

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 393. INFORMAL DISPUTE RESOLUTION AND INFORMAL RECONSIDERATION

1 TAC §§393.1 - 393.3

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes amendments to §393.1, concerning Informal Dispute Resolution for Nursing Facilities and Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions (ICF/IID); §393.2, concerning Informal Dispute Resolution for Assisted Living Facilities; and new §393.3 concerning Informal Dispute Resolution for Texas Home Living and Home and Community-based Service providers.

BACKGROUND AND PURPOSE

The purpose of the amendment to §393.1 is to comply with Senate Bill (S.B.) 304, 84th Legislature, Regular Session, 2015, which modified §531.058 Texas Government Code by requiring HHSC to contract with a disinterested non-profit organization to perform Informal Dispute Resolution (IDR) reviews for nursing facilities. To foster consistency, all three facility types IDR serves were included in the procurement. Additionally, amendments to this rule also align with House Bill (H.B.) 2025, 85th Legislature, Regular Session, 2017, which modified Texas Health and Safety Code Chapters 242, 247, and 252. H.B. 2025 required a system to be developed to record and track the severity and scope of licensure violations for Intermediate Care Facilities (ICF/IIDs) and Assisted Living Facilities (ALFs).

The purpose of the amendment to §393.2 is to comply with S.B. 924, 85th Legislature, Regular Session, 2017, which modified Texas Health and Safety Code §247.051, concerning the IDR process for ALFs. This statute was modified to include the language in Texas Government Code §531.058 from S.B. 304 regarding the outsourcing of the IDR process to ensure it was also required of ALFs. Other modifications to that statute included provisions for Assisted Living Facility providers to be able to obtain documentation regarding the survey/investigation. Additionally, amendments to this rule also align with H.B. 2025.

The purpose of the new §393.3 is to comply with H.B. 2590, 85th Legislature, Regular Session, 2017, which modified Human Resources Code by adding a new section §161.0892. This new section directs HHSC to establish and outsource an IDR

process for Texas Home Living (TxHmL) and Home and Community-based Service (HCS) providers.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §393.1(b) specifies the name of the program and deletes text related to due dates falling on a Saturday, Sunday or legal holiday. The text is unnecessary because it is already included by reference in another subsection. The amendment also adds "official" in front of the statement of deficiencies/violations to clarify what initiates the opportunity for the IDR process. Subsection 393.1(d) is revised to remove the unnecessary text related to due dates falling on a Saturday, Sunday or legal holiday, as this is already included by reference in another subsection. This revision also removes the requirement for facilities to submit two copies of the rebuttal letter and supporting documentation, as that is no longer customary practice. Additionally, minor edits are made for clarity. The revision to §393.1(e) removes the requirement which specifies how a facility's supporting documentation is to be submitted. Minor edits are made for clarity. The revision to §393.1(g) rearranges and renumbers the paragraphs and subparagraphs to create a new subsection (h) for clarity. The revision also changes the availability of review of severity and scope to include ICF/IIDs. H.B. 2025 required HHSC to develop definitions of severity and scope and a system to record and track the severity and scope of licensure violations by certain facilities, including ICF/IIDs. Previously, severity and scope was not assigned to ICF/IID licensure violations and therefore, there was no opportunity to dispute it in an IDR. The subsections are relabeled to account for the new subsection. The revision to §393.1(i) deletes text regarding the method in which IDR receives information from the State survey agency, and the reference to IDR operating procedures.

New subsection (m) is added to §393.1 to provide a timeframe in which all information must be received.

The revision to current §393.1(m) modifies the verbiage to indicate participating in an IDR conference, and deletes telephone and face-to-face as the types of conferences to expand the types of conferences that may be offered. The revision to §393.1(n) deletes telephone and face-to-face as the types of conferences offered and adds that the conference may be scheduled by a designee. The revision to §393.1(o) replaces "emphasize" with "present" which is more suitable to the nature of an IDR conference. Additionally, the revision removes "new" as the reference to the information submitted in an IDR and specifies the types of information (Statement of Deficiencies/Licensing Violations, submitted in the provider's rebuttal letter, or response(s) to shared information) for clarity. Last, the revision clarifies the nature of questioning that is acceptable in IDR conferences.

The revision to §393.1(p) removes the text related to due dates falling on a Saturday, Sunday, or legal holiday that is unneces-

sary because it is already included by reference in another subsection. The revision also changes "decision" to "recommendation" to adhere to Federal guidance. A minor formatting edit is made to §393.1(q). The revision to §393.1(s) changes "decision" to "recommendation" and names the specific authority as the State survey agency, to revise an IDR recommendation in accordance with Federal guidance.

New subsection (v) is added to comply with the legislative mandate from S.B. 304, which required HHSC to contract IDR functions to a disinterested non-profit organization, and with relevant Federal guidance.

The proposed amendment to §393.2(a) removes "or its designee" as there is no other governing authority that cites licensure violations against ALFs. The revision to §393.2(b) specifies the name of the program and deletes text related to due dates falling on a Saturday, Sunday or legal holiday. The text is unnecessary because it is already included by reference in another subsection. The revision also adds "official" in front of the statement of violations to clarify what initiates the opportunity for the IDR process. The revision to §393.2(d) also removes the unnecessary text related to due dates falling on a Saturday, Sunday or legal holiday and the requirement for facilities to submit two copies of the rebuttal letter and supporting documentation, as that is no longer customary practice. Minor edits are made for clarity. The revision to §393.2(e) removes the requirement which specifies how a facility's supporting documentation is to be submitted and minor edits are made for clarity. The revisions to §393.2(g) are consistent with the revisions to Texas Health and Safety Code as a result of S.B. 924. The bill removed language that specified information to be considered in the IDR process. The language now indicates that full consideration will be given to all factual arguments raised in the IDR process. The revisions to §393.2(h) are consistent with the revisions to Texas Health and Safety Code as a result of S.B. 924. The language was modified to exclude references to IDR staff, as the process is required to be outsourced.

New subsection (i) and (j) are added to comply with the revisions to Texas Health and Safety Code as a result of S.B. 924. Subsection (i) provides a provision for both parties in the dispute to be able to respond to information presented in the IDR process. Subsection (j) provides that the State survey agency bears the burden of proof when proving a violation of a standard. The subsections are relabeled to account for the new subsections.

The revision to §393.2(i) adds language to indicate that a violation must first be established by the State survey agency and rearranges the paragraphs into new subsection (l). Paragraphs (5) and (6) are added to provide the availability of review of severity and scope as H.B. 2025 required HHSC to develop definitions of severity and scope and a system to record and track the severity and scope of licensure violations by certain facilities, including ALFs. Previously, severity and scope was not assigned to ALF licensure violations and therefore, there was no opportunity to dispute it in an IDR. The revision to §393.2(k) deletes text regarding the method in which IDR receives information from the State survey agency, and the reference to IDR operating procedures. The revision to §393.2(m) changes "the ALF or the State survey agency" to "either party in the dispute."

New subsection (q) provides a timeframe in which all information must be received.

The revision to §393.2(o) modifies the verbiage to indicate participation in an IDR conference and deletes telephone and face-

to-face as the types of conferences to expand the types of conferences that may be offered. The revision to §393.2(p) deletes telephone and face-to-face as the types of conferences offered and adds that the conference may be scheduled by a designee. The revision to §393.2(q) replaces "emphasize" with "present" which is more suitable to the nature of an IDR conference. Additionally, the amendment removes "new" as the reference to the information submitted in an IDR and specifies the types of information (Statement of Licensing Violations, submitted in the provider's rebuttal letter, or response(s) to shared information) for clarity. Last, the amendment clarifies the nature of questioning that is acceptable in IDR conferences. The revision to §393.2(r) removes the text related to due dates falling on a Saturday, Sunday or legal holiday that is unnecessary because it is already included by reference in another subsection. The amendment also changes "decision" to "recommendation" to ensure consistency in the IDR process. A minor formatting edit is made to §393.2(s).

New subsection (y) is added to comply with the legislative mandate from S.B. 924 which required HHSC to contract the IDR function to a disinterested organization.

Proposed new §393.3(a) establishes the new IDR process for HCS and TxHmL waiver providers. Subsections 393.3(b)-(f) establish timeframes for submitting IDR materials, and subsection (g) describes potential outcomes of an IDR. Limitations in the IDR process are described in subsection (h). Subsection (i) states the necessary information the IDR Department must receive from the State survey agency to process an IDR request. Subsections (j)-(l) discuss the timelines for receiving additional information in IDR, and the requirements for sharing information with all parties. The prohibition against ex parte communications is described at (m).

Subsections (n)-(p) discuss the availability of IDR conferences to the provider, the deadline by which an IDR conference must occur, and the requirements for the IDR conferences. The deadline by which an IDR must be completed is stated at (q). Subsection (r) requires that timeframes in the IDR process be computed in accordance with Texas Government Code §311.014. The requirement for IDR participants to comply with operating procedures is discussed at (s). Subsection (t) permits the State survey agency to revise an IDR recommendation should it violate a federal law, regulation, or State of Texas rule. Last, subsection (u) complies with the legislative mandate by H.B. 2590 to contract the IDR function to a disinterested organization.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that during the first five-year period the rules are in effect, there will be a fiscal impact to state government of an estimated additional cost of \$591,694 General Revenue (GR) (\$591,695 Federal Funds (FF), \$1,183,389 All Funds (AF)) for State Fiscal Year (SFY) 2021, \$1,014,333 GR (\$1,014,334 FF, \$2,028,667 AF) for SFY 2022, \$1,011,833 GR (\$1,011,834 FF, \$2,023,667 AF) for SFY 2023, \$1,014,333 GR (\$1,014,334 FF, \$2,028,667 AF) for SFY 2024 and \$1,011,833 GR (\$1,011,834 FF, \$2,023,667 AF) for SFY 2025.

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

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

Trey Wood has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities because there is no requirement to alter current business practices.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules do not impose a cost on regulated persons, and are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

PUBLIC BENEFIT

Karen Ray, HHSC Chief Counsel, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result is ensuring an independent third party is conducting the IDR reviews.

Trey Wood has also determined that for the first five years the rules are in effect there are no anticipated economic costs to persons required to comply with the proposed rules because the proposal does not impose and new costs or fees on persons required to comply.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Written comments on the proposal may be submitted to Allison Levee, Director, by email to InformalDisputeResolution@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed by midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 20R093" in the subject line.

STATUTORY AUTHORITY

The proposed amendments and new rule are authorized by Texas Government Code §531.038(a), which provides that the HHSC Executive Commissioner by rule establish an informal dispute resolution process that must provide for adjudication by an appropriate disinterested person of disputes relating to a proposed enforcement action or related proceeding of the commission under Section 32.021(d), Human Resources Code, or the Department of Aging and Disability Services or its successor agency under Chapter 242, 247, or 252, Health and Safety Code; and Texas Human Resources Code §161.0892(a) that provides that the Executive Commissioner of HHSC by rule establish an informal dispute resolution process for HCS and TxHML waiver providers.

