ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 97. PLANNING AND ACCOUNTABILITY

SUBCHAPTER EE. ACCREDITATION STATUS, STANDARDS, AND SANCTIONS

DIVISION 1. STATUS, STANDARDS, AND SANCTIONS

19 TAC §97.1062

The Texas Education Agency (TEA) adopts new §97.1062, concerning applicability of intervention pause under district partnerships or mathematics innovation zones. The new section is adopted without changes to the proposed text as published in the June 1, 2018 issue of the *Texas Register* (43 TexReg 3539) and will not be republished. The adopted new section implements Senate Bill (SB) 1882 and SB 1318, 85th Texas Legislature, Regular Session, 2017.

REASONED JUSTIFICATION. Adopted new 19 TAC §97.1062, Applicability of Intervention Pause under District Partnerships or Mathematics Innovation Zones, addresses the implementation of the exemption from intervention that applies to partnerships to operate school district campuses (partnerships) and designation of a campus of a school district or open-enrollment charter school as a mathematics innovation zone (MIZ).

New subsection (a) clarifies that §97.1062 discusses the application of intervention pauses for school district campuses pursuant to the district charter partnership statute (Texas Education Code (TEC), §11.174) and for campuses of school districts and open-enrollment charter schools pursuant to the mathematics innovation zone statute (TEC, §28.020). As the surrounding rules in Chapter 97, Subchapter EE, Division 1, apply to both open-enrollment charter school campuses as well as school district campuses, this explicit statement should remove doubt regarding the application of the proposed rule to open-enrollment charter campuses in connection with the district charter partnership statute.

As the intervention pause does not apply to interventions that result from the first year of unacceptable performance, new subsection (b) implements the statutory requirement that a district charter partnership must begin operation after a campus has been rated unacceptable in order to be eligible for an intervention pause. The subsection clarifies that the operation must be for an entire school year unless a special circumstance exists as defined by other rules implementing the district charter partnership. This ensures school districts understand how and when the campus is eligible for the intervention pause.

The MIZ statute does not contain the same intervention pause eligibility requirement as the partnership statute that the campus be rated unacceptable prior to taking the actions that make the campus eligible for the intervention pause. However, the intervention pause by statute does not apply to the interventions that stem from the first year of unacceptable performance. New subsection (c) clarifies that designation as an MIZ during a year that could count as the first year of consecutive years of unacceptable performance will not cease the resulting interventions. As the statute limits the pause to the first two years of designation, the subsection makes clear that being designated an MIZ for the first two years of unacceptable performance only results in one year of intervention pause. This ensures school districts and open-enrollment charter schools understand how and when the campus is eligible for the intervention pause.

As the intervention pause only applies to the first two years for which the campus operated under a partnership or was designated an MIZ, new subsection (d) clarifies that orders of intervention will still issue that arise from the performance rating from the year prior to the start of the district charter partnership or designation as an MIZ. Accountability ratings issue in August upon the conclusion of the school year. Final accountability ratings will not be issued until the subsequent school year has started. The statutes authorizing the intervention pauses only apply the intervention pause for the school years in which the district charter partnership operates or receives designation as an MIZ. As a consequence, the intervention pause does not affect the requirement that interventions be ordered for the performance of the prior year. This ensures that the statutory requirements for consequences of unacceptable performance harmonize with the intervention pause enacted by the legislature. New subsection (d), working in conjunction with new subsection (e), clarifies that statutory orders of interventions will be issued for performance for the year prior to the operation of the partnership or designation of MIZ, though enforcement of the order in the subsequent year will be paused. As a corollary, once the intervention pause expires, the order previously issued will automatically resume its effect. This ensures that school districts and open-enrollment charter schools understand that if the pause expires without removing the campus from being subject to interventions, then implementation of interventions previously ordered must be fulfilled without further action by the TEA.

New subsection (e) makes clear that the TEA will cease to enforce the increasing interventions that arise from the second consecutive year of unacceptable performance (development of a turnaround plan) to the interventions that arise from the fifth consecutive year of unacceptable performance (campus closure or board of managers for the school district or open-enrollment charter school). This fulfills the legislative intent in implementing the pause by maximizing the time periods for which the school district or open-enrollment charter school may take advantage

of the intervention pause to improve student performance. The subsection makes clear that the intervention pause ceases on the conclusion of the second consecutive school year of operation or designation unless extended under the commissioner's statutory authority. This aligns the expiration with the statutory directive that the pause applies to school years.

New subsection (f) makes clear that the TEA will continue to enforce interventions not covered by the pause. As the legislation only provides for the pause of certain interventions, this provision eliminates any lack of understanding regarding whether other enforcement actions will persist.

New subsection (g) makes clear that, if a campus loses an MIZ designation or a partnership no longer operates or ceases to meet the eligibility requirements for a district charter partnership, then the campus loses its qualification for an intervention pause. This prevents campuses from initiating an effort and then ceasing to fulfill the alternative educational arrangements incentivized by the Texas legislature.

New subsection (h) indicates that the TEA will not pursue interventions if, while during the pause, the campus attains an acceptable or higher performance rating. This ensures that subsection (e) is not read to resume interventions upon expiration of the pause even if the campus attains an acceptable or higher performance rating. The subsection specifically removes TEC, §39A.010, from its application because that section imposes a continuing duty with regard to turnaround plans even if a campus attains an acceptable or higher performance rating.

New subsection (i) clarifies the counting rules for consecutive years of unacceptable performance accounting for the time when the intervention pause applies. The provision makes clear that the pause, while not counted in the number of consecutive years, does not break the consecutive year chain. This aligns with the statutory requirement that the campus is exempt from intervention during the intervention pause. It also makes clear that in certain circumstances explained in other subsections in the rule, the intervention pause may only constitute one year, as the intervention pause only applies to certain interventions. The legislation was designed to encourage schools to try alternative educational arrangements to improve performance of students. This provision implements the statutory requirements that the intervention pause does not restart the clock that may result in ultimate sanctions required by statute.

New subsection (j) makes clear that school districts and open-enrollment charter schools understand that a district charter partnership or designation as an MIZ that begins the year after the fifth consecutive year of poor campus performance does not pause the requirement that the campus be ordered closed or a board of managers take control of the school district or open-enrollment charter school. As the legislature applies the intervention pause to the years under which the district charter partnership operates or the MIZ designation applies, the intervention pause does not affect interventions that must result from the performance of the prior year. The law's requirement that the campus cease to exist or the board of trustees cede their authority was fixed prior to the district implementing the policies that allow access to the intervention pause. This rule ensures school districts and open-enrollment charter schools can adequately plan when a campus needs to implement a partnership or MIZ to take advantage of the intervention pause.

New subsection (k) makes clear that a campus will receive an accountability rating even though it was eligible for an intervention pause. This implements the statutory directive that MIZ campuses still receive accountability ratings, as the exemption from intervention does not apply to the assignment of a performance rating. This fulfills the public policy of showing performance and change in performance at the campus.

New subsection (l) makes clear that performance of a campus that receives an intervention pause will still be included in the performance of the school district or open-enrollment charter school and does not extend to other campuses that have not implemented the actions necessary to receive the intervention pause. Both intervention pause statutes only exempt interventions for certain actions imposed on a particular campus. The statutes do not extend the intervention pause to the school district or open-enrollment charter school nor do they extend the intervention pause to any other campus that does not independently qualify for an intervention pause. This subsection makes clear that school districts and open-enrollment charter schools still retain responsibility for the performance of the campus and other campuses not initiating the necessary actions to receive an intervention pause and ensure fidelity in the development and implementation of the avenues that lead to an intervention pause.

