorized to transact business in this state immediately before a disaster response period; and

(-b-) is not registered with the secretary of state to transact business in this state, does not file a tax report with this state, or a political subdivision of this state, and is not engaged in business [does not have a nexus] with this state for the purpose of taxation during the tax year immediately preceding the disaster response period.

(M) A broadcaster, printer, outdoor advertising firm, advertising distributor, or publisher that broadcasts, publishes, displays, or distributes paid commercial advertising in this state that is intended to be disseminated primarily to consumers located in this state and is only secondarily disseminated to bordering jurisdictions, including advertising appearing exclusively in a Texas edition or section of a national publication, is considered for purposes of this subsection to be the agent of the person placing the advertisement and is not considered to be engaged in business in this state as a result of those acts.

(5) Internet hosting service--The provision to an unrelated user of access over the Internet to computer services using property that is owned or leased and managed by the service provider and on which the unrelated user may store or process the user's own data or use software that is owned, licensed, or leased by the unrelated user or service provider. The term does not include telecommunications services as defined in §3.344 of this title (relating to Telecommunications Services).

(6) Itinerant vendor--A seller who does not operate a place of business in this state and who travels to various locations in this state to solicit sales.

(7) Kiosk--A small, stand-alone area or structure that:

(A) is used solely to display merchandise or to submit orders for taxable items from a data entry device, or both;

(B) is located entirely within a location that is a place of business of another seller, such as a department store or shopping mall; and

(C) at which taxable items are not available for immediate delivery to a purchaser.

[(8) Nexus--Sufficient contact with or activity within this state, as determined by state and federal law, to require a person to collect and remit sales and use tax. A person does not have nexus in this state if the person has no connection with this state except the possession of a certificate of authority to do business in this state issued by the Texas Secretary of State.]

(8) [(9)] Permit holder--A person to whom the comptroller has issued a sales and use tax permit. The term includes permitted sellers as well as permitted purchasers, but does not include a person who does not hold a Texas sales and use tax permit or whose sales and use tax permit is suspended, pursuant to subsection (l) of this section, or cancelled, pursuant to subsection (n) of this section, or a person who has not received a sales and use tax permit due to an unsigned or incomplete application.

(9) [(10)] Place of business--This term has the meaning given in §3.334 of this title (relating to Local Sales and Use Taxes).

(10) [(11)] Seller--Every retailer, wholesaler, distributor, manufacturer, or any other person who sells, leases, rents, or transfers ownership of tangible personal property or performs taxable services [in this state] for consideration. Seller is further defined as follows:

(A) A promoter of a flea market, trade day, or other event that involves the sales of taxable items is a seller responsible for the collection and remittance of the sales tax that dealers, salespersons, or individuals collect at such events, unless those persons hold active sales and use tax permits that the comptroller has issued.

(B) A direct sales organization that is engaged in business in this state is a seller responsible for the collection and remittance of the sales and use tax collected by the organization's independent salespersons.

(C) Pawnbrokers, storage facility operators [storagemen], mechanics, artisans, or others who sell property to enforce a lien are sellers responsible for the collection and remittance of sales and use tax on the sale of such tangible personal property.

(D) A person engaged in business in this state who sells, leases, or rents tangible personal property owned by another person by means of a consignment sale is a seller responsible for the collection and remittance of the sales tax on the consignment sale.

(E) An auctioneer who owns tangible personal property or to whom tangible personal property has been consigned is a seller responsible for the collection and remittance of the sales and use tax on tangible personal property sold at auction. For more information, auctioneers should refer to §3.311 of this title (relating to Auctioneers, Brokers, and Factors).

(11) [(12)] Taxable item--Tangible personal property and taxable services. Except as otherwise provided in Tax Code, Chapter 151, the sale or use of a taxable item in electronic form instead of on physical media does not alter the item's tax status.

(A) Tangible personal property means property that can be seen, weighed, measured, felt, or touched or that is perceptible to the senses in any other manner, including a computer program as defined in §3.308 of this title (relating to Computers--Hardware, Computer Programs [Software], Services, and Sales) and a telephone prepaid calling card, as defined in §3.344 of this title.

(B) Taxable services are those identified in Tax Code, §151.0101 (Taxable Services).

(b) Who must have a sales and use tax permit.

(1) Sellers. Except as provided in paragraph (2) of this subsection, each [Each] seller who is engaged in business in this state, including itinerant vendors, persons who own or operate a kiosk, and sellers operating temporarily in this state, must apply to the comptroller and obtain a sales and use tax permit for each place of business operated in this state and a single permit for its out-of-state places of business.

(2) Safe harbor for remote sellers.

(A) Remote seller defined. For purposes of this paragraph, a remote seller is a seller engaged in business in this state whose only activity in the state is described in subsection (a)(4)(I) or (J) of this section.

(B) Safe harbor. The comptroller will not enforce the permit requirement of this subsection or the collection obligation of subsection (d) of this section on a remote seller whose total Texas revenue in the preceding twelve calendar months is less than $500,000. If a remote seller's total Texas revenue exceeds that amount, the remote seller shall obtain a permit and begin collecting as provided in subparagraph (E) of this paragraph and shall continue to collect unless it terminates its collection obligation under subparagraph (F) of this paragraph.

(C) Total Texas revenue defined. For purposes of this paragraph, total Texas revenue means the gross revenue from the sale of tangible personal property and services for storage, use, or other consumption in this state recognized under the accounting method used by the seller, and includes separately stated handling, transportation, installation, and other similar fees collected by the seller in connection with the sale. Total Texas revenue includes taxable, nontaxable, and tax-exempt sales. A sale of an item for delivery in this state is presumed to be a sale for storage, use, or other consumption in this state. With respect to a service, "use" means the derivation in this state of direct or indirect benefit from the service.

(D) Consolidation of total Texas revenue. The comptroller may consolidate the total Texas revenue of sellers engaged in conduct that circumvents the safe harbor amount in subparagraph (B) of this paragraph.

(E) When to obtain a permit and begin collecting. No later than the first day of the fourth month after the month in which a remote seller exceeds the safe harbor amount in subparagraph (B) of this paragraph, the remote seller shall obtain a permit and begin collecting use tax. For example, if during the period of July 1, 2018, through June 30, 2019, a remote seller's total Texas revenue exceeds the safe harbor amount in subparagraph (B) of this paragraph, the remote seller shall obtain a permit by October 1, 2019, and begin collecting use tax no later than October 1, 2019.

(F) Terminating collection obligation. A remote seller that is required to be permitted may terminate its collection obligation under this paragraph after twelve consecutive months in which the remote seller's total Texas revenue for the preceding twelve calendar months is below the safe harbor amount in subparagraph (B) of this paragraph. In order to terminate its collection obligation, a remote seller must submit a form prescribed by the comptroller. Thereafter, the remote seller shall resume collection on the first day of the second month following any twelve calendar months in which the remote seller's total Texas revenue exceeds the safe harbor amount in subparagraph (B) of this paragraph. For example, if the total Texas revenue of a remote seller that previously terminated its collection obligation exceeds the safe harbor amount in subparagraph (B) of this paragraph during the period of January 1, 2020, through December 31, 2020, the remote seller shall resume collection on February 1, 2021.