The amendments and new sections affect Texas Government Code §531.058, Texas Health and Safety Code §247.058, and Texas Human Resources Code §161.0892.

§393.1. Informal Dispute Resolution for Nursing Facilities and Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions (ICF/IID).

(a) The Texas Health and Human Services Commission (HHSC) provides an informal dispute resolution (IDR) process for nursing facilities and intermediate care facilities for individuals with an intellectual disability or related conditions (ICF/IID) (hereinafter referred to collectively as "facility") through which a facility may dispute deficiencies/violations cited against that facility by the State survey agency, or its designee.

(b) The HHSC IDR Department must receive a facility's written request for an IDR no later than the tenth ~~[10th]~~ calendar day after the facility's receipt of the official statement of deficiencies/violations from the State survey agency, or its designee. ~~[If the 10th calendar day falls on a Saturday, Sunday, or legal holiday, the due date becomes the following business day.]~~ The facility must submit its written request for an IDR on the form designated for that purpose by HHSC. HHSC will make that form publicly available, e.g., maintained on the HHSC website.

(c) Within three business days of its receipt of the facility's written request for an IDR, HHSC will notify the facility and the State survey agency's regional office under which the facility operates of its receipt of the request.

(d) Within five calendar days of HHSC's receipt of the facility's request for an IDR, HHSC must receive from the facility ~~[two copies of]~~ the facility's rebuttal letter and attached supporting documentation. ~~[If the 5th calendar day falls on a Saturday, Sunday, or legal holiday, the due date becomes the following business day.]~~ The rebuttal letter must contain:

(1) a list of the deficiencies/violations disputed (only those deficiencies/violations listed on the IDR request form and addressed in the rebuttal letter and supporting ~~[letter/supporting]~~ documentation will be reviewed);

(2) the reason or reasons ~~[reason(s)]~~ each deficiency/violation is disputed; and

(3) the outcome desired by the facility for each disputed deficiency/violation.

(e) The facility submits its supporting documentation or information in the following format. [:]

(1) Organize the attachments by deficiency/violation and cross-reference to the disputed deficiency/violation in the rebuttal letter.

- (2) Ensure all information is labeled and legible.
- (3) Highlight information relevant to the disputed deficiency/violation, such as a particular portion of a narrative.

(4) Describe the relevance of the documentation or information ~~[documentation/information]~~ to the disputed deficiency/violation.

(5) Do not de-identify documents that name residents referenced in disputed deficiencies/violations.

~~[(6) Submit supporting documentation or information by regular mail, hand delivery, or overnight delivery. HHSC will not review supporting documentation submitted by facsimile transmission.]~~

(f) If the facility substantially complies with the procedures set out in subsections (d) and (e) of this section, HHSC will proceed with its review of the facility's IDR request.

(g) It is the facility's responsibility to present sufficient credible information to HHSC to support the outcome requested by the facility.

~~(h) [(4)] Possible outcomes of an IDR for nursing facilities and ICF/IID are:~~

~~(1) [(A)] a determination that there is insufficient evidence to sustain a deficiency/violation;~~

~~(2) [(B)] a determination that there is insufficient evidence to sustain a portion or a finding of a deficiency/violation;~~

~~(3) [(C)] a determination that there is sufficient evidence to sustain a deficiency/violation; or~~

~~(4) [(D)] a determination that there is insufficient evidence to sustain the deficiency/violation as cited but that there is sufficient evidence to sustain a different citation.~~

~~[(2) In addition to the outcomes stated in paragraph (4) of this subsection, possible additional outcomes of an IDR for nursing facilities only include:]~~

~~(5) [(A)] a determination that there is insufficient evidence to sustain the severity and scope assessment but that there is sufficient evidence to sustain a reduced severity and scope assessment (for Immediate Jeopardy or Substandard Quality of Care only); or~~

~~(6) [(B)] a determination that there is sufficient evidence to sustain the severity and scope assessment as cited.~~

~~(i) [(h)] HHSC will not conduct an IDR based on alleged surveyor misconduct, alleged State survey agency failure to comply with survey protocol, complaints about existing federal or State standards, or attempts to clear previously corrected deficiencies/violations.~~

~~(j) [(i)] Upon receipt of the facility's IDR request, the State survey agency must submit to HHSC [by means allowing confirmation of HHSC's receipt, e.g., overnight delivery or electronic mail,] the following supporting documentation [as specified in the IDR operating procedures]:~~

- (1) resident identifier list;
- (2) report of contact; and
- (3) Automated Survey Processing Environment (ASPEN) event ID number.

~~(k) [(j)] Any information related to an IDR request that is received by HHSC from either the facility or the State survey agency will be made available by HHSC to the opposing party. Parties have until the end of the second business day after receipt of such shared IDR~~

information to respond to HHSC about that information. HHSC will share any responses with the opposing party.

~~(l) [(k)] HHSC may request additional information from the facility and/or the State survey agency. Both parties will be notified of the request for additional information and have until the end of the second business day after notification to respond to the request. The opposing party will be provided with copies of the response submitted to HHSC.~~

~~(m) All responses to shared information as described in subsections (j) and (k) of this section must be received no later than the tenth calendar day after the facility's rebuttal letter and supporting documentation are submitted.~~

~~(n) [(h)] Ex parte communications by the facility or by the State survey agency with HHSC personnel conducting the IDR are prohibited.~~

~~(o) [(m)] An eligible facility may participate in an [receive a telephone or face-to-face] IDR conference provided that the facility requested an IDR conference on the IDR request form.~~

~~(p) [(n)] Any [telephone or face-to-face] IDR conference will be scheduled by HHSC, or its designee on or before the 22nd calendar day after HHSC received the IDR request. If the facility is unable to participate on the scheduled date, the IDR conference will be cancelled, and the IDR will continue as though no conference had been requested.~~

~~(q) [(o)] The IDR conference is an informal opportunity for an eligible facility to present ~~[emphasize]~~ important information previously submitted in the facility's rebuttal letter or responses ~~[response(s)]~~ to shared information. The facility and the State survey agency may attend any IDR conference, but neither party may present ~~[new]~~ information that was not previously included in the Statement of Deficiencies/Licensing Violations, submitted in the provider's rebuttal letter, or responses to shared information as set forth in subsections (j), (k), and (l) of this section. While the facility may ask clarifying questions related to the information in the Statement of Deficiencies/Licensing Violations, the questions are strictly limited to the review in question.~~

~~(r) [(p)] HHSC will complete the IDR no later than the 30th calendar day after its receipt of the facility's written request. [If the 30th calendar day falls on a Saturday, Sunday or legal holiday, the due date becomes the following business day.] The IDR recommendation ~~[decision]~~ shall be in writing, address all the issues raised by the facility, and explain the rationale for the recommendation ~~[decision]~~.~~

~~(s) [(q)] The time frames designated in the IDR process shall be computed in accordance with Texas Government Code §311.014[, Texas Government Code].~~

~~(t) [(r)] HHSC may issue and enforce operating procedures concerning the IDR process and the conduct of IDR participants. IDR participants must comply with any such procedures. HHSC may deny an IDR request if the information submitted is incorrect, incomplete, or otherwise not in compliance with applicable HHSC operating procedures.~~

~~(u) [(s)] The State survey agency may [HHSC will] revise an IDR recommendation ~~[decision]~~ as a result of a review[, requested by the State survey agency,] and subsequent determination that the IDR recommendation ~~[decision]~~ may violate a federal law, regulation, or the CMS State Operations Manual.~~

~~(v) HHSC may contract with an appropriate disinterested organization to adjudicate disputes between a facility and the State survey agency. Texas Government Code §2009.053 does not apply to the selection of an appropriate disinterested organization. For purposes~~

of this section, a reference to HHSC with respect to HHSC's role in the IDR process includes an organization with which HHSC has contracted for the purpose of performing IDR, and a contracted organization is bound by the same requirements to which HHSC is bound for the purposes of conducting an IDR. The results of an IDR conducted by a contracted organization serve only as a recommendation to the State survey Agency. The State survey Agency maintains responsibility for and makes final IDR decisions.

§393.2. Informal Dispute Resolution for Assisted Living Facilities.

(a) The Texas Health and Human Services Commission (HHSC) provides an informal dispute resolution (IDR) process for assisted living facilities (ALFs) through which an ALF may dispute violations cited against that ALF by the State survey agency [or its designee].

(b) The HHSC IDR Department must receive the ALF's written request for an IDR no later than the tenth [10th] calendar day after the ALF's receipt of the official statement of violations [from the State survey agency or its designee. If the 10th calendar day falls on a Saturday, Sunday, or legal holiday, the due date becomes the following business day]. The ALF must submit its written request for an IDR on the form designated for that purpose by HHSC. HHSC will make that form publicly available, e.g., maintained on the HHSC website.

(c) Within three business days of its receipt of the ALF's written request for an IDR, HHSC will notify the ALF and the State survey agency's regional office under which the ALF operates of its receipt of the request.

(d) Within 15 calendar days of HHSC's receipt of the ALF's request for an IDR, HHSC must receive from the ALF [two copies of] the ALF's rebuttal letter and attached supporting documentation. [If the 15th calendar day falls on a Saturday, Sunday, or legal holiday, the due date becomes the following business day.] The rebuttal letter must contain:

(1) a list of the violations disputed (only those violations listed on the IDR request form and addressed in the rebuttal letter and supporting [letter/supporting] documentation will be reviewed);

(2) the reason or reasons [reason(s)] each violation is disputed; and

(3) the outcome desired by the ALF for each disputed violation.

(e) The ALF submits its supporting documentation or information in the following format:

(1) organize the attachments by violation and cross-reference to the disputed violation in the rebuttal letter;

(2) ensure all information is labeled and legible;

(3) highlight information relevant to the disputed violation, such as a particular portion of a narrative;

(4) describe the relevance of the documentation or information [documentation/information] to the disputed violation; and

(5) do not de-identify documents that name residents referenced in disputed deficiencies/violations. [; and]

[(6) submit supporting documentation or information by regular mail, hand delivery, or overnight delivery. HHSC will not review supporting documentation submitted by facsimile transmission.]

(f) If the ALF substantially complies with the procedures set out in subsections (d) and (e) of this section, HHSC will proceed with its review of the ALF's IDR request.

(g) HHSC will give full consideration to all factual arguments raised during the IDR process. [that are:]

[(1) supported by references to specific information that the ALF or State survey agency relies on to dispute or support findings in the statement of violations; and]

[(2) provided by the proponent of the argument to HHSC and the opposing party.]