New subsection (m) replicates the TEC, §28.020, provision making commissioner determinations regarding implementation of MIZs, including the application of the intervention pause, final and unappealable.

New subsection (n) provides a transition counting provision regarding implementation of an intervention pause. As a transition provision, 19 TAC §97.1077, School Year Under Contract to Operate a District Campus, authorizes operation of a district charter partnership for less than a year to count toward receiving an intervention pause. This provision clarifies that, if pursued, a district charter partnership will consume one full year of receipt of the intervention pause. The policy underpinning the intervention pause requires a school district to pursue alternative educational delivery to improve student performance. The most practical approach is to develop the alternative education model and implement it for two full school years to change performance. By requiring partial year operation to count for a full year, the rule encourages school districts to implement a particularly effective alternative educational model in exchange for access to an intervention pause for which they would otherwise not qualify as they could not have implemented the necessary requirements in time.

SUMMARY OF COMMENTS AND AGENCY RESPONSES. The public comment period on the proposal began June 1, 2018 and ended July 2, 2018. No public comments were received.

STATUTORY AUTHORITY. The new section is adopted under Texas Education Code (TEC), §11.174, as added by Senate Bill (SB) 1882, 85th Texas Legislature, Regular Session, 2017, which authorizes school districts who enter into a partnership to operate the school district's campus to receive an exemption from intervention for the first two years of operation of the partnership (intervention pause). The partnership and participants must satisfy the requirements of the statute and associated rules. Eligibility for the exemption only applies if operation of the partnership begins in a year following a year that the campus earns an unacceptable performance rating. The exemption from interventions applies to interventions for campuses that result from the second consecutive year of unacceptable performance and the fifth consecutive year of unacceptable performance. The commissioner is authorized to adopt rules to implement the sec-

tion; TEC, §28.020, as added by SB 1318, 85th Texas Legislature, Regular Session, 2017, which exempts school districts and open-enrollment charter schools designated as mathematics innovation zones from interventions that apply to campuses that result from the second consecutive year of unacceptable performance and the fifth consecutive year of unacceptable performance. The commissioner is authorized to adopt rules to implement the section. Decisions of the commissioner under this section are final and unappealable; TEC, §39.001, which authorizes the commissioner to adopt rules regarding accountability; and TEC, §39A.115, which authorizes the commissioner to adopt rules regarding interventions that apply to campuses that result from the second consecutive year through the fifth consecutive year of unacceptable performance.

CROSS REFERENCE TO STATUTE. The new section implements Texas Education Code, §§11.174, 28.020, 39.001, and 39A.115.

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

Filed with the Office of the Secretary of State on October 29, 2018.

TRD-201804693
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: November 18, 2018
Proposal publication date: June 1, 2018
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 188. PERFUSIONISTS

22 TAC §§188.4, 188.26, 188.28

The Texas Medical Board (Board) adopts amendments to §188.4, concerning Qualifications for Licensure; §188.26, concerning Exemption from Registration Fee for Retired Perfusionists Providing Voluntary Charity Care; and §188.28, concerning Exemption from Registration Fee for Retired Perfusionists. The amendments are being adopted without changes to the proposed text as published in the September 7, 2018, issue of the *Texas Register* (43 TexReg 5748). The adopted amendments will not be republished.

The amendment to §188.4 removes the jurisprudence exam attempt limit for applicants.

The amendment to §188.26 removes the language in subsection (g) that requires a licensee to submit evaluations from previous employers upon application to return to active status after being inactive and only providing charity care.

The amendment to §188.28 removes the language in subsection (c) that requires a licensee to submit evaluations from previous employers upon application to return to active status after being retired.

The Board has determined that the public benefit anticipated as a result of enforcing this adoption will be to have rules that are aligned with other rules relating to other license types and will streamline the Board's processes with regard to all license types and will streamline the Board's procedures for evaluating such requests to return to active status.

No comments were received regarding §§188.4, 188.26, and 188.28.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001 and §603.152, which provides authority for the Board to adopt rules and bylaws as necessary to: regulate the practice of Perfusion; govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure amend as necessary.

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

Filed with the Office of the Secretary of State on October 24, 2018.

TRD-201804665
Scott Freshour
General Counsel
Texas Medical Board
Effective date: November 13, 2018
Proposal publication date: September 7, 2018
For further information, please call: (512) 305-7016

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CHAPTER 190. DISCIPLINARY GUIDELINES
SUBCHAPTER C. SANCTION GUIDELINES

22 TAC §190.14

The Texas Medical Board (Board) adopts amendments to §190.14, concerning Disciplinary Sanction Guidelines, without changes to the text as published in the August 17, 2018, issue of the *Texas Register* (43 TexReg 5329). The rule will not be republished.

The amendments to §190.14(9) are made to correct the sanction guidelines chart and add violation categories that were inadvertently deleted from the Texas Administrative Code due to a filing error. The Board recently adopted amendments to §190.14(9) in the July 13, 2018, issue of the *Texas Register* (43 TexReg 4750). When filing this recent adoption notice with the *Texas Register,* only the amended sections were included in the graphic and subsequently only the amended portion of the graphic was published in the *Texas Register.* This resulted in the inadvertent omission of the remaining portion of the graphic. Therefore, portions of the graphic are not currently included in the Texas Administrative Code.

All of the sanction guidelines shown in the graphic have been previously submitted to stakeholders, published for comment, and adopted by the Board in previous meetings, including the June 2018 meeting.

The amendment to §190.14, related to Disciplinary Sanction Guidelines, replaces the current graphic and reflects the sanction guidelines previously adopted by the Board and inadvertently deleted from the Texas Administrative Code through

publication of the Board's amendments adopted at the June 2018 meeting.

The Board has determined that the public benefit anticipated as a result of enforcing this proposal will be to provide guidance to Board members to achieve consistency in assessing violations and recommending disciplinary sanctions or remedial action.

No comments were received regarding adoption of this amendment.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure. The amendments are also adopted under the authority of the Texas Occupations Code Annotated, Chapter 107.

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

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Effective date: November 13, 2018
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For further information, please call: (512) 305-7016

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PART 11. TEXAS BOARD OF NURSING

CHAPTER 222. ADVANCED PRACTICE REGISTERED NURSES WITH PRESCRIPTIVE AUTHORITY

22 TAC §222.8, §222.10

Introduction. The Texas Board of Nursing (Board) adopts amendments to §222.8, relating to Authority to Order and Prescribe Controlled Substances, and §222.10, relating to Enforcement. The amendments are adopted with changes to the proposed text published in the August 31, 2018, issue of the *Texas Register* (43 TexReg 5638).

Reasoned Justification. The amendments are adopted under the authority of the Occupations Code §301.151 and are necessary for compliance with the statutory mandates of the Health and Safety Code §481.0764 and §481.0765. Additionally, the adopted amendments remove outdated and obsolete references from the sections.

Background. During the 85th Legislative Session, the Texas Legislature enacted House Bill (HB) 2561, which amended the Health and Safety Code Chapter 481, and became effective on September 1, 2107. Among other things, HB 2561 requires health care practitioners, including advanced practice registered nurses (APRNs), to access the Texas Prescription Monitoring Program (PMP) prior to prescribing or dispensing opioids, benzodiazepines, barbiturates, or carisoprodol. The bill further authorizes, but does not require, practitioners to access the PMP prior to prescribing or dispensing any controlled substance.

The Texas PMP collects and monitors prescription data for all controlled substances dispensed by pharmacies in Texas or from a pharmacy that is located in another state that dispenses to Texas residents. The PMP also allows providers to query their own prescribing history. Because opioids, benzodiazepines, barbiturates, carisoprodol (Soma), and other controlled substances have significant addictive risks and potential impact on public health, it is important for APRNs to recognize their responsibility to review the PMP as part of responsible prescribing practices.