(G) Records retention required. A remote seller that terminates its collection obligation shall comply with the record retention requirement of §3.281 of this title (relating to Records Required; Information Required) and §3.282 of this title (relating to Auditing Taxpayer Records). The remote seller must maintain sufficient documentation to verify the date on which the remote seller terminated its collection obligation under subparagraph (F) of this paragraph or ceases to engage in business in this state.

(H) Transition rule. Remote sellers will be subject to the permit requirement of this subsection and the collection obligation of subsection (d) of this section beginning on October 1, 2019. The initial twelve calendar months for determining a remote seller's total revenue will be July 1, 2018, through June 30, 2019. If a remote seller's total revenue during that period exceeds the safe harbor amount in subparagraph (B) of this paragraph, the seller shall obtain a permit by October 1, 2019, and begin collecting use tax no later than October 1, 2019.

[~~(2) Out-of-state sellers. Each out-of-state seller who has nexus with this state and is engaged in business in this state must apply to the comptroller and obtain a sales and use tax permit. An out-of-state seller is responsible for the collection and remittance of sales and use tax on all sales of taxable items made in this state until the seller ceases to have nexus with this state. An out-of-state seller ceases to have nexus with this state when the seller no longer has, and no longer intends to engage in activities that would create, nexus with this state. For example, an out-of-state seller who enters the state each year to participate in an annual trade show does not cease to have nexus with this state between one trade show and the next. In contrast, an out-of-state seller who discontinues the product line that it marketed and sold in this state, and who does not anticipate entering the state to solicit new business, has ceased to have nexus with this state. An out-of-state seller is required to maintain, for at least four years after the out-of-state seller ceases to have nexus with this state, all records required by subsection (j) of this section, including sufficient documentation to verify the date on which the out-of-state seller ceased to have nexus with this state. For more information regarding reporting periods, refer to subsection (g) of this section.~~]

(3) A seller that no longer has and no longer intends to engage in business and make sales of taxable items in the state shall submit a form prescribed by the comptroller to terminate its permit and must obtain a new permit before it commences sales of taxable items in the state thereafter. The seller must maintain sufficient documentation to verify the date on which the seller ceases to engage in business in this state.

(4) [~~(3)~~] Direct sales organizations. Independent salespersons of direct sales organizations are not required to hold sales and use tax permits to sell taxable items for direct sales organizations. Direct sales organizations engaged in business in this state are sellers responsible for holding sales and use tax permits and for the collection and remittance of sales and use tax on all sales of taxable items by their independent salespersons. See subsection (d)(3) of this section for more information about the collection and remittance of sales and use tax by direct sales organizations.

(5) [~~(4)~~] Non-permitted purchasers. Persons who are not required to have a sales and use tax permit or who do not have a direct payment permit are still responsible for paying to the comptroller sales or use tax due on purchases of taxable items from sellers who do not collect and remit tax. See subsection (g)(9) of this section for return and payment information and §3.346 of this title (relating to Use Tax).

(6) [~~(5)~~] Non-permitted sellers. Failure to obtain a sales and use tax permit does not relieve a seller required by this section or other applicable law to have a sales and use tax permit from the obligation to properly collect and remit sales and use taxes. Sellers whose sales and use tax permits are suspended, pursuant to subsection (l) of this section, or cancelled, pursuant to subsection (n) of this section, and sellers who have not received sales and use tax permits due to unsigned or incomplete applications, are still responsible for properly collecting and remitting sales and use taxes. See subsection (g) of this section for return and payment information.

(c) Obtaining a sales and use tax permit.

(1) A seller must complete an application that the comptroller furnishes and must return that application to the comptroller, together with bond or other security that may be required by §3.327 of this title (relating to Taxpayer's Bond or Other Security). A seller who files an electronic application furnished by the comptroller is deemed to have signed the application and is not required to print and mail a signed application to the comptroller. A separate sales and use tax permit under the same taxpayer account number is issued to the applicant for each place of business. Sales and use tax permits are issued without charge.

(2) Each seller must apply for a sales and use tax permit. An individual or sole proprietor must be at least 18 years of age unless the comptroller allows an exception from the age requirement. The

sales and use tax permit cannot be transferred from one seller to another. The sales and use tax permit is valid only for the seller to whom it was issued and for the transaction of business only at the address that is shown on the sales and use tax permit. If a seller operates two or more types of business at the same location, then only one sales and use tax permit is required.

(3) The sales and use tax permit must be conspicuously displayed at the place of business for which it is issued. A permit holder that has traveling sales persons who operate from a central office needs only one sales and use tax permit, which must be displayed at that office.

(4) All sales and use tax permits of the seller will have the same taxpayer account number; however, each place of business will have a different outlet number. The outlet numbers assigned may not necessarily correspond to the number of business locations operated by the seller.

(d) Collecting sales and use tax due.

(1) Bracket system.

(A) Each seller must collect sales or use tax on each separate retail sale in accordance with the statutory bracket system in Tax Code, §151.053 (Sales Tax Brackets). The practice of rounding off the amount of sales or use tax that is due on the sale of a taxable item is prohibited. Copies of the bracket system should be displayed in each place of business so both the seller and the purchaser may easily use them.

(B) The sales and use tax applies to each total sale, not to each item of each sale. For example, if two items are purchased at the same time and each item is sold for $.07, then the seller must collect the tax on the total sum of $.14. Sales and use tax must be reported and remitted to the comptroller as provided by Tax Code, §151.410 (Method of Reporting Sales Tax; General Rule). When sales and use tax is collected properly under the bracket system, the seller is not required to remit any amount that is collected in excess of the sales and use tax due. Conversely, when the sales and use tax collected under the bracket system is less than the sales and use tax due on the seller's total receipts, the seller is required to remit sales and use tax on the total receipts even though the seller did not collect sales and use tax from the purchasers.

(2) Sales and use tax due is debt of the purchaser; document requirements.

(A) The sales and use tax due is a debt of the purchaser to the seller until collected. Unpaid sales or use tax is recoverable by the seller in the same manner as the original sales price of the taxable item itself, if unpaid, would be recoverable. The comptroller may proceed against either the seller or purchaser, or against both, until all applicable tax, penalty, and interest due has been paid.