(h) Full [IDR staff will give full] consideration will be given during the IDR process to the information provided by the ALF and the State survey agency.

(i) Both parties will be given a reasonable opportunity to submit arguments and information supporting the position of the ALF or the State survey agency, and to respond to arguments and information presented against them, provided that the ALF submits its arguments and supporting information by the tenth business day after the date of the receipt of the materials specified by Texas Health and Safety Code Chapter 247.051(a)(3).

(j) The State survey agency bears the burden of proving the violation of a standard or standards.

(k) [(4)] Assuming a violation has been established, it [It] is then the ALF's responsibility to present sufficient credible information to HHSC to support the outcome requested by the ALF.

(l) Possible outcomes of an IDR are:

(1) a determination that there is insufficient evidence to sustain a violation;

(2) a determination that there is insufficient evidence to sustain a portion or a finding of a violation;

(3) a determination that there is sufficient evidence to sustain a violation; [or]

(4) a determination that there is insufficient evidence to sustain the violation as cited but that there is sufficient evidence to sustain a different citation; [;]

(5) a determination that there is insufficient evidence to sustain the severity and scope assessment but that there is sufficient evidence to sustain a reduced severity and scope assessment (for Immediate Threat only); or

(6) a determination that there is sufficient evidence to sustain the severity and scope assessment as cited.

(m) [(4)] HHSC will not conduct an IDR based on alleged surveyor misconduct, alleged State survey agency failure to comply with survey protocol, complaints about existing State standards, or attempts to clear previously corrected violations.

(n) [(4)] Upon receipt of the ALF's IDR request, the State survey agency must submit to HHSC [by means allowing confirmation of HHSC's receipt, e.g., overnight delivery or electronic mail,] the following supporting documentation [as specified in the IDR operating procedures]:

(1) resident identifier list;

(2) report of contact; and

(3) Automated Survey Processing Environment (ASPEN) event ID number.

(o) [(4)] Any information related to an IDR request that is received by HHSC from either the ALF or the State survey agency will be made available by HHSC to the opposing party. Parties have until the end of the second business day after receipt of such shared IDR

information to respond to HHSC about that information. HHSC will share any responses with the opposing party.

(p) ~~[(m)]~~ HHSC may request additional information from either party in the dispute ~~[the ALF or the State survey agency]~~. Both parties will be notified of the request for additional information and have until the end of the second business day after notification to respond to the request. The opposing party will be provided with copies of the response submitted to HHSC.

(q) All responses to shared information as described in (o) and (p) above must be received no later than the tenth calendar day after the facility's rebuttal letter and supporting documentation are submitted.

(r) ~~[(n)]~~ Ex parte communications by the ALF or by the State survey agency with HHSC personnel conducting the IDR are prohibited.

(s) ~~[(o)]~~ An eligible ALF may participate in an ~~[receive a telephone or face-to-face]~~ IDR conference provided that the ALF requested an IDR conference on the IDR request form.

(t) ~~[(p)]~~ Any ~~[telephone or face-to-face]~~ IDR conference will be scheduled by HHSC, or its designee on or before the 30th calendar day after HHSC received the IDR request. If the ALF is unable to participate on the scheduled date, the IDR conference will be cancelled and the IDR will continue as though no conference had been requested.

(u) ~~[(q)]~~ The IDR conference is an informal opportunity for an eligible ALF to present ~~[emphasize]~~ important information previously submitted in the ALF's rebuttal letter or responses ~~[response(s)]~~ to shared information. The ALF and the State survey agency may attend any IDR conference but neither party may present ~~[new]~~ information that was not previously included in the Statement of Licensing Violations, submitted in the provider's rebuttal letter, or responses to shared information. While the facility may ask clarifying questions related to the information in the Statement of Licensing Violations, the questions are strictly limited to the review in question.

(v) ~~[(r)]~~ HHSC will complete the IDR no later than the 90th calendar day after its receipt of the ALF's written request. ~~[If the 90th calendar day falls on a Saturday, Sunday or legal holiday, the due date becomes the following business day.]~~ The IDR recommendation ~~[decision]~~ shall be in writing, address all the issues raised by the ALF, and explain the rationale for the recommendation ~~[decision]~~.

(w) ~~[(s)]~~ The time frames designated in the IDR process shall be computed in accordance with Texas Government Code §311.014, ~~Texas Government Code~~.

(x) ~~[(t)]~~ HHSC may issue and enforce operating procedures concerning the IDR process and the conduct of IDR participants. IDR participants must comply with any such procedures. HHSC may deny an IDR request if the information submitted is incorrect, incomplete, or otherwise not in compliance with applicable HHSC operating procedures.

(y) HHSC may contract with an appropriate disinterested organization to adjudicate disputes between an ALF and the State survey agency. Texas Government Code §2009.053 does not apply to the selection of an appropriate disinterested organization. For purposes of this section, a reference to HHSC with respect to HHSC's role in the IDR process includes an organization with which HHSC has contracted for the purpose of performing IDR, and a contracted organization is bound by the same requirements to which HHSC is bound for the purposes of conducting an IDR. The results of an IDR conducted by a contracted organization serve only as a recommendation to the State survey Agency. The State survey Agency maintains responsibility for and makes final IDR decisions.

§393.3. Informal Dispute Resolution for Texas Home Living and Home and Community-Based Service Providers.

(a) The Texas Health and Human Services Commission (HHSC) provides an informal dispute resolution (IDR) process for Texas Home Living (TxHmL) and Home and Community-based Service (HCS) providers (hereinafter referred to collectively as "provider") through which a provider may dispute citations cited against that provider by the State survey agency.

(b) The HHSC IDR Department must receive a provider's written request for an IDR no later than the tenth calendar day after the provider's receipt of the final report from the State survey agency, or its designee. The provider must submit its written request for an IDR on the form designated for that purpose by HHSC. HHSC will make that form publicly available, e.g., maintained on the HHSC website. The provider must also submit the final report containing the citations the provider wishes to dispute.

(c) Within three business days of its receipt of the provider's written request for an IDR, HHSC will notify the provider and the State survey agency of its receipt of the request.

(d) Within five calendar days of HHSC's receipt of the provider's request for an IDR, HHSC must receive from the provider, the provider's rebuttal letter and attached supporting documentation. The rebuttal letter must contain:

(1) a list of the citations disputed (only those citations listed on the IDR request form and addressed in the rebuttal letter and supporting documentation will be reviewed);

(2) the reason or reasons each citation is disputed; and

(3) the outcome desired by the provider for each disputed citation.

(e) The provider submits its supporting documentation or information in the following format:

(1) organize the attachments by citation and cross-reference to the disputed citation in the rebuttal letter;

(2) ensure all information is labeled and legible;

(3) highlight information relevant to the disputed citation, such as a particular portion of a narrative;

(4) describe the relevance of the documentation or information to the disputed citation; and

(5) do not de-identify documents that name individuals referenced in disputed citations.

(f) If the provider substantially complies with the procedures set out in subsections (d) and (e) of this section, HHSC will proceed with its review of the provider's IDR request.

(g) It is the provider's responsibility to present sufficient credible information to HHSC to support the outcome requested by the provider. Possible outcomes of an IDR for TxHmL and HCS are:

(1) a determination that there is insufficient evidence to sustain a citation;

(2) a determination that there is insufficient evidence to sustain a portion or a finding of a citation;

(3) a determination that there is sufficient evidence to sustain a citation;

(4) a determination that there is insufficient evidence to sustain the citation as cited but that there is sufficient evidence to sustain a different citation;

(5) a determination that there is insufficient evidence to sustain the severity and scope assessment but that there is sufficient evidence to sustain a reduced severity and scope assessment (for Immediate Threat only); or

(6) a determination that there is sufficient evidence to sustain the severity and scope assessment as cited.

(h) HHSC will not conduct an IDR based on alleged surveyor misconduct, alleged State survey agency failure to comply with survey protocol, complaints about existing federal or State standards, or attempts to clear previously corrected citations.

(i) Upon receipt of the provider's IDR request, the State survey agency must submit the following to HHSC:

- (1) report Log ID;
- (2) contract number; and
- (3) component code.

(j) Any information related to an IDR request that is received by HHSC from either the provider or the State survey agency will be made available by HHSC to the opposing party. Parties have until the end of the second business day after receipt of such shared IDR information to respond to HHSC about that information. HHSC will share any responses with the opposing party.

(k) HHSC may request additional information from the provider and/or the State survey agency. Both parties will be notified of the request for additional information and have until the end of the second business day after notification to respond to the request. The opposing party will be provided with copies of the response submitted to HHSC.

(l) All responses to shared information as described in subsections (j) and (k) above must be received no later than the tenth calendar day after the provider's rebuttal letter and supporting documentation are submitted.

(m) Ex parte communications by the provider or by the State survey agency with HHSC personnel conducting the IDR are prohibited.

(n) A provider may participate in an IDR conference provided that the provider requested an IDR conference on the IDR request form.

(o) Any IDR conference will be scheduled by HHSC, or its designee on or before the 22nd calendar day after HHSC received the IDR request. If the provider is unable to participate on the scheduled date, the IDR conference will be cancelled, and the IDR will continue as though no conference had been requested.

(p) The IDR conference is an opportunity for an eligible provider to present important information previously submitted in the provider's rebuttal letter or responses to shared information. The provider and the State survey agency may attend any IDR conference, but neither party may present information that was not previously included in the final report, submitted in the provider's rebuttal letter, or responses to shared information.

(q) HHSC will complete the IDR no later than the 30th calendar day after its receipt of the provider's written request. The IDR recommendation shall be in writing, address all the issues raised by the provider, and explain the rationale for the recommendation.

(r) The time frames designated in the IDR process shall be computed in accordance with Texas Government Code §311.014.

(s) HHSC may issue and enforce operating procedures concerning the IDR process and the conduct of IDR participants. IDR

participants must comply with any such procedures. HHSC may deny an IDR request if the information submitted is incorrect, incomplete, or otherwise not in compliance with applicable HHSC operating procedures.

(t) The State survey agency may revise an IDR recommendation as a result of a review and subsequent determination that the IDR recommendation may violate a federal law, regulation, or State of Texas rule.

(u) HHSC may contract with an appropriate disinterested organization to adjudicate disputes between a provider and the State survey agency. Texas Government Code §2009.053 does not apply to the selection of an appropriate disinterested organization. For purposes of this section, a reference to HHSC with respect to HHSC's role in the IDR process includes an organization with which HHSC has contracted for the purpose of performing IDR, and a contracted organization is bound by the same requirements to which HHSC is bound for the purposes of conducting an IDR. The results of an IDR conducted by a contracted organization serve only as a recommendation to the State survey Agency. The State survey Agency maintains responsibility for and makes final IDR decisions.