The adopted rule implements the statutory requirements of HB 2561 and provides guidance to Board regulated practitioners who prescribe controlled substances. First, as required by the bill, the adopted rule requires APRNs to access and review the PMP prior to prescribing opioids, benzodiazepines, barbiturates, or carisoprodol. There are two exceptions to this requirement. First, a prescriber is not required to review the PMP if the patient for whom the medication is being prescribed has been diagnosed with cancer or is receiving hospice care, and the APRN clearly notes these circumstances on the patient's prescription or in the patient's electronic prescription record. Second, an APRN will not be in violation of the statute's requirements if the APRN attempts to review the PMP but is unable to do so due to circumstances outside the APRN's control and clearly documents the reason(s) for the APRN's inability to access the PMP on the patient's prescription or in the patient's electronic prescription record. The rule also encourages, although does not require, APRNs who prescribe controlled substances to review the PMP prior to prescribing these medications.

The adopted rule also requires APRNs to document their review of the PMP and their rational for prescribing the medication in the patient's medical record. This requirement is intended to ensure that APRNs who prescribe opioids, benzodiazepines, barbiturates, carisoprodol (Soma), or other controlled substances have appropriately considered the risks associated with the prescribed medication, particularly in light of the patient's past medical history, and have adequate medical necessity and judgment to justify the prescription. Consistent with the provisions of HB 2561, this rule will become effective September 1, 2019.

Changes to the Adopted Text. The Board received one written comment on the proposal. The comment was considered by the Board at its October 2018 meeting. In response to the written comment on the published proposal, the Board has made changes to §222.8(d)(2)(B), (3)(B), and (4) of the section as adopted. The Board has also added new paragraph (5) to this section. The Board has also made changes to §222.10(a)(6) of the section as adopted and has also added new paragraph (6) to this section in response to comments. None of these changes, however, materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice. Further, the Board believes these changes address a portion of the commenter's concerns.

How the Sections Will Function.

Chapter 222 sets forth the general requirements applicable to APRNs with prescriptive authority. Section 222.8 sets forth the specific requirements applicable to APRNs prescribing controlled substances. Adopted §222.8(d) sets forth new requirements, consistent with the mandates of HB 2561, regarding the prescription of certain types of controlled substances.

Adopted §222.8(d)(1) provides that APRNs should access and review the PMP prior to prescribing any controlled substance for patients being treated for pain. Adopted §222.8(d)(2) provides that APRNs must access and review the PMP before prescribing opioids, benzodiazepines, barbiturates, or carisoprodol unless the patient has been diagnosed with cancer or the patient is receiving hospice care and the APRN clearly notes on the patient's prescription or in the patient's electronic prescription record that the patient was diagnosed with cancer or is receiving hospice care. This change to the text of the rule as adopted was necessary to clarify the term "˜prescription record' in the proposal and was made in response to comments received. Adopted §222.8(d)(3) states that an APRN will not be subject to disciplinary action if the APRN makes a good faith attempt to access and review the PMP prior to prescribing opioids, benzodiazepines, barbiturates, or carisoprodol, but is unable to access the information because of circumstances outside the control of the APRN and clearly notes on the patient's prescription or in the patient's electronic prescription record the APRN's attempt to access and review the PMP and the circumstances that prevented the APRN from being able to do so. This change to the text of the rule as adopted was necessary to clarify the term "˜prescription record' in the proposal and was also made in response to comments received. Finally, adopted §222.8(d)(4) requires that documentation that the review of the PMP occurred and rationale for prescribing a controlled substance be included in the patient's medical record. Paragraph (5) was added to the text as adopted to clarify that the effective date of the section will be September 1, 2019, which is consistent with the provisions of HB 2561. The remaining adopted amendments to this section remove obsolete and outdated references from the rule text.

Section 222.10 provides instruction to APRNs regarding the consequences of violating the Nursing Practice Act and Board rules. Specifically, §222.10(a) enumerates several potential violations of the Nursing Practice Act and Board rules for which the Board may impose a disciplinary action. Adopted §222.10(a)(6) specifies that an APRN may be subject to disciplinary action for failing to access and review the PMP before prescribing opioids, benzodiazepines, barbiturates, or carisoprodol, unless a statutory exemption has been documented. Further, the rule specifies that if an APRN has made a good faith effort to comply with the requirement and is unable to do so because of circumstances beyond the APRN's control, documentation of this effort must be made on the patient's prescription or in the patient's electronic prescription record. This change in the rule text as adopted was necessary to clarify the expectation of the Board and to address concerns of the commenter. The remaining adopted amendments to this section remove obsolete and outdated references from the rule text.

Summary of Comments.

Summary of Comment: A commenter representing the APRN Alliance states that the proposal creates two disciplinable offenses: failing to check the prescription monitoring program (PMP) and failing to properly document the check. However, the commenter points out that the Health and Safety Code §481.0764 provides that a failure to check the PMP is grounds for disciplinary action, but there is no mention of documenting the check in the patient's records. The commenter states that the APRN Alliance feels strongly that documentation should be encouraged and appreciates the Board's efforts to do so. However, the commenter recommends that the Board consider alternative ways to encourage documentation, without making failure to do so disciplinable. The commenter suggests that the Board could modify the language in the rule by creating a safe harbor for documentation instead of requiring it. This would ensure that the Board is not forced to discipline a nurse who can prove, despite failing to document, that they complied with the applicable law by checking the PMP. If the Board feels that failure to document should be independently disciplinable, the commenter asks that the Board reconsider the standards it has set for the documentation. The commenter states that the standards inject subjectivity into the rules, and could be resolved by requiring only the documentation, as the requirement is stated in §222.10(a)(6).

Further, the commenter states that the Board's repeated use of the term "prescription record" implies that documentation will be made within the PMP itself, rather than in the patient's medical record. If this is the case, the commenter questions whether the Board has done its due diligence to ensure that the PMP has the ability to include the Board's various requirements. However, if the Board intended "prescription record" to mean the medical record, the commenter asks that the Board change the rule language to reflect its intent.

Finally, the commenter asks the Board to include an effective date for the rule in the rule language. The commenter states that although the Board acknowledges, in the preamble for the rule, that it will become effective in September 2019, few, if any, nurses will see the rule preamble. The commenter states that this will create confusion for nurses, especially if the legislature modifies the statutory requirements during the legislative session. Further, the commenter states that the Administrative Procedure Act requires that the rule become effective 20 days after filing with the Secretary of State. The Government Code §2001.036(a)(1) provides that the only way to move the effective date past the 20-day standard is "if a later date is required by statute or specified in the rule." The commenter states that the effective date of House Bill 2561 is not required by statute, but is instead required by the effective date provisions of the bill, which do not become statute upon passage. Therefore, as currently drafted, the commenter states that a later date is not required by statute or specified in rule, and the rule will become effective 20 days after filing with the Secretary of State's Office. The commenter urges the Board to remedy this oversight by specifying an effective date in the rule.