(B) The amount of sales and use tax due must be separately stated on the bill, contract, or invoice to the purchaser or there must be a written statement to the purchaser that the stated price includes sales or use tax. Contracts, bills, or invoices that merely state that "all taxes" are included are not specific enough to relieve either party to the transaction of its sales and use tax responsibilities. The total amount that is shown on such documents is presumed to be the taxable item's sales price, without sales and use tax included. The seller or purchaser may overcome the presumption by using the seller's records to show that sales or use tax was included in the sales price. Sellers located outside of Texas must identify the tax as Texas sales or use tax on their bill, contract, or invoice to the purchaser. If the out-of-state seller does not identify the tax as Texas sales or use tax at the time of the transaction, the seller is presumed not to have collected Texas sales or use tax. Either the seller or the purchaser may overcome the presumption by submitting evidence that clearly demonstrates that the Texas sales or use tax was remitted to the comptroller.

(3) Direct sales organizations. A direct sales organization is responsible for the collection and remittance of the sales and use tax on all sales of taxable items in this state by the independent salespersons who sell the organization's product or service as explained in this paragraph. See subsection (b)(4) [~~(b)(3)~~] of this section for information about sales and use tax permits required to be held by direct sales organizations.

(A) If an independent salesperson purchases a taxable item from a direct sales organization after taking the purchaser's order, then the direct sales organization must collect from the independent salesperson, and remit to the comptroller, the sales and use tax on the actual sales price for which the independent salesperson sold the taxable item to the purchaser.

(B) If an independent salesperson purchases a taxable item from a direct sales organization before the purchaser's order is taken, then the direct sales organization must collect from the independent salesperson, and remit to the comptroller, the sales and use tax based on the organization's suggested retail sales price of the taxable item.

(C) Taxable items that are sold to an independent salesperson for the salesperson's use are taxed based on the actual sales price for which the item was sold to the salesperson at the tax rate in effect for the salesperson's location.

(D) Incentives, including rewards, gifts, and prizes.

(i) Direct sales organizations owe sales and use tax on the cost of all taxable items used as incentives that are transferred to a recipient in this state, including purchasers, independent salespersons, and persons who host a direct sales event.

(ii) Direct sales organizations must collect sales or use tax on the total amount of consideration received in exchange for taxable items, including items purchased with hostess points or similar forms of compensation paid to a person for hosting a direct sales event and items that are earned by the host based on the volume of purchases. The redemption of reward points in exchange for taxable items is subject to sales tax under Tax Code, §151.005(2) ("Sale" or "Purchase"). See also §3.283 of this title (relating to Bartering Clubs and Exchanges).

(4) Printers. A printer is a seller of printed materials and is required to collect sales and use tax on sales of those materials in this state. A printer who is engaged in business in this state, however, is not required to collect the sales and use tax if:

(A) the printed materials are produced by a web offset or rotogravure printing process;

(B) the printer delivers those materials to a fulfillment house or to the United States Postal Service for distribution to third parties who are located both inside and outside of this state; and

(C) the purchaser issues a properly completed exemption certificate that contains the statement that the printed materials are for multistate use and the purchaser agrees to pay to this state all the sales and use taxes that are or may become due to the state on the taxable items that are purchased under the exemption certificate. See subsection (g)(4) of this section for additional reporting requirements.

(5) Fundraisers by exempt entities. Regardless of the contractual terms between a for-profit entity and a non-profit exempt entity relating to the sale of taxable items, other than amusement services, as

part of any fundraiser, the for-profit entity will be considered the seller of the items under Tax Code, §151.024 (Persons Who May be Regarded as Retailers), must be a permit holder, and is responsible for the proper collection and remittance of any sales or use tax due. The exempt entity and its representatives will be considered as representatives of the for-profit entity. The for-profit entity may advertise in a sales catalog or state on each invoice that sales and use tax is included, as provided under paragraph (2) of this subsection, or may require that the sales and use tax be calculated and collected by its representatives based on the sales price of each taxable item. Fundraisers conducted by exempt entities in this manner do not qualify as a tax-free sale day. For more information on exempt entities and tax-free sales days, see §3.322 of this title (relating to Exempt Organizations). For more information on amusement services, see §3.298 of this title (relating to Amusement Services).

(6) Local sales and use tax. A seller who is required to be permitted in this state [~~has nexus with this state and is engaged in business in this state~~] is required to properly collect and remit local sales and use tax even if no sales and use tax permit is required at the location where taxable items are sold. For more information on the proper collection of local taxes, see §3.334 of this title.

(e) Sales and use tax returns and remitting tax due.

(1) Forms prescribed by the comptroller. Sales and use tax returns must be filed on forms that the comptroller prescribes. The fact that a person does not receive or obtain the correct forms from the comptroller does not relieve a person of the responsibility to file a sales and use tax return and to remit the required sales and use tax.

(2) Signatures. Sales and use tax returns must be signed by the person who is required to file the sales and use tax return or by the person's duly authorized agent, but need not be verified by oath.

(3) Permit holders.

(A) Each permit holder is required to file a sales and use tax return for each reporting period, even if the permit holder has no sales or use tax to report for the reporting period.

(B) Each permit holder must remit sales and use tax on all receipts from sales or purchases of nonexempt taxable items, less any applicable discounts as provided by subsection (h) of this section.

(C) Each permit holder shall file a single sales and use tax return together with the tax payment for all businesses that operate under the same taxpayer number. The sales and use tax return for each reporting period must reflect the total sales, taxable sales, and taxable purchases for each outlet.

(D) Consolidated reporting by affiliated entities is not allowed. Each legal entity engaged in business in this state is responsible for filing a separate sales and use tax return.

(4) Electronic returns and remittances. Certain persons must file returns and transfer payments electronically as provided by Tax Code, §111.0625 (Electronic Transfer of Certain Payments) and §111.0626 (Electronic Filing of Certain Reports). For more information, see §3.9 of this title (relating to Electronic Filing of Returns and Reports; Electronic Transfer of Certain Payments by Certain Taxpayers).

(f) Due dates.

(1) General rule. Sales and use tax returns and remittances are due no later than the 20th day of the month following each reporting period end date unless otherwise provided by this section. Sales and use tax returns and remittances that are due on Saturdays, Sundays, or legal holidays may be submitted on the next business day.

(A) Sales and use tax returns submitted by mail must be postmarked on or before the due date to be considered timely.

(B) Sales and use tax returns filed electronically must be completed and submitted by 11:59 p.m., central time, on the due date to be considered timely.

(2) Due dates for payments made using an electronic funds transfer method approved by the comptroller are provided at §3.9(c) of this title.

(3) Extensions for persons located in an area designated in a state of disaster or state of emergency declaration. The comptroller may grant an extension of not more than 90 days to make or file a sales and use tax return or pay sales and use tax that is due by a person located in an area designated in an executive order or proclamation issued by the governor declaring a state of disaster or state of emergency, or an area that the president of the United States declares a major disaster or emergency, if the comptroller finds the person to be a victim of the disaster or emergency. The person owing the sales and use tax may file a written request for an extension at any time before the expiration of 90 days after the original due date. If an extension is granted, interest on the unpaid tax does not begin to accrue until the day after the day on which the extension expires, and penalties are assessed and determined as though the last day of the extension were the original due date.