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) 706-7273



TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 1. LIBRARY DEVELOPMENT

SUBCHAPTER C. MINIMUM STANDARDS FOR ACCREDITATION OF LIBRARIES IN THE STATE LIBRARY SYSTEM

13 TAC §1.87

The Texas State Library and Archives Commission (Commission) proposes new §1.87, Emergency Waiver of Accreditation Criteria.

BACKGROUND. Government Code, §441.127 authorizes the commission to set accreditation standards for libraries so that they are eligible for Library Systems membership. The Commission established these standards in Texas Administrative Code, Title 13, Part 1, Subchapter C. Existing rules authorize probational accreditation if a library fails to meet not more than one of the requirements in §1.81. The rule does not authorize probational accreditation for failure to meet any other requirement established by a different rule in Subchapter C.

The proposed new rule is necessary to provide a means by which an accredited library may retain accreditation if the library is unable to meet minimum accreditation criteria through no fault of their own, but due to circumstances caused by a disaster, public health emergency, or other extraordinary hardship. This rule would authorize Commission staff to waive one or more criteria for library accreditation in an accreditation year, thereby preventing loss of accreditation, if a library shows it was unable to meet that criteria for good cause.

The rule defines "good cause" as a public health emergency, including a pandemic or epidemic; a natural or man-made disaster, including a tornado, hurricane, flood, wildfire, explosion, or chemical spill; or other extraordinary hardship which is beyond the control of the library as determined by the agency. Examples of situations that may not be considered "good cause" include, but are not limited to, reporting errors made by previous library directors; staff turnover; loss of access to an integrated library system (ILS), which is used to manage cataloging, borrowing, reports and stats, integrated access to a variety of digital resources, or the internet; changes in city leadership; library Board turmoil; local budget cuts or diminishment of library services due to voluntary local decisions, such as redistributing dedicated public library space for non-library use or other actions that result in curtailment in the resources and access available to the public.

Public libraries rely on accreditation for access to the TexShare databases, grants, and special training programs. This proposed rule will provide assurances to libraries that they will not necessarily lose accreditation if they fail to meet an accreditation standard due to a situation created by a disaster, emergency, or other extraordinary hardship.

If a library requests a waiver of one or more accreditation criteria under the proposed rule but Commission staff does not waive the criteria, the library may appeal the potential loss of accreditation to the Library Systems Act Advisory Board, which will make a recommendation to the Director and Librarian for decision. A decision of the Director and Librarian may be appealed to the Commission under 13 Texas Administrative Code §2.55.

SIMULTANEOUS RULEMAKING. Simultaneous with this proposal and in response to the current COVID-19 pandemic, the Commission has adopted this rule on an emergency basis under Government Code, §2001.034, which authorizes adoption of an emergency rule without prior notice or hearing upon finding that an imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice. Emergency rules adopted under Government Code, §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days. By also proposing this rule under Government Code, §2001.023, with the notice required by Government Code, §2001.024 and opportunity for public comment as provided by Government Code, §2001.029, the Commission will ensure continuity and coverage beyond the effective dates of the emergency rule.

FISCAL IMPACT. Jennifer Peters, Director, Library Development and Networking, has determined that for each of the first five years the proposed amendment and new rule are in effect, there will be no increase in costs to the state as a result of enforcing or administering these rules, as proposed. Ms. Peters does not anticipate a fiscal impact to local governments as a result of enforcing or administering these rules, as proposed.

PUBLIC BENEFIT AND COSTS. Ms. Peters has determined that for each of the first five years the proposed amendment and new rules are in effect, the anticipated public benefit will be continued accreditation of local public libraries and local access to agency services and programs when a library faces loss of accreditation due to extraordinary circumstances, such as a pandemic. Accreditation established a baseline of acceptable operations for stakeholders. Moreover, through accreditation, a library is able to offer its population access to statewide print and electronic resources, including TexShare databases, which are valued in the tens of millions of dollars. Libraries losing accreditation lose access to these resources, which provide free access to GED prep materials, basic computer skills, adult basic education, and other career and job tools. There are no anticipated economic costs to persons required to comply with the proposed amendment and new rule.

LOCAL EMPLOYMENT IMPACT STATEMENT. The proposal has no impact on local economy; therefore, no local employment impact statement under Government Code, §2001.022 is required.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT STATEMENT. There will be no adverse economic effect on small businesses, micro-businesses, or rural communities; therefore, a regulatory flexibility analysis under Government Code, §2006.002 is not required.

COST INCREASE TO REGULATED PERSONS. The proposed rules do not impose or increase a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the commission is not required to take any further action under Government Code, §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT. In compliance with Government Code, §2001.0221, the commission provides the following government growth impact statement. For each year of the first five years the proposed rules will be in effect, the commission has determined the following:

1. The proposed rules will not create or eliminate a government program;
2. Implementation of the proposed rules will not require the creation of new employee positions or the elimination of existing employee positions;
3. Implementation of the proposed rules will not require an increase or decrease in future legislative appropriations to the commission;
4. The proposed rules will not require an increase or decrease in fees paid to the commission;
5. The proposed rules will create a new regulation as authorized by Government Code, §441.127;
6. The proposed rules will not expand, limit, or repeal an existing regulation;
7. The proposed rules will not increase the number of individuals subject to the proposed rules' applicability; and
8. The proposed rules may positively affect this state's economy. For example, access to TexShare databases provide free access to GED prep materials, basic computer skills, adult basic education, and career and job tools, which makes Texans more employable. Libraries losing accreditation will lose access to these resources.

TAKINGS IMPACT ASSESSMENT. No private real property interests are affected by this proposal, and the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action. Therefore, the proposed rules do not constitute a taking under Texas Gov't Code §2007.043.

REQUEST FOR PUBLIC COMMENT. Written comments on the proposed amendment and new rule may be submitted to Jennifer Peters, Director, Library Development and Networking, Texas State Library and Archives Commission, P.O. Box 12927, Austin, Texas, 78711, or via email at rules@tsl.texas.gov. To be considered, a written comment must be received no later than 30 days from the date of publication in the *Texas Register*.

STATUTORY AUTHORITY. This new rule is proposed under Government Code, §441.006(a)(2), which authorizes the Commission to adopt policies and rules to aid and encourage the development of and cooperation among all types of libraries, including public, academic, special, and other types of libraries; and Government Code, §441.127, which authorizes the Commission to set accreditation standards for libraries.

CROSS REFERENCE TO STATUTE. Government Code, Chapter 441, Subchapter I.

§1.87. Emergency Waiver of Accreditation Criteria.

One or more accreditation criteria in this subchapter may be waived if a library shows good cause for failure to meet the criteria. For purposes of this subchapter, good cause means a public health emergency, including, but not limited to a pandemic or epidemic; a natural or man-made disaster, including, but not limited to a tornado, hurricane, flood, wildfire, explosion, or chemical spill; or other extraordinary hardship which is beyond the control of the library as determined by the agency.

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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Sarah Swanson

General Counsel

Texas State Library and Archives Commission

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For further information, please call: (512) 463-5591



TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 6. HEALTH EDUCATION, TRAINING, AND RESEARCH FUNDS SUBCHAPTER C. TOBACCO LAWSUIT SETTLEMENT FUNDS

19 TAC §6.74

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 6, Subchapter C, §6.74, concerning the

Minority Health Research and Education Grant Program. Specifically, this amendment will clarify the grant program's statutory authority, application and review processes, and procedures for award recommendations and approval.

Texas Education Code, Chapter 63, Subchapter D, Section 63.302(d) directs the Coordinating Board to adopt rules relating to the award of grants under the permanent fund for minority health research and education. The Coordinating Board adopted initial rules in 2003. Areas indicating a lack of clarity existed in the adopted rules, particularly relating to the grant application, evaluation, and award processes. Through a negotiated rulemaking process, the Coordinating Board amends the rules to enhance clarity.

Dr. Stacey Silverman, Assistant Commissioner for Academic Quality and Workforce, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There is no estimated loss or increase in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Stacey Silverman, Assistant Commissioner for Academic Quality and Workforce, 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 enhanced clarity in the administration of the Minority Health Research and Education Grant Program. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

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 not create a new rule;
- (6) the rules will not limit an existing rule;
- (7) the rules will not change the number of individuals subject to the rule; and
- (8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Dr. Stacey Silverman, Assistant Commissioner for Academic Quality and Workforce, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711, or via email at RuleComments@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under the Texas Education Code, Section 63.301 and 63.302, which creates the Permanent Fund For Minority Health Research And Education, and provides the

Coordinating Board with the authority to adopt rules relating to the award of grants under the fund.

The proposed amendment affects Texas Administrative Code, Title 19, Part 1, Chapter 6, Subchapter C, §6.74.

§6.74. Minority Health Research and Education Grant Program.

(a) General Information. The program, as it applies to this section:

(1) Name--Minority Health Research and Education Grant Program.

(2) Purpose--To provide funding to eligible institutions of higher education to conduct research and educational programs on public health issues affecting one or more minority groups in Texas.

(3) Authority--Texas Education Code [~~Texas Government Code~~], §§63.301 - 63.302.

(4) Minority--~~A~~ [a] particular ethnic or racial group that is under-represented in one or more areas of health research or health education.

(5) Eligible institutions--Public and private accredited general academic and health-related institutions, and Centers for Teacher Education, that conduct research or educational programs that address minority health issues or form partnerships with minority organizations, colleges, or universities to conduct research and educational programs that address minority health issues. Two-year institutions, including junior and community colleges, state colleges or technical colleges, and other agencies of higher education as defined by Texas Education Code, §61.003(6) are not eligible to submit an application for program funding but may receive program funding indirectly as a partner to an eligible institution.

(6) Eligible programs--Research and educational initiatives, including those that expand existing research and degree programs, and develop other new or existing activities and projects, that are not funded by state appropriation during the funding period. Proposed programs shall not conflict with current judicial decisions and state interpretation on administering minority programs in higher education.

(7) Application requirements--Applicants shall submit applications [~~Applications shall be submitted~~] to the Board in the format and at the time specified by the Board.

(8) General Selection Criteria--Competitive. Designed to award grants that provide the best overall value to the state. Selection criteria shall be based on:

(A) Program quality as defined by the evaluation criteria in the Request for Applications (RFA) [~~as determined by reviewers~~];

(B) Potential impact [~~Impact the grant award shall have~~] on public health issues affecting one or more minority groups in the state;

(C) Cost of the proposed program; and

(D) Other factors to be considered may include [~~by the Board, including~~] financial ability to perform program, state and regional needs and priorities, whether the eligible institution has been designated as an Historically Black or Hispanic Serving institution by the U.S. Department of Education, ability to continue program after grant period, and past performance.