Agency Response: The minimum standards of nursing practice require nurses to accurately and completely document the care they render. For APRNs who prescribe medications, this includes appropriate documentation of treatment plans and goals, evaluation of treatment options, and rationale for ongoing medical treatment. The review of the PMP is a necessary and important part of formulating an appropriate treatment plan for a patient, particularly in circumstances where the PMP indicates the patient's history of multiple prescriptions from several different providers. Likewise, it is also important for a prescriber to document the rationale for prescribed medication(s) in order to ensure that the prescriber has appropriately considered the PMP, if applicable, and/or other pertinent factors that may affect the effectiveness and safety of the prescribed medications. These requirements are consistent with the prevailing standard of care and are intended to provide safeguards for patients and to prevent the inappropriate prescribing of dangerous and additive substances. To that end, the Board will review a prescriber's documentation when investigating complaints involving inappropriate or non-therapeutic prescribing. Further, a prescriber's failure to document the review of the PMP and/or the prescriber's rational for prescribing a controlled substance may result in disciplinary action, if warranted by the circumstances of the par-

ticular case. If the Board is unable to enforce the standards it prescribes, they are rendered meaningless. As such, the Board declines to make changes suggested by the commenter, as they relate to required documentation.

Further, the Board notes that §481.0765(c) exempts a prescriber from reviewing the PMP if the prescriber makes a good faith attempt to check the PMP, but is unable to access the information because of circumstances outside the control of the prescriber. The proposal gives the prescriber the benefit of this exception so long as the prescriber is able to document the circumstances that prevented him/her from reviewing the PMP. While the commenter states that this requirement is too subjective in nature, it seems inevitable that every situation will necessarily involve unique circumstances that prevent a prescriber from accessing the PMP at the specific date and time he/she attempts to review the program. As such, this information, by its very nature, will be subjective and individualized. So long as the information is appropriately documented, the prescriber will not be subject to discipline for failing to review the PMP under these circumstances. The Board, therefore, declines to make changes to this portion of the rule, as requested by the commenter.

Although the proposal includes the same terminology as that of §481.0765, the Board has determined that clarification of the term "prescription record" is necessary within the context of this rule. HB 2561 amended the Health & Safety Code §481.0765 to require a prescriber to review the PMP prior to prescribing opioids, benzodiazepines, barbiturates, or carisoprodol. However, §481.0765(a) exempts a prescriber from this requirement if the prescription is for a patient who has been diagnosed with cancer or the patient is receiving hospice care and the prescriber clearly notes in the prescription record that the patient was diagnosed with cancer or is receiving hospice care. §481.0765(c) contains an additional exemption if a prescriber is unable to access the PMP due to circumstances outside of his/her control. HB 2561 utilizes the phrase "prescription record" in conjunction with requirements and conditions related to electronic prescription records. The bill does not utilize this term to refer to the PMP or to a patient's medical record. As such, the Board has determined that, in order to give proper effect to the exemptions in §481.0765, the rule should include reference to both electronic and non-electronic prescription records. To that end, the Board has changed the text of the rule as adopted to clarify that the exception(s) specified in §481.0765 must be documented on either the patient's hard copy prescription or in the patient's electronic prescription record.

Finally, although the Board disagrees with the commenter that the effective date of a statute may not be utilized to satisfy the criteria set forth in the Government Code §2001.036(a)(1) without the necessity of the effective date appearing in the text of the statute itself, the Board has added the effective date of this rule into the text of the rule, as suggested by the commenter.

Names of Those Commenting For and Against the Proposal.

For: None.

Against: None.

For, with changes: The APRN Alliance.

Neither for nor against, with changes: None.

Statutory Authority. The amendments are adopted under the authority of the Health and Safety Code §481.0764(a), (b), and (d) and §481.0765(a) and (c) and the Occupations Code §301.151.

Section 481.0764(a) provides that a person, authorized to receive information under Section 481.076(a)(5), other than a veterinarian, shall access that information with respect to the patient before prescribing or dispensing opioids, benzodiazepines, barbiturates, or carisoprodol.

Section 481.0764(b) states that a person authorized to receive information under Section 481.076(a)(5) may access that information with respect to the patient before prescribing or dispensing any controlled substance.

Section 481.0764(d) states that a violation of Section 481.0764(a) is grounds for disciplinary action by the regulatory agency that issued a license, certification, or registration to the person who committed the violation.

Section 481.0765(a) states that a prescriber is not subject to the requirements of Section 481.0764(a) if the patient has been diagnosed with cancer or the patient is receiving hospice care and the prescriber clearly notes in the prescription record that the patient was diagnosed with cancer or is receiving hospice care, as applicable.

Section 481.0765(c) provides that a prescriber or dispenser is not subject to the requirements of Section 481.0764(a) and a dispenser is not subject to a rule adopted under Section 481.0761(j) if the prescriber or dispenser makes a good faith attempt to comply but is unable to access the information under Section 481.076(a)(5) because of circumstances outside the control of the prescriber or dispenser.

Section 301.151 addresses the Board's rulemaking authority. Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders under Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

§222.8. Authority to Order and Prescribe Controlled Substances.

(a) APRNs with full licensure and a valid prescription authorization number are eligible to obtain authority to order and prescribe certain categories of controlled substances. The APRN must comply with all federal and state laws and regulations relating to the ordering and prescribing of controlled substances in Texas, including but not limited to, requirements set forth by the United States Drug Enforcement Administration.

(b) Orders and prescriptions for controlled substances in Schedules III through V may be authorized, provided the following criteria are met:

(1) Prescriptions for a controlled substance in Schedules III through V, including a refill of the prescription, shall not exceed a 90 day supply. This requirement includes a prescription, either in the form of a new prescription or in the form of a refill, for the same controlled substance that a patient has been previously issued within the time period described by this subsection.

(2) Beyond the initial 90 days, the refill of a prescription for a controlled substance in Schedules III through V shall not be authorized prior to consultation with the delegating physician and notation of the consultation in the patient's chart.

(3) A prescription of a controlled substance in Schedules III through V shall not be authorized for a child less than two years of

age prior to consultation with the delegating physician and notation of the consultation in the patient's chart.

(c) Orders and prescriptions for controlled substances in Schedule II may be authorized only:

(1) in a hospital facility-based practice, in accordance with policies approved by the hospital's medical staff or a committee of the hospital's medical staff as provided by the hospital's bylaws to ensure patient safety and as part of care provided to a patient who:

(A) has been admitted to the hospital for an intended length of stay of 24 hours or greater; or

(B) is receiving services in the emergency department of the hospital; or

(2) as part of the plan of care for the treatment of a person who has executed a written certification of a terminal illness, has elected to receive hospice care, and is receiving hospice treatment from a qualified hospice provider.

(d) Prescription Monitoring Program (PMP).

(1) APRNs should access and review the prescription monitoring program (PMP) authorized by Chapter 481, Health and Safety Code, prior to prescribing any controlled substance for patients being treated for pain.

(2) APRNs must access and review the PMP before prescribing opioids, benzodiazepines, barbiturates, or carisoprodol unless:

(A) the patient has been diagnosed with cancer or the patient is receiving hospice care; and

(B) the APRN clearly notes on the prescription or in the electronic prescription record that the patient was diagnosed with cancer or is receiving hospice care, as applicable.

(3) An APRN will not be subject to disciplinary action if the APRN:

(A) makes a good faith attempt to access and review the PMP prior to prescribing opioids, benzodiazepines, barbiturates, or carisoprodol, but is unable to access the information because of circumstances outside the control of the APRN; and

(B) clearly notes on the patient's prescription or in the patient's electronic prescription record the APRN's attempt to access and review the PMP and the circumstances that prevented the APRN from being able to do so.

(4) Documentation that the review of the PMP occurred and rationale for prescribing a controlled substance must be included in the patient's medical record.

(5) This section takes effect September 1, 2019.

§222.10. Enforcement.