(g) Reporting periods.

(1) Quarterly filers. Permit holders who have less than $1,500 in state sales and use tax per quarter to report may file sales and use tax returns quarterly. The quarterly reporting periods end on March 31, June 30, September 30, and December 31.

(2) Yearly filers. Permit holders who have less than $1,000 in state sales and use tax to report during a calendar year may file yearly sales and use tax returns upon authorization from the comptroller.

(A) Authorization to file sales and use tax returns on a yearly basis is conditioned upon the correct and timely filing of prior returns.

(B) Authorization to file sales and use tax returns on a yearly basis will be denied if a permit holder's liability exceeded $1,000 in the prior calendar year.

(C) A permit holder who files on a yearly basis without authorization is liable for applicable penalty and interest on any previously unreported quarter.

(D) Authority to file on a yearly basis is automatically revoked if a permit holder's state sales and use tax liability is greater than $1,000 during a calendar year. The permit holder must file a sales and use tax return for that month or quarter, depending on the amount, in which the sales and use tax payment or liability is greater than $1,000. On that return, the permit holder must report all sales and use taxes that are collected and all accrued liability for the year, and must file monthly or quarterly, as appropriate, thereafter for as long as the yearly sales and use tax liability is greater than $1,000.

(E) Once each year, the comptroller reviews all accounts to confirm yearly filing status and to authorize permit holders who meet the filing requirements to file yearly sales and use tax returns.

(F) Yearly filers must report on a calendar year basis. The sales and use tax return and payment are due on or before January 20 of the next calendar year.

(3) Monthly filers. Permit holders who have $1,500 or more in state sales and use tax per quarter to report must file monthly

sales and use tax returns except for permit holders who prepay the sales and use tax as provided in subsection (h) of this section.

(4) Printers. A printer who is not required to collect sales and use tax on the sale of printed materials because the transaction meets the requirements of subsection (d)(4) of this section must file a quarterly special use tax report, Form 01-157, Texas Special Use Tax Report for Printers, its electronic equivalent, or any form promulgated by the comptroller that succeeds such form, with the comptroller on or before the last day of the month following the quarter. The report must contain the name and address of each purchaser with the sales price and date of each sale. The printer is still required to file sales and use tax returns to report and remit sales and use taxes that the printer collected from purchasers on transactions that do not meet the requirements of subsection (d)(4) of this section.

(5) Local sales and use tax. Each permit holder who is required to collect, report, and remit a city, county, special purpose district, or metropolitan transit authority/city transit department sales and use tax must report the amount subject to local sales and use tax on the state sales and use tax return described in subsection (e) of this section.

(6) State agencies. Sales and use taxes must be deposited with the comptroller within the time period specified by law for deposit of state funds. State agencies may file sales and use tax returns through electronic reporting methods provided by the comptroller, which allocates total sales and use tax deposits by state and local taxing authority. State agencies that deposit sales and use taxes according to Accounting Policy Statement Number 8 are not required to file a separate sales and use tax return, but must manually allocate total sales and use tax deposits by state and local taxing authority and deposit those amounts in accordance with the policy. Paragraphs (1) - (3) of this subsection do not apply to agencies following Accounting Policy Statement Number 8, as a fully completed deposit request voucher is deemed to be the sales and use tax return filed by these agencies. [~~State agencies that deposit sales and use taxes directly with the comptroller's office according to Accounting Policy Statement Number 8 are not required to file a separate sales and use tax return. A fully completed deposit request voucher is deemed to be the sales and use tax return filed by these agencies. Paragraphs (1) - (3) of this subsection do not apply to these state agencies. Sales and use taxes must be deposited with the comptroller's office within the time period otherwise specified by law for deposit of state funds.~~]

(7) Refunds on exports. Sellers who refund sales tax on exports based on customs broker certifications should refer to §3.360 of this title (relating to Customs Brokers).

(8) Direct payment permit holders. Yearly and quarterly filing requirements, as discussed in this subsection, and prepayment discounts and discounts for timely filing, as discussed in subsection (h) of this section, do not apply to holders of direct payment permits. See §3.288 of this title (relating to Direct Payment Procedures and Qualifications).

(9) Non-permitted purchasers. A person who does not hold a sales and use tax permit or a direct payment permit must pay sales or use tax that is due on purchases of taxable items when the sales or use tax is not collected by the seller. The sales or use tax is to be remitted on comptroller Form 01-156, Texas [~~Occasional Sales and~~] Use Tax Return, its electronic equivalent, or any form promulgated by the comptroller that succeeds such form.

(A) A non-permitted purchaser who owes less than $1000 in sales and use tax on all purchases made during a calendar year on which sales and use tax was not collected by the seller must file the return on or before the 20th of January following the year in which the purchases were made.

(B) A non-permitted purchaser who owes $1000 or more in sales and use tax on all purchases made during a calendar year on which sales and use tax was not collected by the seller must file a return and remit sales and use taxes due on or before the 20th of the month following the month when the $1000 threshold is reached and thereafter file monthly returns and make sales and use tax payments on all purchases on which sales and use tax is due.

(h) Discounts; prepayments; penalties and interest relating to filing sales and use tax returns.

(1) Discounts. Unless otherwise provided by this section, each permit holder may claim a discount for timely filing a sales and use tax return and paying the taxes due as reimbursement for the expense of collecting and remitting the sales and use tax. The discount is equal to 0.5% of the amount of sales and use tax due and may be claimed on the return for each reporting period and is computed on the amount timely reported and paid with that return.

(2) Prepayments. Prepayments may be made by permit holders who file monthly or quarterly sales and use tax returns. The amount of the prepayment must be a reasonable estimate of the state and local sales and use tax liability for the entire reporting period. "Reasonable estimate" means at least 90% of the total amount due or an amount equal to the actual net tax liability due and paid for the same reporting period of the immediately preceding year.

(A) A permit holder who makes a timely prepayment based upon a reasonable estimate of sales and use tax liability may retain an additional discount of 1.25% of the amount due.

(B) The monthly prepayment is due on or before the 15th day of the month for which the prepayment is made.

(C) The quarterly prepayment is due on or before the 15th day of the second month of the quarter for which the sales and use tax is due.

(D) A permit holder who makes a timely prepayment must file a sales and use tax return showing the actual liability and remit any amount due in excess of the prepayment on or before the 20th day of the month that follows the quarter or month for which a prepayment was made. If there is an additional amount due, the permit holder may retain the 0.5% reimbursement on the additional amount due, provided that both the sales and use tax return and the additional amount due are timely filed. If the prepayment exceeded the actual liability, the permit holder will be mailed an overpayment notice or refund warrant.

(E) Remittances that are less than a reasonable estimate, as described by this paragraph, are not regarded as prepayments and the 1.25% discount will not be allowed. If the permit holder owes more than $1,500 in a calendar quarter, the permit holder is regarded as a monthly filer. All monthly sales and use tax returns that are not filed because of the invalid prepayment are subject to late filing penalty and interest.