(9) Award amounts will be set forth in the RFA based on the availability of funds. [~~Minimum award--\$15,000 per award in any fiscal year.~~]

[(10) Maximum award--30 percent of the estimated available funding per award in any fiscal year.]

(10) [(44)] Maximum award length--A program is eligible to receive funding for up to three years within a grant period. Currently and previously [~~Previously~~] funded programs may reapply to receive funding according to eligibility requirements specified in the RFA [for one additional grant period].

(b) Review Criteria. The review criteria will be set forth in the RFA.

(1) Board staff and/or peer reviewers may evaluate the applications. [~~The Board shall use peer and Board staff reviewers to evaluate the quality of applications.~~]

(2) The Commissioner shall select qualified individuals to serve as reviewers. Reviewers shall demonstrate appropriate credentials to evaluate grant applications in health research and education. Reviewers shall not evaluate any applications for which they have a conflict of interest.

(3) The Board staff shall provide written instructions and training for reviewers.

(4) The reviewers shall review [~~score~~] each application according to these evaluation criteria [~~award criteria and weights~~]:

(A) Significance and impact of research or educational program for minority health issues; [~~Significance of research or educational program for minority health issues.~~ The reviewers shall consider issues such as: How relevant and timely is this topic to minority public health issues? Is the program unique and important or unique and important for a geographic area? Will the program be useful to or later replicated at other institutions in the state? Will the program provide an advancement of knowledge that may result in positive changes in patient care, education or health care policy for minorities? How many people will benefit directly from the program? Maximum points: 30]

(B) Program design; [~~Resources to perform program.~~ The reviewers shall consider issues such as: What new personnel, equipment and facility resources are needed for the program? What existing resources can be used? Will the program draw on resources from other institutions and organizations? Do the institution's partners, if any, demonstrate financial stability and effectiveness in conducting similar research or education programs? What are the professional credentials and experience of the program's key personnel? Maximum points: 15]

(C) Resources to perform the program; [~~Program design.~~ The reviewers shall consider issues such as: Is the program well defined? Is it a discrete program which can be completed in the grant period? Are the goals and objectives realistic? How well has the proposal described the data collection or program development process and the nature of analysis to be carried out? Maximum points: 25]

(D) Cost effectiveness; and [~~Cost sharing.~~ The reviewers shall consider issues such as: What level of local funding, if any, is available to share in the cost of the program? Maximum points: 5]

(E) Evaluation and expected outcomes. [~~(E) Cost effectiveness.~~ The reviewers shall consider issues such as: How appropriate are the chosen equipment, staffing and service providers for the program given the cost of the program? Is the budget realistic? Does the proposal make effective use of the grant funds? Maximum points: 25.]

[(F) Evaluation and expected outcomes. The reviewers shall consider issues such as: How well has the proposal described the methodology to evaluate and estimate the outcomes from the program?

Is the evaluation methodology appropriate and effective? Are the outcomes realistic? Maximum points: 30]

[(5) Award criteria and weights may be adjusted to best fulfill the purpose of an individual grant competition, if those adjusted award criteria and weights are first included in the Request for Proposal for the grant competition.]

(c) Application and Review Process.

[(1) The Commissioner may solicit recommendations from an advisory committee or other group of qualified individuals on funding priorities for each grant period, and the administration of the application and review process.]

(1) [(2)] The Board staff shall review applications to determine if they adhere to the grant program requirements and the funding priorities contained in the RFA [Request for Proposal]. An application must meet the requirements of the RFA [Request for Proposal] and be submitted with proper authorization on or before the deadline [before or on the day] specified by the RFA [Board] to qualify for further consideration. Qualified applications shall be forwarded to the reviewers for evaluation. Board staff shall notify an applicant if their application does not qualify based on [applicants eliminated through] the screening process no later than 30 days after the RFA deadline [within 30 days of the submission deadline].

(2) [(3)] Reviewers shall evaluate applications based on the evaluation criteria included in the RFA. [and assign scores based on award criteria: All evaluations and scores of the review committee are final.]

[(4) Board staff shall rank each application based on points assigned by reviewers, and then may request that individuals representing the most highly-ranked applications make oral presentations on their applications to the reviewers and other Board staff. The Board staff may consider reviewer comments from the oral presentations in recommending a priority ranked list of applications to the Board for approval.]

(d) Funding Decisions.

(1) Board staff and/or peer reviewers will evaluate applications for grant funding [Applications for grant funding shall be evaluated] only based upon the information provided in the written application.

(2) Board staff shall make a recommendation of selected applicants to be funded to the Commissioner, who will submit a funding decision recommendation to the Board for their final approval as consistent with Texas Administrative Code, Title 19, §1.16.

(3) [(2)] The Board shall review and may approve grants based upon the Commissioner's recommendation. [the recommendation of the panel of reviewers and Board staff. The Commissioner shall report approved grants to the Board for each biennial grant period.]

[(3) Funding recommendations to the Board shall consist of the most highly ranked and recommended applications up to the limit of available funds. If available funds are insufficient to fund a proposal after the higher-ranking and recommended applications have been funded, staff shall negotiate with the applicant to determine if a lesser amount would be acceptable. If the applicant does not agree to the lesser amount, the staff shall negotiate with the next applicant on the ranked list. The process shall be continued until all grant funds are awarded to the most highly ranked and recommended applications.]

[(e) Contract. Following approval of grant awards by the Board the successful applicants shall sign a contract issued by Board staff and based on the information contained in the application.]

[(f) Cancellation or Suspension of Grants. The Board has the right to reject all applications and cancel a grant solicitation at any point before a contract is signed.]

[(g) Request for Proposal. The full text of the administrative regulations and budget guidelines for this program are contained in the official Request for Proposal (RFP) available upon request from the Board.]

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

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Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

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For further information, please call: (512) 427-6206



TITLE 22. EXAMINING BOARDS

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.15

The Texas Appraiser Licensing and Certification Board (TALCB) proposes amendments to 22 TAC §153.15, Experience Required for Licensing.

The proposed amendments clarify the type of supporting documentation that must be submitted to TALCB to verify an applicant's experience and the circumstances when additional documentation may be requested by TALCB.

The proposed amendments also allow TALCB staff to inform supervisory appraisers of its communications with supervisory appraisers' respective trainee, and to provide supervisory appraisers a better understanding of a trainee's progress in the licensure process and professional development.

Kathleen Santos, General Counsel, has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for the state or units of local government as a result of enforcing or administering the proposed amendments. There is no adverse economic impact anticipated for local or state employment, rural communities, small businesses, or micro-businesses as a result of implementing the proposed amendments. There is no significant economic cost anticipated for persons who are required to comply with the proposed amendments. Accordingly, no Economic Impact statement or Regulatory Flexibility Analysis is required.

Ms. Santos has also determined that for each year of the first five years the proposed amendments and rules are in effect the

public benefits anticipated as a result of enforcing the proposed amendments will be requirements that are consistent with statutes and easier to understand, apply, and process.

Growth Impact Statement:

For each year of the first five years the proposed amendments and rules are in effect the amendments and rules will not:

- create or eliminate a government program;
- require the creation of new employee positions or the elimination of existing employee positions;
- require an increase or decrease in future legislative appropriations to the agency;
- require an increase or decrease in fees paid to the agency;
- create a new regulation;
- expand, limit or repeal an existing regulation; and
- increase the number of individuals subject to the rule's applicability.

For each year of the first five years the proposed amendments are in effect, there is no anticipated impact on the state's economy.

Comments on the proposed amendments may be submitted to Kathleen Santos, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or emailed to: general.counsel@talcb.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code §1103.151, which authorizes TALCB to adopt rules for certifying or licensing an appraiser or appraiser trainee in this state that are in accordance with Chapter 1103 and consistent with applicable federal law.

The statute affected by these amendments is Chapter 1103, Texas Occupations Code. No other statute, code or article is affected by the proposed amendments.

§153.15. *Experience Required for Licensing.*

(a) - (h) (No change.)

(i) The Board must verify the experience claimed by each applicant generally complies with USPAP.

(1) Verification may be obtained by:

(A) requesting copies of appraisals and all supporting documentation, including the work files; and

(B) engaging in other investigative research determined to be appropriate by the Board.

(2) If the Board requests documentation from an applicant to verify experience claimed by an applicant, the applicant has 60 days to provide the requested documentation to the Board.

(A) In response to an initial request for documentation to verify experience, an applicant must submit a copy of the relevant appraisals, but is not required to submit the associated work files at that time.

(B) If in the course of reviewing the submitted appraisals, the Board determines additional documentation is necessary to verify general compliance with USPAP, the Board may make additional requests for supporting documentation.

(3) Experience involved in pending litigation.

(A) The Board will not request work files from an applicant to verify claimed experience if the appraisal assignments are identified on the experience log submitted to the Board as being involved in pending litigation.

(B) If all appraisal assignments listed on an applicant's experience log are identified as being involved in pending litigation, the Board may audit any of the appraisal assignments on the applicant's experience log, regardless of litigation status, with the written consent of the applicant and the applicant's supervisory appraiser.

(4) Failure to comply with a request for documentation to verify experience, or submission of experience that is found not to comply with the requirements for experience credit, may result in denial of a license application.

(5) A license holder who applies to upgrade an existing license and submits experience that does not comply with USPAP may also be subject to disciplinary action up to and including revocation.

(j) Unless prohibited by Tex. Occ. Code §1103.460, applicable confidentiality statutes, privacy laws, or other legal requirements, or in matters involving alleged fraud, Board staff shall use reasonable means to inform supervisory appraisers of Board communications with their respective trainees.

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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Kathleen Santos

General Counsel

Texas Appraiser Licensing and Certification Board

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For further information, please call: (512) 936-3652



22 TAC §153.24

The Texas Appraiser Licensing and Certification Board (TALCB) proposes amendments to 22 TAC §153.24, Complaint Processing.

The proposed amendments clarify the process in which complaints or allegations that staff determines are not within the TALCB's jurisdiction; found not to exist; or are inappropriate or without merit are investigated and dismissed in accordance with Texas Occupations Code §1103.452.

Kathleen Santos, General Counsel, has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for the state or units of local government as a result of enforcing or administering the proposed amendments. There is no adverse economic impact anticipated for local or state employment, rural communities, small businesses, or micro-businesses as a result of implementing the proposed amendments. There is no significant economic cost anticipated for persons who are required to comply with the proposed amendments. Accordingly, no Economic Impact statement or Regulatory Flexibility Analysis is required.

Ms. Santos has also determined that for each year of the first five years the proposed amendments and rules are in effect the

public benefits anticipated as a result of enforcing the proposed amendments will be requirements that are consistent with statutes and easier to understand, apply, and process.