(a) Any APRN who violates the sections of this rule or orders or prescribes in a manner that is not consistent with the standard of care shall be subject to removal of the authority to order or prescribe under this section and disciplinary action by the Board. Behaviors associated with ordering and prescribing medications for which the Board may impose disciplinary action include, but are not limited to:

(1) ordering, prescribing, dispensing, or administering medications or devices for other than evidenced based therapeutic or prophylactic purposes that meet the minimum standards of care;

(2) ordering, prescribing, or dispensing medications or devices for personal use;

(3) failing to properly assess and document the assessment prior to ordering, prescribing, dispensing, or administering a medication or device;

(4) selling, purchasing, trading, or offering to sell, purchase, or trade a prescription drug sample;

(5) delegation of authority to any other person to order, prescribe, or dispense of an order or prescription for a drug or device; and

(6) failing to access and review the prescription monitoring program (PMP) authorized by Chapter 481, Health and Safety Code, before prescribing opioids, benzodiazepines, barbiturates, or carisoprodol, unless a statutory exemption contained in that chapter has been documented. If an APRN has made a good faith effort to comply with the requirement and is unable to do so because of circumstances beyond the APRN's control, documentation of this effort shall be made on the patient's prescription or in the patient's electronic prescription record.

(b) Failure to cooperate with a representative of the Board who conducts an onsite investigation may result in disciplinary action. Failure to cooperate with a representative of the Board or the Texas Medical Board who inspects and audits the practice relating to the implementation and operation of the prescriptive authority agreement may result in disciplinary action.

(c) The Board shall immediately notify the Texas Medical Board and the Texas Physician Assistant Board:

(1) when an APRN licensed by the Board becomes the subject of an investigation involving the delegation and supervision of prescriptive authority; and

(2) upon the final disposition of an investigation involving an APRN licensed by the Board and the delegation and supervision of prescriptive authority.

(d) Upon receipt of notice from the Texas Medical Board and/or the Texas Physician Assistant Board that a licensee of one of those boards is under investigation involving the delegation and supervision of prescriptive authority, the Board may open an investigation against an APRN who is a party to the prescriptive authority agreement with the licensee who is under investigation by the board that provided the notice.

(e) The Board shall report to the United States Drug Enforcement Administration any of the following:

(1) any significant changes in the status of the RN license or advanced practice license; or

(2) disciplinary action impacting an APRN's ability to authorize or issue prescription drug orders and medication orders.

(f) The practice of the APRN approved by the Board to order and prescribe is subject to monitoring by the Board on a periodic basis.

(g) The Board shall maintain a list of APRNs who have been subject to a final adverse disciplinary action for an act involving the delegation and supervision of prescriptive authority.

(h) The Board shall provide information to the public regarding APRNs who are prohibited from entering into or practicing under a prescriptive authority agreement.

(i) This section takes effect September 1, 2019.

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

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Jena Abel
Deputy General Counsel
Texas Board of Nursing
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For further information, please call: (512) 305-6822

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 145. PAROLE

SUBCHAPTER A. PAROLE PROCESS

37 TAC §§145.1 - 145.3, 145.9, 145.12 - 145.18, 145.20

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC Chapter 145, Subchapter A, §§145.1 - 145.3, 145.9, 145.12 - 145.18 and 145.20, concerning parole process. These rules are adopted with changes to the proposed text as published in the August 3, 2018, issue of the *Texas Register* (43 TexReg 5045). The text of the rules will be republished.

Sections 145.1 - 145.3, 145.9, 145.12 - 145.18 and 145.20 are adopted with changes for definition clarification, to capitalize titles and reformat statutory references throughout the rules.

No public comments were received regarding adoption of these amendments.

The amended rules are adopted under Sections 508.036, 508.0441, and 508.045, 508.141 and 508.149, Government Code. Section 508.036 authorizes the Board to adopt rules relating to the decision-making processes used by the Board and parole panels. Sections 508.0441 and 508.045 authorize the Board to adopt reasonable rules as proper or necessary relating to the eligibility of an offender for release to parole or mandatory supervision and to act on matters of release to parole or mandatory supervision. Section 508.141 provides the board authority to adopt policy establishing the date on which the board may reconsider for release an inmate who has previously been denied release. Section 508.149 provides authority for the discretionary release of offenders on mandatory supervision.

§145.1. Parole Decision-Maker.

(a) Unless otherwise provided, parole decisions shall be made by two-thirds vote of a parole panel. The Board is the parole release decision-maker of persons convicted of a capital felony offense, who are eligible for parole, or an offense under Sections 20A.03, 21.02, 21.11(a)(1), and 22.021, Penal Code, or who is required under Section 508.145(c), Government Code to serve 35 calendar years before becoming eligible for parole review. In these cases, the Board may grant parole only upon a two-thirds vote. The Board is not required to meet as a body to perform this duty.

(b) In all other matters of parole and mandatory supervision and revocation of parole and mandatory supervision, three-member parole panels are parole decision-makers. A parole panel may consider any eligible offender for release and, upon a majority vote of the panel may approve or deny release to supervision. If a majority of the panel does not concur, the case is forwarded to a panel designated by the Presiding Officer Chair to revote. The members of a parole panel are not required to meet as a body to perform these decision-making duties.

§145.2. Standard Parole Guidelines.

(a) The parole panels are vested with complete discretion in making parole decisions to accomplish the mandatory duties found in Chapter 508, Government Code.

(b) Parole guidelines have been adopted by the Board to assist parole panels in the selection of possible candidates for release. Parole guidelines are applied as a basis, but not as the exclusive criteria, upon which parole panels base release decisions.

(1) The parole guidelines consist of a risk assessment instrument and an offense severity scale. Combined, these components serve as an instrument to guide parole release decisions.

(2) The risk assessment instrument includes two sets of components, static and dynamic factors.

(A) Static factors include:

(i) Age at first admission to a juvenile or adult correctional facility;

(ii) History of supervisory release revocations for felony offenses;

(iii) Prior incarcerations;

(iv) Employment history; and

(v) The commitment offense.

(B) Dynamic factors include:

(i) The offender's current age;

(ii) Whether the offender is a confirmed security threat group (gang) member;

(iii) Education, vocational and certified on-the-job training programs completed during the present incarceration;

(iv) Prison disciplinary conduct; and

(v) Current prison custody level.

(3) Scores from the risk assessment instrument are combined with an offense severity rating for the sentenced offense of record to determine a parole candidate's guidelines level.

(c) The adoption and use of the parole guidelines does not imply the creation of any parole release formula, or a right or expectation by an offender to parole based upon the guidelines. The risk assessment instrument and the offense severity scale, while utilized for research and reporting, are not to be construed so as to mandate either a favorable or unfavorable parole decision. The parole guidelines serve as an aid in the parole decision process and the parole decision shall be at the discretion of the Board and the voting parole panel.

(d) The Board is authorized to revise the parole guidelines as warranted.

§145.3. Policy Statements Relating to Parole Release Decisions by the Board of Pardons and Paroles.

To aid the Board in its analysis and research of parole release, the Board adopts the following policies.

(1) Release to parole is a privilege, not an offender right, and the parole decision maker is vested with complete discretion to grant, or to deny parole release as defined by statutory law.

(A) Candidates for parole are to be evaluated on an individual basis.

(B) There are no mandatory rules or guidelines that must be followed in every case because each offender is unique. The Board and Parole Commissioners have the statutory duty to make release decisions which are only in the best interest of society. The Board and parole panels use parole guidelines as a tool to aid in the discretionary parole decision process.

(2) The Board will reconsider for release an offender, other than an offender serving a sentence for an offense listed in Section 508.149(a), Government Code as soon as practicable after the first anniversary of the date of denial.