(3) Penalties and interest.

(A) If a person does not file a sales and use tax return together with payment on or before the due date, the person forfeits all discounts and incurs a mandatory 5.0% penalty. After the first 30 days delinquency, an additional mandatory penalty of 5.0% is assessed against the person, and after the first 60 days delinquency, interest begins to accrue at the prime rate, as published in the Wall Street Journal on the first business day of each calendar year, plus 1.0%. For taxes that are due on or before December 31, 1999, interest is assessed at the rate of 12% annually.

(B) A person who fails to timely file a sales and use tax return when due shall pay an additional penalty of $50. The penalty is

due regardless of whether the person subsequently files the sales and use tax return or whether no taxes are due for the reporting period.

(i) Reports of alcoholic beverage sales to retailers. Each brewer, manufacturer, wholesaler, winery, distributor, or package store local distributor shall electronically file a report of alcoholic beverage sales to retailers, as that term is defined in §3.9(e)(2) of this title, as provided in that section.

(j) Records required for comptroller inspection. See §3.281 of this title [(relating to Records Required; Information Required)] and §3.282 of this title [(relating to Auditing Taxpayer Records)].

(k) Resale and exemption certificates. See §3.285 of this title (relating to Resale Certificate; Sales for Resale) and §3.287 of this title (relating to Exemption Certificates).

(l) Suspension of sales and use tax permit.

(1) If a permit holder fails to comply with any provision of Tax Code, Title 2, or with the rules issued by the comptroller under those statutes, the comptroller may suspend the permit holder's sales and use tax permit or permits.

(2) Before a permit holder's sales and use tax permit is suspended, the permit holder is entitled to a hearing before the comptroller to show cause why the permit should not be suspended. The comptroller shall give the permit holder at least 20 days notice. The notice will include a statement of the matters asserted and procedures to be followed. See §1.5(d) of this title (relating to Initiation of a Hearing)[, which shall be in accordance with the requirements of §1.14 of this title (relating to Notice of Setting for Certain Cigarette, Cigar, and Tobacco Tax Cases)].

(3) After a sales and use tax permit has been suspended, a new permit will not be issued to the same person until the person has posted sufficient security and satisfied the comptroller that the person will comply with both the provisions of the law and the comptroller's rules and regulations.

(m) Refusal to issue sales and use tax permit. The comptroller is required by Tax Code, §111.0046 (Permit or License), to refuse to issue any sales and use tax permit to a person who:

(1) is not permitted or licensed as required by law for a different tax or activity administered by the comptroller; or

(2) is currently delinquent in the payment of any tax or fee collected by the comptroller.

(n) Cancellation of sales and use tax permits with no reported business activity.

(1) Permit cancellation due to abandonment. Any holder of a sales and use tax permit who reported no business activity in the previous calendar year is deemed to have abandoned the sales and use tax permit, and the comptroller may cancel the sales and use tax permit. "No business activity" means zero total sales, zero taxable sales, and zero taxable purchases.

(2) Re-application. If a sales and use tax permit is cancelled, the person may reapply and obtain a new sales and use tax permit upon request, provided the issuance is not prohibited by subsection (m) of this section, or by Tax Code, §111.0046.

(o) Liability related to acquisition of a business or assets of a business. Tax Code, §111.020 (Tax Collection on Termination of Business) and §111.024 (Liability in Fraudulent Transfers), provides that the comptroller may impose a tax liability on a person who acquires a business or the assets of a business. See §3.7 of this title (relating to Successor Liability [and Fraudulent Transfers]: Liability Incurred by Purchase [or Acquisition] of a Business).

(p) Criminal penalties. Tax Code, Chapter 151, imposes criminal penalties for certain prohibited activities or for failure to comply with certain provisions under the law. See §3.305 of this title (relating to Criminal Offenses and Penalties).

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 October 8, 2018.

TRD-201804353
William Hamner
Special Counsel for Tax Administration
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

CHAPTER 5. FUNDS MANAGEMENT (FISCAL AFFAIRS)

SUBCHAPTER E. CLAIMS PROCESSING--PURCHASE VOUCHERS

34 TAC §5.54, §5.57

The Comptroller of Public Accounts proposes amendments to §5.54 concerning consulting services contracts and §5.57 concerning use of payment cards by state agencies.

The amendments to §5.54 update the format of the definitions listed in subsection (a), without changing the substance of the definitions, so that they are presented in the same format as other definitions listed in Chapter 5; delete the definitions of consultant, executive director, and USAS in subsections (a)(1), (3), and (7), respectively, because these terms are no longer used in this section; add a definition of SPD in subsection (a), and change the references to Texas Procurement and Support Services and TPASS in subsection (e) to SPD, because the name of the division has changed to the Statewide Procurement Division; and update the legal citation listed in the definition of state agency in subsection (a)(6). These amendments also change "service" to "services" in subsection (d)(1)(A) and "paragraph" to "subsection" in subsection (f)(4) to correct typographical errors in this section.

The amendments to §5.57 update the format of the definitions listed in subsection (a), without changing the substance of the definitions, so that they are presented in the same format as other definitions listed in Chapter 5; delete the definition of TPASS in subsection (a)(1) because this term will no longer be used in this section; change the references to TPASS and institutions of higher education in subsections (e), (e)(1), and (h) to the comptroller to clarify that the comptroller has the authority to procure payment card services and adopt purchasing requirements for state agencies; and delete subsections (a)(2), (3), and (4) to reflect the comptroller's policy that the authority to contract with a payment card issuer on behalf of another state agency will not be delegated.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposals are in effect, the rule: will not create or eliminate a government program; will not re-

quire the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy. This proposals amend existing rules.

Mr. Currah also has determined that the proposals would have no fiscal impact on small businesses or rural communities. The rules would have no significant fiscal impact on the state government, units of local government, or individuals. The proposed amendments would benefit the public by conforming the rule to current comptroller policy and definitions used. There would be no anticipated significant economic cost to the public.

Comments on the proposals may be submitted to Rob Coleman, Director, Fiscal Management Division, at rob.coleman@cpa.texas.gov or at P.O. Box 13528, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

Section 5.54 is proposed under Government Code, §2254.039(a), which requires the comptroller to adopt rules to implement and administer Government Code, Chapter 2254, Subchapter B concerning consulting services. The comptroller has given the proposed amendments to §5.54 to the governor for review and comment as required by Government Code, §2254.039(b). Section 5.57 is proposed under Government Code, 403.023(b), which authorizes the comptroller to "adopt rules relating to the use of credit or charge cards by state agencies to pay for purchases."

Section 5.54 implements Government Code, Chapter 2254, Subchapter B concerning consulting services. Section 5.57 implements Government Code, §403.023 concerning credit, charge, and debit cards.

§5.54. Consulting Services Contracts.