Growth Impact Statement:

For each year of the first five years the proposed amendments and rules are in effect the amendments and rules will not:

- create or eliminate a government program;
- require the creation of new employee positions or the elimination of existing employee positions;
- require an increase or decrease in future legislative appropriations to the agency;
- require an increase or decrease in fees paid to the agency;
- create a new regulation;
- expand, limit or repeal an existing regulation; and
- increase the number of individuals subject to the rule's applicability.

For each year of the first five years the proposed amendments are in effect, there is no anticipated impact on the state's economy.

Comments on the proposed amendments may be submitted to Kathleen Santos, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or emailed to: general.counsel@talcb.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code §1103.151, which authorizes TALCB to adopt rules for certifying or licensing an appraiser or appraiser trainee and §1103.154, which authorizes TALCB to adopt rules relating to professional conduct.

The statute affected by these amendments is Chapter 1103, Texas Occupations Code. No other statute, code or article is affected by the proposed amendments.

§153.24. Complaint Processing.

(a) Receipt of a Complaint Intake Form by the Board does not constitute the filing of a formal complaint by the Board against the individual named on the Complaint Intake Form. Upon receipt of a signed Complaint Intake Form, staff shall:

- (1) assign the complaint a case number in the complaint tracking system; and
 - (2) send written acknowledgement of receipt to the Complainant.
- (b) Priority of complaint investigations. The Board prioritizes and investigates complaints based on the risk of harm each complaint poses to the public. Complaints that pose a high risk of public harm include violations of the Act, Board rules, or USPAP that:

- (1) evidence serious deficiencies, including:
 - (A) Fraud;
 - (B) Identity theft;
 - (C) Unlicensed activity;
 - (D) Ethical violations;
 - (E) Failure to properly supervise an appraiser trainee;

or

(F) Other conduct determined by the Board that poses a significant risk of public harm; and

(2) were done:

- (A) with knowledge;
- (B) deliberately;
- (C) willfully; or
- (D) with gross negligence.

(c) The Board or the Commissioner may delegate to staff the duty to dismiss complaints. The complaint shall be dismissed with no further processing if the staff determines at any time that:

- (1) the complaint is not within the Board's jurisdiction;
- (2) no violation exists; or

(3) an allegation or formal complaint is inappropriate or without merit.

~~[(e) If the staff determines at any time that the complaint is not within the Board's jurisdiction or that no violation exists, the complaint shall be dismissed with no further processing. The Board or the commissioner may delegate to staff the duty to dismiss complaints.]~~

(d) A determination that an allegation or complaint is inappropriate or without merit includes a determination that the allegation or complaint:

- (1) was made in bad faith;
- (2) filed for the purpose of harassment;
- (3) to gain a competitive or economic advantage; or
- (4) lacks sufficient basis in fact or evidence.

(e) Staff shall conduct a preliminary inquiry to determine if dismissal is required under subsection (d) of this section.

(f) [(d)] A complaint alleging mortgage fraud or in which mortgage fraud is suspected:

- (1) may be investigated covertly; and
- (2) shall be referred to the appropriate prosecutorial authorities.

(g) [(e)] Staff may request additional information from any person, if necessary, to determine how to proceed with the complaint.

(h) [(f)] As part of a preliminary investigative review, a copy of the Complaint Intake Form and all supporting documentation shall be sent to the Respondent unless the complaint qualifies for covert investigation and the Standards and Enforcement Services Division deems covert investigation appropriate.

(i) [(g)] The Board will:

(1) protect the complainant's identity to the extent possible by excluding the complainant's identifying information from a complaint notice sent to a respondent.

(2) periodically send written notice to the complainant and each respondent of the status of the complaint until final disposition. For purposes of this subsection, "periodically" means at least once every 90 days.

(j) [(h)] The Respondent shall submit a response within 20 days of receiving a copy of the Complaint Intake Form. The 20-day period may be extended for good cause upon request in writing or by e-mail. The response shall include the following:

(1) a copy of the appraisal report that is the subject of the complaint;

(2) a copy of the Respondent's work file associated with the appraisal(s) listed in the complaint, with the following signed statement attached to the work file(s) : I SWEAR AND AFFIRM THAT EXCEPT AS SPECIFICALLY SET FORTH HEREIN, THE COPY OF EACH AND EVERY APPRAISAL WORK FILE ACCOMPANYING THIS RESPONSE IS A TRUE AND CORRECT COPY OF THE ACTUAL WORK FILE, AND NOTHING HAS BEEN ADDED TO OR REMOVED FROM THIS WORK FILE OR ALTERED AFTER PLACEMENT IN THE WORK FILE.(SIGNATURE OF RESPONDENT);

(3) a narrative response to the complaint, addressing each and every item in the complaint;

(4) a list of any and all persons known to the Respondent to have actual knowledge of any of the matters made the subject of the complaint and, if in the Respondent's possession, contact information;

(5) any documentation that supports Respondent's position that was not in the work file, as long as it is conspicuously labeled as non-work file documentation and kept separate from the work file. The Respondent may also address other matters not raised in the complaint that the Respondent believes need explanation; and

(6) a signed, dated and completed copy of any questionnaire sent by Board staff.

(k) [(i)] Staff will evaluate the complaint within three months after receipt of the response from Respondent to determine whether sufficient evidence of a potential violation of the Act, Board rules, or the USPAP exists to pursue investigation and possible formal disciplinary action. If the staff determines that there is no jurisdiction, no violation exists, there is insufficient evidence to prove a violation, or the complaint warrants dismissal, including contingent dismissal, under subsection (m) of this section, the complaint shall be dismissed with no further processing.

(l) [(j)] A formal complaint will be opened and investigated by a staff investigator or peer investigative committee, as appropriate, if:

(1) the informal complaint is not dismissed under subsection (i) of this section; or

(2) staff opens a formal complaint on its own motion.

(m) [(k)] Written notice that a formal complaint has been opened will be sent to the Complainant and Respondent.

(n) [(h)] The staff investigator or peer investigative committee assigned to investigate a formal complaint shall prepare a report detailing its findings on a form approved by the Board. Reports prepared by a peer investigative committee shall be reviewed by the Standards and Enforcement Services Division.

(o) [(m)] In determining the proper disposition of a formal complaint pending as of or filed after the effective date of this subsection, and subject to the maximum penalties authorized under Texas Occupations Code §1103.552, staff, the administrative law judge in a contested case hearing, and the Board shall consider the following sanctions guidelines and list of non-exclusive factors as demonstrated by the evidence in the record of a contested case proceeding.

(1) For the purposes of these sanctions guidelines:

(A) A person will not be considered to have had a prior warning letter, contingent dismissal or discipline if that prior warning letter, contingent dismissal or discipline was issued by the Board more than seven years before the current alleged violation occurred;

(B) Prior discipline is defined as any sanction (including administrative penalty) received under a Board final or agreed order;

(C) A violation refers to a violation of any provision of the Act, Board rules or USPAP;

(D) "Minor deficiencies" is defined as violations of the Act, Board rules or USPAP which do not impact the credibility of the appraisal assignment results, the assignment results themselves and do not impact the license holder's honesty, integrity, or trustworthiness to the Board, the license holder's clients, or intended users of the appraisal service provided;

(E) "Serious deficiencies" is defined as violations of the Act, Board rules or USPAP that:

(i) impact the credibility of the appraisal assignment results, the assignment results themselves or do impact the license holder's honesty, trustworthiness or integrity to the Board, the license holder's clients, or intended users of the appraisal service provided; or

(ii) are deficiencies done with knowledge, deliberate or willful disregard, or gross negligence that would otherwise be classified as "minor deficiencies";

(F) "Remedial measures" include, but are not limited to, training, mentorship, education, reexamination, or any combination thereof; and

(G) The terms of a contingent dismissal agreement will be in writing and agreed to by all parties. If the Respondent completes all remedial measures required in the agreement within the prescribed period of time, the complaint will be dismissed with a non-disciplinary warning letter.

(2) List of factors to consider in determining proper disposition of a formal complaint:

(A) Whether the Respondent has previously received a warning letter or contingent dismissal and, if so, the similarity of facts or violations in that previous complaint to the facts or violations in the instant complaint matter;

(B) Whether the Respondent has previously been disciplined;

(C) If previously disciplined, the nature of the prior discipline, including:

(i) Whether prior discipline concerned the same or similar violations or facts;

(ii) The nature of the disciplinary sanctions previously imposed; and

(iii) The length of time since the prior discipline;

(D) The difficulty or complexity of the appraisal assignment(s) at issue;

(E) Whether the violations found were of a negligent, grossly negligent or a knowing or intentional nature;

(F) Whether the violations found involved a single appraisal/instance of conduct or multiple appraisals/instances of conduct;

(G) To whom were the appraisal report(s) or the conduct directed, with greater weight placed upon appraisal report(s) or conduct directed at:

(i) A financial institution or their agent, contemplating a lending decision based, in part, on the appraisal report(s) or conduct at issue;

(ii) The Board;

(iii) A matter which is actively being litigated in a state or federal court or before a regulatory body of a state or the federal government;

(iv) Another government agency or government sponsored entity, including, but not limited to, the United States Department of Veteran's Administration, the United States Department of Housing and Urban Development, the State of Texas, Fannie Mae, and Freddie Mac; or

(v) A consumer contemplating a real property transaction involving the consumer's principal residence;

(H) Whether Respondent's violations caused any harm, including financial harm, and the extent or amount of such harm;

(I) Whether Respondent acknowledged or admitted to violations and cooperated with the Board's investigation prior to any contested case hearing;

(J) The level of experience Respondent had in the appraisal profession at the time of the violations, including:

(i) The level of appraisal credential Respondent held;

(ii) The length of time Respondent had been an appraiser;

(iii) The nature and extent of any education Respondent had received related to the areas in which violations were found; and

(iv) Any other real estate or appraisal related background or experience Respondent had;

(K) Whether Respondent can improve appraisal skills and reports through the use of remedial measures;

(3) The following sanctions guidelines shall be employed in conjunction with the factors listed in paragraph (2) of this subsection to assist in reaching the proper disposition of a formal complaint:

(A) 1st Time Discipline Level 1--violations of the Act, Board rules, or USPAP which evidence minor deficiencies will result in one of the following outcomes:

(i) Dismissal;

(ii) Dismissal with non-disciplinary warning letter; or

(iii) Contingent dismissal with remedial measures.