(3) The Board will reconsider for release an offender who is serving a sentence for an offense under Section 508.149(a), Government Code, or second or third degree under Section 22.04, Penal Code, after the first anniversary date of the denial and end before the fifth anniversary date of the denial, but in no event shall it be less than one calendar year from the panel decision date.

(4) An offender will be considered for parole when eligible and when the offender meets the following criteria with regard to behavior during incarceration.

(A) Other than on initial parole eligibility, the person must not have had a major disciplinary misconduct report in the six-month period prior to the date he is reviewed for parole; which has resulted in loss of good conduct time or reduction to a classification status below that assigned during that person's initial entry into TDCJ-CID.

(B) Other than on initial parole eligibility, at the time he is reviewed for parole the person must be classified in the same or higher time earning classification assigned during that person's initial entry into TDCJ-CID.

(C) If any offender who has received an affirmative vote to parole and following the vote, notification is received that the offender has been reduced below initial classification status or has lost good conduct time, the parole decision will be reviewed and revoted by the parole panel that rendered the decision.

(D) A person who has been revoked and returned to custody for a violation of the conditions of release to parole or mandatory supervision will be considered for release to parole or mandatory supervision when eligible.

(E) An offender who is otherwise eligible for parole and who has charges pending alleging a felony offense committed while in TDCJ, and for which a complaint has been filed with a magistrate of the State of Texas, any facility under its supervision, or a facility under contract with TDCJ will not be considered for release to parole.

(F) An offender who is otherwise eligible for release and meets the criteria for Medically Recommended Intensive Supervision (MRIS) as required by Section 508.146, Government Code may be considered for release on parole.

(5) Any consideration by a Board Member or Parole Commissioner of an offender's litigation activities when determining an offender's candidacy for parole is strictly prohibited. No offender will be denied the opportunity to present to the judiciary, including appellate courts, his or her allegations concerning violations of fundamental constitutional rights. Any consideration of such legal activity during the parole review, supervision or revocation process is a violation of Board policy. In the event parole is denied in violation of this section, the offender may pursue a remedy under the special review provisions of §145.17 of this title (relating to Action upon Special Review--Release Denied). In the event parole or mandatory supervision is revoked in violation of this section, the offender may pursue a remedy under the motion to reopen hearing provisions of §146.11 of this title (relating to Releasee's Motion to Reopen Hearing or Reinstate Supervision).

§145.9. Parole Interview.

Prior to consideration for parole by a parole panel, the offender may be interviewed by a Board member or Parole Commissioner whether it is the initial review or a subsequent review.

§145.12. Action upon Review.

A case reviewed by a parole panel for parole consideration may be:

(1) deferred for request and receipt of further information;

(2) denied a favorable parole action at this time and set for review on a future specific month and year (Set-Off). The next review date (Month/Year) for an offender serving a sentence listed in Section 508.149(a), Government Code, or serving a sentence for second or third degree under Section 22.04 Penal Code may be set at any date after the first anniversary of the date of denial and end before the fifth anniversary of the date of denial, unless the inmate is serving a sentence for an offense under Section 22.021, Penal Code, or a life sentence for a capital felony, in which event the designated month must begin after the first anniversary of the date of the denial and end before the 10th anniversary of the date of the denial. The next review date for an offender serving a sentence not listed in Section 508.149(a), Government Code shall be as soon as practicable after the first anniversary of the denial;

(3) denied parole and ordered serve-all, but in no event shall this be utilized if the offender's projected release date is greater than five years for offenders serving sentences listed in Section 508.149(a), Government Code, or serving a sentence for second or third degree under Section 22.04 Penal Code; or greater than one year for offenders not serving sentences listed in Section 508.149(a), Government Code. If the serve-all date in effect on the date of the panel decision is extended by more than 180 days, the case shall be placed in regular parole review;

(4) determined that the totality of the circumstances favor the offender's release on parole, further investigation (FI) is ordered with the following available voting options; and, impose all conditions of parole or release to mandatory supervision that the parole panel is required or authorized by law to impose as a condition of parole or release to mandatory supervision;

(A) FI-1--Release the offender when eligible;

(B) FI-2 (Month/Year)--Release on a specified future date;

(C) FI-3 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than three months from specified date. Such TDCJ program may include either CHANGES/Lifeskills, Voyager, Segovia Pre-Release Center (Segovia PRC), or any other approved tier program;

(D) FI-4 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than four months from specified date. Such TDCJ program shall be the Sex Offender Education Program (SOEP);

(E) FI-5--Transfer to In-Prison Therapeutic Community Program. Release to aftercare component only after completion of IPTC program;

(F) FI-6--Transfer to a DWI Program. Release to continuum of care program as required by paragraph (5) of this section;

(G) FI-6 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and

no earlier than six months from specified date. Such TDCJ program may include the Pre-Release Therapeutic Community (PRTC), Pre-Release Substance Abuse Program (PRSAP), or In-Prison Therapeutic Community Program (IPTC), or any other approved tier program;

(H) FI-7 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than seven months from the specified date. Such TDCJ program shall be the Serious and Violent Offender Reentry Initiative (SVORI);

(I) FI-9 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than nine months from specified date. Such TDCJ program shall be the Sex Offender Treatment Program (SOTP-9);

(J) FI-18 R (Month/Year)--Transfer to a TDCJ rehabilitation treatment program. Release to parole only after program completion and no earlier than 18 months from specified date. Such TDCJ program shall be either the Sex Offender Treatment Program (SOTP-18), or the InnerChange Freedom Initiative (IFI);

(5) any person released to parole after completing a TDCJ program as a prerequisite for parole, must participate in and complete any required post-release program. A parole panel shall require as a condition of release on parole or release to mandatory supervision that an offender who immediately before release is a participant in the program established under Section 501.0931, Government Code, participate as a releasee in a drug or alcohol abuse continuum of care treatment program; or

(6) any offender receiving an FI vote, as listed in paragraph (4)(A) - (J) of this section, shall be placed in a program consistent with the vote. If treatment program managers recommend a different program for an offender, a transmittal shall be forwarded to the parole panel requesting approval to place the offender in a different program.

§145.13. Action upon Review; Consecutive (Cumulative) Felony Sentencing.

(a) This section applies only to an offender sentenced to serve consecutive sentences if each sentence in the series is for an offense committed on or after September 1, 1987.

(b) A parole panel shall review for parole consideration consecutive felony sentencing cases as determined and in the sequence submitted by TDCJ.

(c) If the case under parole consideration is a pre-final consecutive felony sentencing case, the parole panel may:

(1) defer for request and receipt of further information;

(2) vote CU/FI (Month/Year Cause Number), designate the date on which the offender would have been eligible for release on parole if the offender had been sentenced to serve a single sentence. This date shall be within a three-year incarceration period following the panel decision;

(3) vote CU/NR (Month/Year Cause Number), deny favorable parole action and set the next review date at one year from the panel decision date. If the offender is serving an offense under Section 508.149(a), Government Code, or second or third degree under Section 22.04, Penal Code; the next review date (month/year) may be set at any date in the five-year incarceration period following the panel decision date, but in no event shall it be less than one calendar year from the panel decision date; or

(4) vote CU/SA (Month/Year Cause Number): If the offender is serving an offense under Section 508.149(a), Government Code, or second or third degree under Section 22.04, Penal Code; deny release and order serve-all, but in no event shall this be utilized if the offender's maximum expiration date is over five years from the date of the panel decision. If the offender is not serving an offense under Section 508.149(a), Government Code, deny release and order serve-all, but in no event shall this be utilized if the offender's maximum expiration date is over one year from the date of the panel decision.