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

[~~(1) "Consultant" has the meaning assigned by Government Code, §2254.021(3).~~]

(1) [~~(2)~~] Consulting service--A [~~"Consulting service" means~~ a] study conducted for a state agency or advice provided to a state agency under a contract that does not involve the traditional relationship of employer and employee. The term does not include a routine service that is necessary to the functioning of a state agency's programs.

[~~(3) "Executive director" means the individual who is the chief administrative officer of a state agency. The term excludes a member of a governing body.~~]

(2) [~~(4)~~] Institution of higher education--Has [~~"Institutiuon of higher education" has~~] the meaning assigned by Education Code, §61.003 except the term does not include a public junior college or a community college.

(3) [~~(5)~~] Major consulting services contract--Has [~~"Major consulting services contract" has~~] the meaning assigned by Government Code, §2254.021(2).

(4) SPD--The Statewide Procurement Division of the comptroller's office.

(5) [~~(6)~~] State agency --Has [~~"State agency" has~~] the meaning assigned by Government Code, §2151.002 [~~§2151.002(2)~~].

[~~(7) "USAS" means the uniform statewide accounting system.~~]

(b) Applicability of this section. This section applies to a consulting service only to the extent Government Code, Chapter 2254, Subchapter B, applies to that service.

(c) Effect of noncompliance with this section or applicable statutes.

(1) If a state agency contracts for a consulting service or renews, amends, or extends a consulting services contract without complying with the requirements of subsection (d) of this section and Government Code, §§2254.029, 2254.030, 2254.0301, and 2254.033, then the contract, renewal, amendment, or extension is void.

(2) If a contract, renewal, amendment, or extension is void under paragraph (1) of this subsection, then the comptroller may not:

(A) draw a warrant or transmit funds to satisfy an obligation under the contract, renewal, amendment, or extension; or

(B) reimburse a state agency for a payment made under the contract, renewal, amendment, or extension.

(3) If a contract, renewal, amendment, or extension is void under paragraph (1) of this subsection, then a state agency may not make any payments under the contract, renewal, amendment, or extension from any state or federal funds held in or outside the state treasury.

(d) Renewals, amendments, or extensions of consulting services contracts.

(1) A state agency must comply with this paragraph when the agency intends to renew, amend, or extend a major consulting services contract.

(A) If the renewal contract itself is not a major consulting services contract or if the contract after the amendment or extension is no longer a major consulting services [~~service~~] contract, then the agency shall file the information required by Government Code, §2254.030 with the secretary of state for publication in the *Texas Register*. The information must be filed not later than the 20th day after either the date the renewal contract is entered into or the date the original contract is amended or extended.

(B) If the renewal contract itself is a major consulting services contract or if the contract after the amendment or extension is still a major consulting services contract, then the agency shall comply with the requirements of Government Code, §2254.028(a) and §2254.029.

(2) A state agency that intends to renew, amend, or extend a consulting services contract that is not a major consulting services contract shall comply with the requirements of Government Code, §2254.028(a) and §2254.029 if the original contract and either the renewal contract, the amendment, or the extension have a reasonably foreseeable value totaling more than $15,000 if the agency is not an institution of higher education or $25,000 if the agency is an institution of higher education.

(e) Procurement of consulting services by SPD [~~the Texas Procurement and Support Services (TPASS) division of the comptroller's office~~]. If SPD [~~TPASS~~] procures a consulting service for a state agency under Government Code, §2254.040, then SPD [~~TPASS~~] must comply with any requirements of this section and Government Code, Chapter 2254, Subchapter B that would apply if the agency were procuring the consulting service directly.

(f) Purchase document requirements.

(1) In addition to the requirements of paragraph (2) of this subsection, the purchase document submitted to the comptroller that requests payment under a contract subject to that paragraph must be supported by the following documentation:

(A) a copy of the original contract and, if the contract has been renewed, amended, or extended, a copy of the renewal, amendment, or extension;

(B) a copy of any written notice provided to the Legislative Budget Board under Government Code, §2254.0301 if the amount of the contract, including any renewal, amendment, or extension, exceeds $14,000; and

(C) a statement that the payment complies with Government Code, §§2155.004(a) - (b), 2254.026, 2254.027, and 2254.033.

(2) This paragraph applies when a purchase document is submitted to the comptroller that requests a payment under either a major consulting services contract (or a renewal, amendment, or extension of a major consulting services contract) or a contract that was not originally a major consulting services contract but whose value after renewal, amendment, or extension totals more than $15,000 if the payer is not an institution of higher education or $25,000 if the payer is an institution of higher education. In addition to the requirements of paragraph (1) of this subsection, the document must be supported by the following documentation:

(A) a reference to the volume and page numbers of the *Texas Register* in which the requirements of Government Code, §2254.029 and §2254.030, and, if applicable, Government Code, §2254.028(c) and §2254.033(b) were fulfilled; and

(B) a copy of the governor's finding of fact that the consulting services are necessary if the finding is required by Government Code, §§2254.028, 2254.031(a)(2), or 2254.031(c)(2), or by any combination of those statutes.

(3) A state agency that has received the governor's emergency waiver of the requirements of Government Code, Chapter 2254, Subchapter B must include a copy of the waiver in the supporting documentation for the contract for which the waiver was received.

(4) A state agency shall retain the supporting documentation required by this subsection [~~paragraph~~] and provide that documentation to the comptroller as required by §5.51 of this title (relating to Requirements for Purchase Documents).

§5.57. Use of Payment Cards by State Agencies.

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

[~~(1) "TPASS" means the Texas Procurement and Support Services division of the comptroller's office.~~]

(1) [~~(2)~~] Consulting service--Has [~~"Consulting service" has~~] the meaning assigned by §5.54 of this title (relating to Consulting Services Contracts).

(2) [~~(3)~~] Executive director--The [~~"Executive director" means the~~] individual who is the chief administrative officer of a state agency. The term excludes a member of a governing body.

(3) [~~(4)~~] Executive head-- [~~"Executive head" means:~~]

(A) the elected or appointed state official who is authorized by law to administer a state agency that is not headed by a governing body; or

(B) the executive director of a state agency that is headed by a governing body.

(4) [~~(5)~~] Institution of higher education--Has [~~"Institution of higher education" has~~] the meaning assigned by Education Code, §61.003, other than a public junior college.

(5) [~~(6)~~] Payment card--A [~~"Payment card" means a~~] credit or charge card issued to an officer or employee of a state agency for the purpose of allowing the officer or employee to purchase goods or services for the agency.

(6) [~~(7)~~] Payment card purchase--The [~~" means the~~] use of a payment card to pay for the purchase of a good or a service.

(7) [~~(8)~~] State agency-- [~~"State agency" means:~~]

(A) a board, commission, department, or other agency in the executive branch of state government that is created by the constitution or a statute of this state, including an institution of higher education;

(B) the legislature or a legislative agency; or

(C) the supreme court, the court of criminal appeals, a court of appeals, or a state judicial agency.