(B) 1st Time Discipline Level 2--violations of the Act, Board rules, or USPAP which evidence serious deficiencies will result in one of the following outcomes:

(i) Contingent dismissal with remedial measures; or

(ii) A final order which imposes one or more of the following:

(I) Remedial measures;

(II) Required promulgation, adoption and implementation of written, preventative policies or procedures addressing specific areas of professional practice;

(III) A probationary period with provisions for monitoring the Respondent's practice;

(IV) Restrictions on the Respondent's ability to sponsor any appraiser trainees;

(V) Restrictions on the scope of practice the Respondent is allowed to engage in for a specified time period or until specified conditions are satisfied; or

(VI) Up to \$250 in administrative penalties per act or omission which constitutes a violation(s) of the Act, Board rules, or USPAP, not to exceed \$3,000 in the aggregate.

(C) 1st Time Discipline Level 3--violations of the Act, Board rules, or USPAP which evidence serious deficiencies and were done with knowledge, deliberately, willfully, or with gross negligence will result in a final order which imposes one or more of the following:

(i) A period of suspension;

(ii) A revocation;

(iii) Remedial measures;

(iv) Required promulgation, adoption and implementation of written, preventative policies or procedures addressing specific areas of professional practice;

(v) A probationary period with provisions for monitoring the Respondent's practice;

(vi) Restrictions on the Respondent's ability to sponsor any appraiser trainees;

(vii) Restrictions on the scope of practice the Respondent is allowed to engage in for a specified time period or until specified conditions are satisfied; or

(viii) Up to \$1,500 in administrative penalties per act or omission which constitutes a violation(s) of the Act, Board rules, or USPAP, up to the maximum \$5,000 statutory limit per complaint matter.

(D) 2nd Time Discipline Level 1--violations of the Act, Board rules, or USPAP which evidence minor deficiencies will result in one of the following outcomes:

(i) Dismissal;

(ii) Dismissal with non-disciplinary warning letter;

(iii) Contingent dismissal with remedial measures; or

(iv) A final order which imposes one or more of the following:

(I) Remedial measures;

(II) Required promulgation, adoption and implementation of written, preventative policies or procedures addressing specific areas of professional practice;

(III) A probationary period with provisions for monitoring the Respondent's practice;

(IV) Restrictions on the Respondent's ability to sponsor any appraiser trainees;

(V) Restrictions on the scope of practice the Respondent is allowed to engage in for a specified time period or until specified conditions are satisfied; or

(VI) Up to \$250 in administrative penalties per act or omission which constitutes a violation(s) of the Act, Board rules, or USPAP, up to the maximum \$5,000 statutory limit per complaint matter.

(E) 2nd Time Discipline Level 2--violations of the Act, Board rules, or USPAP which evidence serious deficiencies will result in a final order which imposes one or more of the following:

- (i) A period of suspension;
- (ii) A revocation;
- (iii) Remedial measures;
- (iv) Required promulgation, adoption and implementation of written, preventative policies or procedures addressing specific areas of professional practice;
- (v) A probationary period with provisions for monitoring the Respondent's practice;
- (vi) Restrictions on the Respondent's ability to sponsor any appraiser trainees;
- (vii) Restrictions on the scope of practice the Respondent is allowed to engage in for a specified time period or until specified conditions are satisfied; or
- (viii) Up to \$1,500 in administrative penalties per act or omission which constitutes a violation(s) of the Act, Board rules, or USPAP, up to the maximum \$5,000 statutory limit per complaint matter.

(F) 2nd Time Discipline Level 3--violations of the Act, Board rules, or USPAP which evidence serious deficiencies and were done with knowledge, deliberately, willfully, or with gross negligence will result in a final order which imposes one or more of the following:

- (i) A period of suspension;
- (ii) A revocation;
- (iii) Remedial measures;
- (iv) Required promulgation, adoption and implementation of written, preventative policies or procedures addressing specific areas of professional practice;
- (v) A probationary period with provisions for monitoring the Respondent's practice;
- (vi) Restrictions on the Respondent's ability to sponsor any appraiser trainees;
- (vii) Restrictions on the scope of practice the Respondent is allowed to engage in for a specified time period or until specified conditions are satisfied; or
- (viii) Up to \$1,500 in administrative penalties per act or omission which constitutes a violation(s) of the Act, Board rules, or USPAP, up to the maximum \$5,000 statutory limit per complaint matter.

(G) 3rd Time Discipline Level 1--violations of the Act, Board rules, or USPAP which evidence minor deficiencies will result in a final order which imposes one or more of the following:

- (i) A period of suspension;
- (ii) A revocation;
- (iii) Remedial measures;
- (iv) Required promulgation, adoption and implementation of written, preventative policies or procedures addressing specific areas of professional practice;
- (v) A probationary period with provisions for monitoring the Respondent's practice;

(vi) Restrictions on the Respondent's ability to sponsor any appraiser trainees;

(vii) Restrictions on the scope of practice the Respondent is allowed to engage in for a specified time period or until specified conditions are satisfied; or

(viii) \$1,000 to \$1,500 in administrative penalties per act or omission which constitutes a violation(s) of the Act, Board rules, or USPAP, up to the maximum \$5,000 statutory limit per complaint matter.

(H) 3rd Time Discipline Level 2--violations of the Act, Board rules, or USPAP which evidence serious deficiencies will result in a final order which imposes one or more of the following:

- (i) A period of suspension;
- (ii) A revocation;
- (iii) Remedial measures;
- (iv) Required promulgation, adoption and implementation of written, preventative policies or procedures addressing specific areas of professional practice;
- (v) A probationary period with provisions for monitoring the Respondent's practice;
- (vi) Restrictions on the Respondent's ability to sponsor any appraiser trainees;
- (vii) Restrictions on the scope of practice the Respondent is allowed to engage in for a specified time period or until specified conditions are satisfied; or
- (viii) \$1,500 in administrative penalties per act or omission which constitutes a violation(s) of the Act, Board rules, or USPAP, up to the maximum \$5,000 statutory limit per complaint matter.

(I) 3rd Time Discipline Level 3--violations of the Act, Board Rules, or USPAP which evidence serious deficiencies and were done with knowledge, deliberately, willfully, or with gross negligence will result in a final order which imposes one or more of the following:

- (i) A revocation; or
- (ii) \$1,500 in administrative penalties per act or omission which constitutes a violation(s) of the Act, Board rules, or USPAP, up to the maximum \$5,000 statutory limit per complaint matter.

(J) 4th Time Discipline--violations of the Act, Board rules, or USPAP will result in a final order which imposes the following:

- (i) A revocation; and
- (ii) \$1,500 in administrative penalties per act or omission which constitutes a violation(s) of USPAP, Board rules, or the Act, up to the maximum \$5,000 statutory limit per complaint matter.

(K) Unlicensed appraisal activity will result in a final order which imposes a \$1,500 in administrative penalties per unlicensed appraisal activity, up to the maximum \$5,000 statutory limit per complaint matter.

(4) In addition, staff may recommend any or all of the following:

(A) reducing or increasing the recommended sanction or administrative penalty for a complaint based on documented factors

that support the deviation, including but not limited to those factors articulated under paragraph (2) of this subsection;

(B) probating all or a portion of any sanction or administrative penalty for a period not to exceed five years;

(C) requiring additional reporting requirements; and

(D) such other recommendations, with documented support, as will achieve the purposes of the Act, Board rules, or USPAP.

(p) [(n)] The Board may order a person regulated by the Board to refund the amount paid by a consumer to the person for a service regulated by the Board.

(q) [(o)] Agreed resolutions of complaint matters pursuant to Texas Occupations Code §1103.458 or §1103.459 must be signed by:

(1) the Board Chair or if the Board Chair is unavailable or must recuse him or herself, the Board Chair's designee, whom shall be (in priority order) the Board Vice Chair, the Board Secretary, or another Board member;

(2) Respondent;

(3) a representative of the Standards and Enforcement Services Division; and

(4) the Commissioner.

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 November 16, 2020.

TRD-202004837

Kathleen Santos

General Counsel

Texas Appraiser Licensing and Certification Board

Earliest possible date of adoption: December 27, 2020

For further information, please call: (512) 936-3652



22 TAC §153.28

The Texas Appraiser Licensing and Certification Board (TALCB) proposes new rule 22 TAC §153.28, Peer Investigative Committee Review.

The proposed new rule outlines the complaint review process of the Peer Investigative Committee pursuant to Texas Occupations Code §1103.453. The proposed new rule identifies who may serve on the committee, terms of appointment, delineates functions of the committee members and TALCB staff in the review process, and establishes process deadlines. The proposed rule also specifies the types of complaints that are subject or not subject to the review of the Peer Investigative Committee, and the manner committee members and staff may communicate during the review process.

The proposed new rule is intended to more clearly establish the agency's Peer Investigative Committee Review process and identify the roles of both committee members and TALCB staff. This rule also allows the Peer Investigative Committee members to provide TALCB Enforcement Division recommendations on complaints where adverse action is sought.

Kathleen Santos, General Counsel, has determined that for the first five-year period the proposed new rule is in effect, there will be no fiscal implications for the state or units of local government as a result of enforcing or administering the proposed new rule. There is no adverse economic impact anticipated for local or state employment, rural communities, small businesses, or micro businesses as a result of implementing the proposed new rule. There is no significant economic cost anticipated for persons who are required to comply with the proposed new rule. Accordingly, no Economic Impact statement or Regulatory Flexibility Analysis is required.

Ms. Santos has also determined that for each year of the first five years the proposed new rule is in effect the public benefits anticipated as a result of enforcing the proposed new rule will be improved clarity and greater transparency for members of the public and license holders, as well as requirements that are consistent with statutes and easier to understand, apply, and process.

Growth Impact Statement:

For each year of the first five years the proposed new rule is in effect the rule will not:

--create or eliminate a government program;

--require the creation of new employee positions or the elimination of existing employee positions;

--require an increase or decrease in future legislative appropriations to the agency;

--require an increase or decrease in fees paid to the agency;

--create a new regulation;

--expand, limit or repeal an existing regulation; and

--increase the number of individuals subject to the rule's applicability.

For each year of the first five years the proposed new rule is in effect, there is no anticipated impact on the state's economy.

Comments on the proposed new rule may be submitted to Kathleen Santos, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or emailed to: general.counsel@talcb.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register*.

The new rule is proposed under Texas Occupations Code §1103.151, which authorizes TALCB to adopt rules for certifying or licensing an appraiser or appraiser trainee and §1103.154, which authorizes TALCB to adopt rules relating to professional conduct.

The statute affected by these amendments is Chapter 1103, Texas Occupations Code. No other statute, code or article is affected by the proposed new rule.

§153.28. Peer Investigative Committee Review.

(a) The Board Chair, with the advice and consent of the Executive Committee, may appoint a Peer Investigative Committee pool at least every two years.

(b) A panel of the Peer Investigative Committee shall consist of:

(1) an Appraiser Board Member;

(2) a Board Member who is a licensed or certified appraiser; and

(3) a TALCB Investigator or a Peer Investigator. A Peer Investigator shall work in conjunction with a TALCB Investigator to ensure consistency in form, investigatory standards, and any other assistance as needed.