(d) If the case under parole consideration is the last and final in a series of consecutive felony sentencing cases, the case shall be reviewed under §145.12 of this title (relating to Action upon Review).

(e) When a parole panel reviews for parole consideration a consecutive felony sentencing case, the parole panel shall indicate the Cause Number of the consecutive felony sentencing case it is considering.

§145.14. Action upon Review; Release to Mandatory Supervision.

(a) This section applies only to an offender eligible for release to mandatory supervision if the sentence is for an offense committed on or after September 1, 1996.

(b) If TDCJ-CID determines that release of the offender will occur because the offender will reach the projected release date, the case will be processed as follows:

(1) the offender shall be provided written notice of the discretionary mandatory review and shall have 30 days from the receipt of the notice to submit, in writing, information to the Board; and

(2) after the expiration of the 30 day time period, the case shall be referred to a parole panel who will consider the case for release to mandatory supervision no earlier than 60 days of the offender's projected release date.

(c) Upon considering a case for release to mandatory supervision, a parole panel may:

(1) defer for request and receipt of further information;

(2) vote DMS Month/Year, deny release to mandatory supervision and set the next mandatory supervision review date one year from the panel decision date; or

(3) vote RMS, release to mandatory supervision.

(d) Subsection (c) of this section applies to all subsequent reconsiderations for release to mandatory supervision.

§145.15. Action upon Review; Extraordinary Vote (SB 45).

(a) This section applies to any offender convicted of or serving a sentence for a capital felony, other than a life sentence, an offense under Sections 20A.03, 21.02, or 21.11(a)(1), Penal Code, or who is required under Section 508.145(c), Government Code to serve 35 calendar years before becoming eligible for parole review. All members of the Board shall vote on the release of an eligible offender. At least two-thirds of the members must vote favorably for the offender to be released to parole. Members of the Board shall not vote until they receive and review a copy of a written report from the department on the probability of the offender committing an offense after being released.

(1) Upon review, use of the full range of voting options is not conducive to determining whether two-thirds of the Board considers the offender ready for release to parole.

(2) If it is determined that circumstances favor the offender's release to parole the Board has the following voting options available:

(A) FI-1--Release the offender when eligible;

(B) FI-4 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and

not earlier than four months from specified date. Such TDCJ program shall be the Sex Offender Education Program (SOEP);

(C) FI-9 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than nine months from specified date. Such TDCJ program shall be the Sex Offender Treatment Program (SOTP-9); or

(D) FI-18 R (Month/Year)--Transfer to a TDCJ rehabilitation treatment program. Release to parole only after program completion and no earlier than eighteen months from the specified date. Such TDCJ program may include the Sex Offender Treatment Program (SOTP-18), or the InnerChange Freedom Initiative (IFI). In no event shall the specified date be set more than three years from the current panel decision date.

(3) If it is determined that circumstances do not support a favorable action upon review, the following options are available:

(A) NR (Month/Year)--Deny release and set the next review date for 36 or 60 months following the panel decision date; or

(B) SA--The offender's minimum or maximum expiration date is less than 60 months away. The offender will continue to serve their sentence until that date.

(b) If the offender is sentenced to serve consecutive sentences and each sentence in the series is for an offense committed on or after September 1, 1987, the following voting options are available to the Board panel:

(1) CU/FI (Month/Year-Cause Number)--A favorable parole action that designates the date an offender would have been released if the offender had been sentenced to serve a single sentence;

(2) CU/NR (Month/Year-Cause Number)--Deny release and set the next review date for 36 or 60 months following the panel decision date; or

(3) CU/SA (Month/Year-Cause Number)--Deny release and order serve-all if the offender is within 60 months of their maximum expiration date.

(c) Some offenders are eligible for consideration for release to Discretionary Mandatory Supervision if the sentence is for an offense committed on or after September 1, 1996. Prior to the offender reaching the projected release date, the voting options are the same as those listed in subsections (a) and (b) of this section. If TDCJ-CID determines that release of the offender will occur because the offender will reach the projected release date, the case shall be referred to a three-member parole panel within 30 days of the offender's projected release date for consideration for release to mandatory supervision using the following options:

(1) RMS--Release to mandatory supervision; or

(2) DMS (Month/Year)--Deny release to mandatory supervision and set for review on a future specific month and year. The next mandatory supervision review date shall be set one year from the panel decision date.

(d) Upon review of any eligible offender who qualifies for release to Medically Recommended Intensive Supervision (MRIS), the MRIS panel shall initially vote to either recommend or deny MRIS consideration. The MRIS panel shall base this decision on the offender's medical condition and medical evaluation, and shall determine whether the offender constitutes a threat to public safety.

(1) If the MRIS panel determines the offender does constitute a threat to public safety, no further voting is required.

(2) If the MRIS panel determines that the offender does not constitute a threat to public safety, the case shall be sent to the full Board, which shall determine whether to approve or deny the offender's release to parole. The following voting options are available to the Board:

(A) Approve MRIS--The Board shall vote F1-1 and impose special condition "O" - "The offender shall comply with the terms and conditions of the MRIS program and abide by a Texas Correctional Office for Offenders with Mental or Medical Impairments (TCOOMMI)-approved release plan. At any time this condition is in effect, an offender shall remain under the care of a physician and in a medically suitable placement"; the Board shall provide appropriate reasons for the decision to approve MRIS; or

(B) Deny MRIS--The Board shall provide appropriate reasons for the decision to deny MRIS.

(3) The decision to approve release to MRIS for an offender remains in effect until specifically withdrawn by the Board.

(e) If a request for a special review meets the criteria set forth in §145.17(f) of this title (relating to Action upon Special Review--Release Denied), the offender's case shall be sent to the special review panel.

(1) The special review panel may take action as set forth in §145.17(i) of this title.

(2) When the special review panel decides the offender's case warrants a special review, the case shall be re-voted by the full Board. The Presiding Officer shall determine the order of the voting panel. Voting options are the same as those in subsections (a) - (c) of this section.

§145.16. Action upon Special Review--Release Approved.

(a) Responses received from trial officials or victims after a release to parole or release to mandatory supervision decision shall be considered information not previously available to the parole panel. Provided that release to parole or mandatory supervision has not occurred, the responses shall be referred to the parole panel or to the Board office corresponding to the parole panel that rendered the release to parole or release to mandatory supervision decision. A case reviewed by a parole panel, pursuant to the receipt of information not previously available to the parole panel, may then:

(1) be continued in a release to parole or release to mandatory supervision status with or without additional conditions of release imposed; or

(2) have the release to parole or release to mandatory supervision decision withdrawn and the next review date set by the parole panel in accordance with applicable provisions of Chapter 145 of this title (relating to Parole Process).

(b) Nothing in this rule is intended to restrict a parole panel member from reconsidering a release vote to parole or mandatory supervision.

§145.17. Action upon Special Review--Release Denied.

(a) This rule provides a forum for receipt and consideration of information not previously available to the parole panel where the decision of the panel was to deny release to parole or mandatory supervision. If the denial decision was based upon erroneous information or an administrative file processing error, this rule does not apply.

(b) Requests for special review shall apply only to cases reviewed for release to parole or mandatory supervision where the decision of the parole panel was to deny release to parole or mandatory supervision.

(c) All requests for special review shall be in writing and signed by the offender, his or her attorney, or in cases where the offender is unable to sign due to a mental or physical impairment, by a person acting on his or her behalf.

(d) All requests for special review shall be filed with the Texas Board of Pardons and Paroles, Board Administrator, 8610 Shoal Creek Blvd., Austin, Texas 78757.

(e) The Board Administrator shall refer to the special review parole panel only those requests for special review which meet the criteria set forth herein.