(b) Applicability of this section. Except as provided in subsection (c) of this section, this section applies to a state agency's use of a payment card regardless of the type of funds the agency uses to pay the payment card issuer.

(c) Exemptions.

(1) This section does not apply to a state agency if a law other than Government Code, §403.023, specifically authorizes, requires, prohibits, or otherwise regulates the agency's use of a payment card.

(2) This section does not apply to the extent its application would affect a contract in which a state agency is a party. This paragraph applies only if the contract was in effect on September 1, 1993.

(3) This section does not apply to the extent its application would violate a constitutional prohibition against a law that impairs a contractual obligation.

(4) This section does not apply to the extent necessary to avoid an irreconcilable conflict with a federal law or regulation.

(5) This section does not apply to the use of a payment card to pay for a travel expense incurred by a state officer or employee while conducting official state business.

(d) Effect of noncompliance with this section. The comptroller may suspend or terminate a state agency's authority to use a payment card if the comptroller determines that the agency or an officer or employee of the agency has violated this section.

(e) Procurement of payment card services by the comptroller [~~TPASS or an institution of higher education~~].

(1) The comptroller [~~TPASS~~] may contract with a payment card issuer on behalf of any state agency that chooses to participate in the contract.

[~~(2) The comptroller may authorize an institution of higher education to contract with a payment card issuer on behalf of any state agency that chooses to participate in the contract. The institution may not enter into the contract without the comptroller's authorization.~~]

[~~(3) A state agency that is participating in a contract between TPASS and a payment card issuer may start participating in a~~

~~contract between an institution of higher education and a payment card issuer if:~~]

[~~(A) the comptroller approves of the agency's participation in the contract involving the institution; and~~]

[~~(B) the agency ceases participation in the contract involving TPASS.~~]

[~~(4) A state agency that is participating in a contract between an institution of higher education and a payment card issuer may start participating in a contract between TPASS and a payment card issuer if:~~]

[~~(A) the comptroller approves of the agency's participation in the contract involving TPASS; and~~]

[~~(B) the agency ceases participation in the contract involving the institution.~~]

(2) [~~(5)~~] A state agency may not use a payment card to pay for a purchase unless the card was issued under a contract between a payment card issuer and the comptroller [~~either TPASS or an institution of higher education~~].

(3) [~~(6)~~] A state agency may begin making payment card purchases only after the agency has complied with the procedural requirements of the comptroller. [~~:~~]

[~~(A) TPASS, if the agency is participating in a contract between TPASS and a payment card issuer; or~~]

[~~(B) an institution of higher education, if the agency is participating in a contract between the institution and a payment card issuer.~~]

(f) Adoption of procedures by state agencies. A state agency shall adopt reasonable procedures governing the issuance and security of payment cards and the use of those cards by the agency's officers and employees. Upon request, the agency shall make the procedures available to the comptroller for review.

(g) Prohibited uses of payment cards. A state agency may not use a payment card and may not reimburse an officer or employee for the use of a payment card for:

(1) a purchase of a personal nature or any other purchase not connected with official state business;

(2) a cash advance;

(3) a purchase of a consulting service;

(4) a purchase of a good or a service that may not be purchased without the prior approval of another state agency;

(5) a purchase that the comptroller audits before payment; or

(6) a purchase from a vendor if a payment to it is prohibited by:

(A) Government Code, §403.055 or §2107.008;

(B) Education Code, §57.48, or §57.482; or

(C) Family Code, §231.007.

(h) Applicability of purchasing requirements. The use of a payment card to pay for a purchase does not automatically exempt a state agency or its officers and employees from any purchasing requirement of state law or the comptroller [~~TPASS~~].

(i) Payments to payment card issuers. A state agency shall pay a payment card issuer through an electronic funds transfer.

(j) Refunds. A state agency may not accept a cash refund for a purchase if the agency paid for the purchase with a payment card.

(k) Lost or stolen payment cards. The state employee that had custody of a payment card immediately before it was lost or stolen shall report the loss or theft to the payment card issuer according to its requirements.

(l) Disputed charges. A state agency shall dispute any incorrect charge that appears on an invoice the agency receives from a payment card issuer. When disputing the charge, the agency shall comply with applicable law and the issuer's requirements.

(m) Taxes. A state agency or a state employee shall properly claim any available exemption from paying a state or federal tax that is assessed on a payment card purchase.

(n) Responsibilities and notification of state employees.

(1) A state employee shall ensure that each of the employee's payment card purchases comply with applicable state law and this section.

(2) The executive head of a state agency shall notify the agency's employees about the requirements of this section.

(o) Fiscal year determination. The fiscal year that must be charged for a purchase is not affected by the use of a payment card to pay for the purchase. For example, a state agency that pays a payment card issuer for a service purchased by the agency must charge the payment to the fiscal year in which the service was rendered.

(p) Prohibition against excess obligations. A state agency that uses a payment card to pay for a purchase should be careful not to violate any provision in the General Appropriations Act about the incurrence of excess obligations.

(q) Purchase document and receipt requirements.

(1) A purchase document that a state agency submits to the uniform statewide accounting system for a payment to a payment card issuer must comply with the comptroller's general requirements for the submission of those documents. In addition, the document must:

(A) provide the transaction charge and the appropriate Texas identification number on the detail lines;

(B) provide the Texas identification number and name of the payment card issuer on the remittance line; and

(C) contain any other information the comptroller considers necessary.

(2) A state agency shall keep in its files any receipt that a vendor issues to the agency for a payment card purchase. The receipt must contain a description of the good or service purchased that is sufficient to support the expenditure object code used by the agency. The agency shall make the receipt available to the comptroller 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.

Filed with the Office of the Secretary of State on *October 4, 2018.

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Victoria North
Chief Counsel, Fiscal and Agency Affairs Legal Services Division
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 217. VEHICLE TITLES AND REGISTRATION

SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §217.27

The Texas Department of Motor Vehicles (department) proposes an amendment to Chapter 217, Vehicle Titles and Registration, Subchapter B, Motor Vehicle Registration, §217.27, Vehicle Registration Insignia.

EXPLANATION OF PROPOSED AMENDMENT

With the proposed amendment to add §217.27(d)(4), the department is clarifying when it may approve and issue a license plate pattern that references certain publicly and privately funded entities. Namely, the department may approve a plate pattern which does not violate §217.27(d) and references publicly and privately funded institutions of higher learning, including military academies.

FISCAL NOTE

Linda M. Flores, Chief Financial Officer, has determined that for each of the first five years the amendment as proposed is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed amendment.

Jeremiah Kuntz, Director of the Vehicle Titles and Registration Division, has determined that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed amendment.

PUBLIC BENEFIT AND COST

Mr. Kuntz has also determined that for each year of the first five years the amendment is in effect, the public benefit anticipated as a result of enforcing or administering the amendment will be to clarify when the department may issue a license plate pattern. There are no anticipated economic costs for persons required to comply with the proposed amendment. There will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

TAKINGS IMPACT ASSESSMENT

The department has determined that this proposal affects no private real property interests and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a taking or require a takings impact assessment under Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT STATEMENT

The department has determined that during the first five years the proposed amendment is in effect, no government program would be created or eliminated. Implementation of the proposed amendment would not require the creation of new employee positions or elimination of existing employee positions. Implementation would not require an increase or decrease in future legislative appropriations to the department or an increase or decrease of fees paid to the department. Additionally, the proposed amendment does not create a new regulation, or expand, limit, or repeal an existing regulation. The proposed amendment does not affect the number of individuals subject to the rule's applicability and will not affect this state's economy.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendment may be submitted to Sarah Swanson, Interim General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731 or by email to *rules@txdmv.gov.* The deadline for receipt of comments is 5:00 p.m. on November 19, 2018.

STATUTORY AUTHORITY

The amendment is proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; and more specifically, §504.0011, which provides that the board may adopt rules to implement and administer Chapter 504, License Plates.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 504.

§217.27. Vehicle Registration Insignia.

(a) On receipt of a complete initial application for registration with the accompanying documents and fees, the department will issue vehicle registration insignia to be displayed on the vehicle for which the registration was issued for the current registration period.

(1) If the vehicle has a windshield, the symbol, tab, or other device prescribed by and issued by the department shall be attached to the inside lower left corner of the vehicle's front windshield in a manner that will not obstruct the vision of the driver.

(2) If the vehicle has no windshield, the symbol, tab, or other device prescribed by and issued by the department shall be attached to the rear license plate, except that registration receipts, retained inside the vehicle, may provide the record of registration for vehicles with permanent trailer plates.

(3) If the vehicle is registered as a former military vehicle as prescribed by Transportation Code, §504.502, the vehicle's registration number shall be displayed instead of displaying a symbol, tab, or license plate.

(A) Former military vehicle registration numbers shall be displayed on a prominent location on the vehicle in numbers and letters of at least two inches in height.

(B) To the extent possible, the location and design of the former military vehicle registration number must conform to the vehicle's original military registration number.

(b) Unless otherwise prescribed by law, each vehicle registered under this subchapter:

(1) must display two license plates, one at the exterior front and one at the exterior rear of the vehicle that are securely fastened at

the exterior front and rear of the vehicle in a horizontal position of not less than 12 inches from the ground, measuring from the bottom, except that a vehicle described by Transportation Code, §621.2061 may place the rear plate so that it is clearly visible; or

(2) must display one plate that is securely fastened at or as close as practical to the exterior rear of the vehicle in a position not less than 12 inches from the ground, measuring from the bottom if the vehicle is a road tractor, motorcycle, trailer or semitrailer.

(c) Each vehicle registered under this subchapter must display license plates:

(1) assigned by the department for the period; or

(2) validated by a registration insignia issued by the department for a registration period consisting of 12 consecutive months at the time of application for registration. Vehicles may be registered for 24 consecutive months only in accordance with Transportation Code, §548.102. However, the vehicle must be registered for 24 consecutive months and all fees must be paid for each year of registration, regardless of the number of months remaining on the inspection at the time of registration, if both of the following occur:

(A) the vehicle receives a two-year inspection under §548.102; and

(B) the application for registration is made in the name of the purchaser under Transportation Code, §501.0234.

(d) The department may cancel any personalized alpha-numeric pattern that was issued if the department subsequently determines or discovers that the personalized license plate was not in compliance with these guidelines when issued, or if due to changing language usage, meaning or interpretation, the personalized license plate has become non-compliant with these guidelines. When reviewing a personalized alpha-numeric pattern, the department need not consider the applicant's subjective intent or declared meaning. The department will not issue any license plate containing an alpha-numeric pattern that meets one or more of the following criteria.

(1) The alpha-numeric pattern conflicts with the department's current or proposed regular license plate numbering system.

(2) The director of the department's Vehicle Titles and Registration Division or the director's designee finds that the personalized alpha-numeric pattern, including plate patterns that feature foreign or slang words or phrases, use phonetic, numeric or reverse spelling, acronyms, patterns viewed in mirror image, or use a code which only a small segment of the community may be able to readily decipher, that may be considered objectionable or misleading, including that the pattern may be viewed as, directly or indirectly:

(A) indecent (defined as including a reference or connotation to a sexual act, sexual body parts, excrement, or bodily fluids or functions. Additionally, "69" formats are prohibited unless used in combination with the vehicle make, for example, "69 CHEV".);

(B) a vulgarity (defined as profane, swear, or curse words);

(C) derogatory (defined as an expression that is demeaning to, belittles, or disparages any person, group, race, ethnicity, nationality, gender, sexual orientation, or refers to an organization that advocates such expressions);

(D) a reference to race, ethnicity, gender or sexual orientation whether the reference is derogatory or not;

(E) a reference to gangs, illegal activities, violence, implied threats of harm, or expressions that describe, advertise, advocate, promote, encourage, glorify, or condone violence, crime or unlawful conduct;

(F) a reference to illegal drugs, controlled substances, the physiological state produced by such substances, intoxicated states, or references that may express, describe, advertise, advocate, promote, encourage, glorify such items or states;

(G) a representation of, or reference to, law enforcement, military branches, or other governmental entities and their titles, including any reference to public office or position, military or law enforcement rank or status, or any other official government position or status; or

(H) deceptively similar to a military, restricted distribution, or other specialty plate.

(3) The alpha-numeric pattern is currently issued to another owner.

<u>(4) Notwithstanding the limitations on issuance of plate patterns in this subsection, the department may issue patterns that refer to publicly and privately funded institutions of higher education, including military academies, whether funded by state or federal sources, or both.</u>

(e) A decision to cancel or not issue a personalized alpha-numeric pattern under subsection (d) of this section may be appealed to the executive director of the department or the executive director's designee within 20 days of notification of the cancellation or non-issuance. All appeals must be in writing and the requesting party may include any written arguments, but shall not be entitled to a contested case hearing. The executive director or the executive director's designee will consider the requesting party's arguments and issue a decision no later than 30 days after the submission of the appeal, unless additional information is sought from the requestor, in which case the time for decision is tolled until the additional information is provided. The decision of the executive director or the executive director's designee is final and may not be appealed. An appeal is denied by operation of law 31 days from the submission of the appeal, or if the requestor does not provide additional requested information within ten days of the request.

(f) The provisions of subsection (a) of this section do not apply to vehicles registered with annual license plates issued by the department.

(g) A person whose initial application has been denied may either receive a refund or select a new alpha-numeric pattern. If an existing personalized alpha-numeric pattern has been cancelled, the person may choose a new personalized alpha-numeric pattern which will be valid for the remainder of the term or will forfeit the remaining term purchased.

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 October 8, 2018.

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Texas Department of Motor Vehicles
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For further information, please call: (512) 465-5665