(f) Requests for special review shall be considered in the following circumstances:

(1) a written request on behalf of an offender is received which cites information not previously available to the parole panel; or

(2) a parole panel denied release to parole or mandatory supervision and a parole panel member who voted with the majority on that panel desires to have the decision reconsidered prior to the next review (NR) date; or

(3) if both parole panel members who voted with the majority are no longer active Board Members or Parole Commissioners, the Presiding Officer Chair places the case in the special review process to be reconsidered prior to the NR date.

(g) Information not previously available shall mean only:

(1) responses from trial officials and victims;

(2) a change in an offender's sentence and judgment; or

(3) an allegation that the parole panel has committed an error of law or Board rule.

(h) Erroneous information shall mean information provided to the parole panel during the review process that may have been utilized as a basis for denial but is later determined to be inaccurate.

(i) Administrative processing error shall mean an action during the processing of an offender's file which results in the omission of or the recording of inaccurate information with respect to voting, denial reasons, or NR dates.

(j) A special review parole panel, other than the current voting panel, shall decide and exercise final action on such requests for special review.

(k) Upon considering a case for special review, the special review parole panel may take the following action:

(1) defer for request and receipt of further information;

(2) vote remain set; or

(3) revote the case in accordance with applicable provisions of Subchapter A of this chapter (relating to Parole Process).

(l) The special review parole panel shall not set an offender's NR date on a date later than the previous NR date.

§145.18. Action upon Review; Extraordinary Vote (HB 1914).

(a) This section applies to any offender convicted of a capital offense with a life sentence, who is eligible for parole, or convicted of or serving an offense under Section 22.021, Penal Code. All members of the Board shall vote on the release of an eligible offender. At least two-thirds of the members must vote favorably for the offender to be released to parole. Members of the Board shall not vote until they receive and review a copy of a written report from the department on the probability of the offender committing an offense after being released.

(1) Upon review, use of the full range of voting options is not conducive to determining whether two-thirds of the Board considers the offender ready for release to parole.

(2) If it is determined that circumstances favor the offender's release to parole the Board has the following voting options available:

(A) FI-1--Release the offender when eligible;

(B) FI-4 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than four months from specified date. Such TDCJ program shall be the Sex Offender Education Program (SOEP);

(C) FI-9 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than nine months from specified date. Such TDCJ program shall be the Sex Offender Treatment Program (SOTP-9); or

(D) FI-18 R (Month/Year)--Transfer to a TDCJ rehabilitation treatment program. Release to parole only after program completion and no earlier than eighteen months from the specified date. Such TDCJ program may include the Sex Offender Treatment Program (SOTP-18), or the InnerChange Freedom Initiative (IFI). In no event shall the specified date be set more than three years from the current panel decision date.

(3) If it is determined that circumstances do not support a favorable action upon review, the following options are available:

(A) NR (Month/Year)--Deny release and set the next review date for 36, 60, 84 or 120 months following the panel decision date; or

(B) SA--The offender's minimum or maximum expiration date is less than 120 months away. The offender will continue to serve their sentence until that date.

(b) If the offender is sentenced to serve consecutive sentences and each sentence in the series is for an offense committed on or after September 1, 1987, the following voting options are available to the Board panel:

(1) CU/FI (Month/Year-Cause Number)--A favorable parole action that designates the date an offender would have been released if the offender had been sentenced to serve a single sentence;

(2) CU/NR (Month/Year-Cause Number)--Deny release and set the next review date for 60, 84 or 120 months following the panel decision date; or

(3) CU/SA (Month/Year-Cause Number)--Deny release and order serve-all if the offender is within 120 months of their maximum expiration date.

(c) Some offenders are eligible for consideration for release to Discretionary Mandatory Supervision if the sentence is for an offense committed on or after September 1, 1996. Prior to the offender reaching the projected release date, the voting options are the same as those listed in subsections (a) and (b) of this section. If TDCJ-CID determines that release of the offender will occur because the offender will reach the projected release date, the case shall be referred to a three-member parole panel within 30 days of the offender's projected release date for consideration for release to mandatory supervision using the following options:

(1) RMS--Release to mandatory supervision; or

(2) DMS (Month/Year)--Deny release to mandatory supervision and set for review on a future specific month and year. The next

mandatory supervision review date shall be set one year from the panel decision date.

(d) Upon review of any eligible offender who qualifies for release to Medically Recommended Intensive Supervision (MRIS), the MRIS panel shall initially vote to either recommend or deny MRIS consideration. The MRIS panel shall base this decision on the offender's medical condition and medical evaluation, and shall determine whether the offender constitutes a threat to public safety.

(1) If the MRIS panel determines the offender does constitute a threat to public safety, no further voting is required.

(2) If the MRIS panel determines that the offender does not constitute a threat to public safety, the case shall be sent to the full Board, which shall determine whether to approve or deny the offender's release to parole. The following voting options are available to the Board:

(A) Approve MRIS--The Board shall vote F1-1 and impose special condition "O" - "The offender shall comply with the terms and conditions of the MRIS program and abide by a Texas Correctional Office for Offenders with Mental or Medical Impairments (TCOOMMI)-approved release plan. At any time this condition is in effect, an offender shall remain under the care of a physician and in a medically suitable placement"; the Board shall provide appropriate reasons for the decision to approve MRIS; or

(B) Deny MRIS--The Board shall provide appropriate reasons for the decision to deny MRIS.

(3) The decision to approve release to MRIS for an offender remains in effect until specifically withdrawn by the Board.

(e) If a request for a special review meets the criteria set forth in §145.17(f) of this title (relating to Action upon Special Review--Release Denied), the offender's case shall be sent to the special review panel.

(1) The special review panel may take action as set forth in §145.17(i) of this title.

(2) When the special review panel decides the offender's case warrants a special review, the case shall be re-voted by the full Board. The Presiding Officer shall determine the order of the voting panel. Voting options are the same as those in subsections (a) - (c) of this section.

§145.20. Parole Certificate.

(a) When the parole plan has been approved, a parole certificate shall be issued and signed with a facsimile signature of the Chair.

(b) The parole approval is not effective or final until a formal parole agreement is executed by the offender. The approval may be withdrawn by a parole panel at any time prior to the acceptance and execution by the offender of the formal parole agreement(s) which is contained in the parole certificate.

(c) The parole certificate shall not become effective and in force until the conditions are agreed to, signed, and accepted by the offender.

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

Filed with the Office of the Secretary of State on October 29, 2018.

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Texas Board of Pardons and Paroles
Effective date: November 18, 2018
Proposal publication date: August 3, 2018
For further information, please call: (512) 463-8216

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SUBCHAPTER B. TERMS AND CONDITIONS OF PAROLE

37 TAC §145.27

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC Chapter 145, Subchapter B, §145.27, concerning terms and conditions of parole. This rule is adopted without changes to the proposed text as published in the August 3, 2018, issue of the *Texas Register* (43 TexReg 5051). The text of the rule will not be republished.

No public comments were received regarding adoption of these amendments.

The amended rule is adopted under Sections 508.036, 508.0441, and 508.045, 508.141 and 508.149, Government Code. Section 508.036 authorizes the Board to adopt rules relating to the decision-making processes used by the Board and parole panels. Sections 508.0441 and 508.045 authorize the Board to adopt reasonable rules as proper or necessary relating to the eligibility of an offender for release to parole or mandatory supervision and to act on matters of release to parole or mandatory supervision. Section 508.141 provides the board authority to adopt policy establishing the date on which the board may reconsider for release an inmate who has previously been denied release. Section 508.149 provides authority for the discretionary release of offenders on mandatory supervision.

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

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