(c) The Board members serving on the Peer Investigative Committee shall serve on the committee on a rotating quarterly basis.

(d) During complaint intake, the Enforcement Director shall assign a TALCB Investigator or Peer Investigator working in conjunction with a TALCB Investigator to investigate the complaint.

(e) Complaints in which adverse action, including contingent dismissals, is recommended by an investigator are subject to review by the Peer Investigative Committee. Complaints that result in dismissals, defaults, or warning letters are not subject to review by the Peer Investigative Committee.

(f) No more than 7 days following the investigator's completion of an Investigative Report, the investigator shall provide his or her findings, including the investigative report and the complaint file, to the Board members of the Peer Investigative Committee. The investigative report must include:

- (1) a statement of facts;
- (2) the investigator's recommendations; and
- (3) the position or defense of the respondent.

(g) Board members of the Peer Investigative Committee, Investigators, and staff may elect to confer in person, via e-mail, or video conference prior to the Board members' determination.

(h) The Board delegates its authority to receive the written findings or determination of the Peer Investigative Committee to the Commissioner.

(i) No more than five business days after the review of the investigator's findings, the Board members of Committee shall render a determination agreeing or disagreeing with the investigator's finding of alleged violations and submit a copy of their determination to the Commissioner or his or her designee on behalf of the Board. The determination shall serve as a recommendation to the TALCB Enforcement Division as to whether to pursue adverse action against a respondent. A copy of the Board members' determination shall be included in the complaint file. The Board Chair may request statistical data related to the investigator's recommendations, Board members' determination, and adverse action pursued by the Enforcement Division.

(j) Board members who participate in the Peer Investigative Committee Review of a complaint are disqualified from participating in any future adjudication of the same complaint.

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 November 16, 2020.

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Kathleen Santos

General Counsel

Texas Appraiser Licensing and Certification Board

Earliest possible date of adoption: December 27, 2020

For further information, please call: (512) 936-3652



PART 11. TEXAS BOARD OF NURSING

CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.23

The Texas Board of Nursing (Board) proposes amendments to §217.23, relating to Balance Billing Dispute Resolution. The amendments are being proposed under the authority of the Insurance Code §752.0003 and §1467.003 and the Occupations Code §301.151 and implement the requirements of the Insurance Code §§1271.157, 1271.158, 1301.164, 1301.165, 1551.229, 1551.230, 1575.172, 1575.173, 1579.110, 1579.111 and the Insurance Code Chapter 1467.

Background. The proposed amendments are necessary to implement changes to the Insurance Code, effectuated by the passage of Senate Bill (SB) 1264 during the 86th Legislative Session, effective September 1, 2019. In order to protect consumers, SB 1264 prohibits balance billing by many out of network providers, except in a narrow set of circumstances. Additionally, SB 1264 authorizes a new dispute resolution process for claim disputes between out of network providers and health benefit plan issuers and administrators.

The balance billing protections provided by SB 1264 generally apply to enrollees of health benefit plans offered by insurers and health maintenance organizations regulated by the Texas Department of Insurance (Department), as well as the Texas Employees Group, the Texas Public School Employees Group, and the Texas School Employees Uniform Group. The provisions of the bill apply to health care and medical services and supplies provided on or after January 1, 2020.

Under SB 1264, an out of network provider is prohibited from seeking payment for a balance bill from an enrollee *unless* the provider provides the enrollee with a written disclosure identifying the projected amounts for which the enrollee may be responsible and the circumstances under which the enrollee may be responsible for those amounts *and* the enrollee elects, in writing, to receive the health care or medical service or supply anyway. This exception only applies in non-emergencies when an enrollee elects to receive covered health care or medical services or supplies from a facility-based provider, diagnostic imaging provider, or laboratory service provider that is not a participating provider for a health benefit plan, if the service or supply is provided at a health care facility that is a participating provider or is provided in connection with a health care or medical service or supply that is provided by a participating provider.

The Department, under the authority of SB 1264, adopted rules to implement this exception to the balance billing prohibitions set forth in the Insurance Code §§1271.157, 1271.158, 1301.164, 1301.165, 1551.229, 1551.230, 1575.172, 1575.173, 1579.110, and 1579.111. These rules took effect on June 25, 2020 (45 TexReg 4204).

Under the Department's rules, an enrollee's election to receive health care or a medical service or supply is only valid if the enrollee has a meaningful choice between an in network provider and an out of network provider; the enrollee was not coerced by another provider or his/her health benefit plan into selecting the out of network provider; and the enrollee signs a notice and disclosure statement at least ten business days before the service or supply is provided acknowledging that the enrollee may be liable for a balance bill and chooses to proceed with the service or

supply anyway. Only an out of network provider that chooses to balance bill an enrollee is required to provide a notice and disclosure statement to the enrollee. The out of network provider may choose to participate in the claim dispute resolution process authorized by SB 1264 instead of balance billing an enrollee. The Department also adopted a notice and disclosure statement that must be filled out by the out of network provider and given to the enrollee if the provider chooses to engage in balance billing.

In light of the many changes made by SB 1264, the provisions of the Board's current rule are now obsolete. The proposed amendments are necessary to implement the new requirements of SB 1264 and mirror the Department's adopted rules.

Section by Section Overview. The title of the section is proposed for amendment to read "Balance Billing Notice and Disclosure Requirements".

Proposed amended §217.23(a) identifies the purpose of the section, which is to implement the requirements of the Insurance Code §§1271.157, 1271.158, 1301.164, 1301.165, 1551.229, 1551.230, 1575.172, 1575.173, 1579.110, and 1579.111 and the Insurance Code Chapter 1467 and notify licensees of their responsibilities under those sections.

Proposed amended §217.23(b) provides the definitions for terms used throughout the section and describes the applicability of the section. Under the proposal, the section only applies to a covered non-emergency health care or medical service or supply provided on or after January 1, 2020, by a facility based provider that is not a participating provider for a health benefit plan, if the service or supply is provided at a health care facility that is a participating provider; or a diagnostic imaging provider or laboratory service provider that is not a participating provider for a health benefit plan, if the service or supply is provided in connection with a health care or medical service or supply provided by a participating provider. Further, the proposed amended subsection makes it clear that the section applies only to providers that are subject to the Board's jurisdiction. For purposes of this rule, this includes an out of network licensee provider that provides non-emergency health care or medical services or supplies, diagnostic imaging services, or laboratory services at an in network health care facility or in connection with a health care or medical service or supply provided by a participating provider.

Proposed amended §217.23(c) sets forth the responsibilities of such licensee providers related to balance billing. First, under the proposal, and consistent with the rules adopted by the Department, an out of network provider may not balance bill an enrollee receiving a non-emergency health care or medical service or supply, and the enrollee does not have financial responsibility for a balance bill, unless the enrollee elects to obtain the service or supply from the out of network provider knowing that the provider is out of network and the enrollee may be financially responsible for a balance bill. An enrollee's legal representative or guardian may elect on behalf of an enrollee.

Second, an enrollee elects to obtain a service or supply only if the enrollee has a meaningful choice between a participating provider for a health benefit plan issuer or administrator and an out of network provider; the enrollee is not coerced by a provider or health benefit plan issuer or administrator when making the election; and the out of network provider or the agent or assignee of the provider provides written notice and disclosure to the enrollee and obtains the enrollee's written consent, as specified in the later provisions of the rule. Under the proposal, a meaningful choice does not exist for an enrollee if an out of network provider

was selected for or assigned to an enrollee by another provider or health benefit plan issuer or administrator. Further, a provider engages in coercion if the provider charges or attempts to charge a nonrefundable fee, deposit, or cancellation fee for the service or supply prior to the enrollee's election.

Third, if an out of network provider elects to balance bill an enrollee rather than participate in the claim dispute resolution process authorized by the Insurance Code Chapter 1467, the out of network provider or agent or assignee of the provider must provide the enrollee with the notice and disclosure statement specified in the later provisions of this rule prior to scheduling the non-emergency health care or medical service or supply. To be effective, the notice and disclosure statement must be signed and dated by the enrollee no less than 10 business days before the date the service or supply is performed or provided. The enrollee may rescind acceptance within five business days from the date the notice and disclosure statement was signed, as explained in the notice and disclosure statement form referenced in the later provisions of this rule.

Fourth, if the medical service or supply is provided and a balance bill is sent to the enrollee, each out of network provider, or the provider's agent or assignee, must maintain a copy of the notice and disclosure statement, signed and dated by the enrollee, for four years. The provider must provide the enrollee with a copy of the signed notice and disclosure statement on the same date the statement is received by the provider.

Finally, the Department adopted Form AH025 as the notice and disclosure statement to be used by out of network providers subject to the requirements of SB 1264. The proposal adopts this form by reference. Although Form AH025 may be accessed on the Department's website at www.tdi.texas.gov/forms, it is also being published elsewhere in this edition of the *Texas Register* as part of this proposal. The notice and disclosure statement may not be modified, including its format or font size, and must be presented to an enrollee as a standalone document and cannot be incorporated into any other document.

A provider who seeks and obtains an enrollee's signature on a notice and disclosure statement is not eligible to participate in the claim dispute resolution process authorized by the Insurance Code Chapter 1467. This prohibition does not apply, however, if the enrollee's election is defective or rescinded by the enrollee.

Proposed amended §217.23(d) relates to the Board's complaint investigation and resolution. The Board is authorized under the Insurance Code §752.0003 to take disciplinary action against a licensee that violates a law that prohibits the licensee from billing an insured, participant, facility, or enrollee in an amount greater than an applicable copayment, coinsurance, and deductible under the insured's, participant's, or enrollee's managed care plan or that imposes a requirement related to that prohibition. Licensees may also be subject to additional consequences pursuant to the Insurance Code §752.0002. Complaints that do not involve delayed health care or medical care shall be assigned a Priority 4 status, as described in §213.13 of this title (relating to Complaint Investigation and Disposition). After its investigation has concluded, if the Board determines that a licensee has engaged in improper billing practices or bad faith participation or has committed a violation of the Nursing Practice Act, the Insurance Code Chapter 1467, or other applicable law, the Board will impose appropriate disciplinary action.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed

amendments will be in effect, there will be no change in the revenue to state and local government as a result of the enforcement or administration of the proposal. The proposed amendments do not add to or decrease state revenues or expenditures and local governments are not involved in enforcing or complying with the proposed amendments. Ms. Thomas does not anticipate any effect on local employment or the local economy as a result of the proposed amendments.

Public Benefit/Cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be the adoption of a rule that implements the consumer protection provisions of SB 1264. Further, the proposed rules are consistent with the rules adopted by the Department.

There are some anticipated costs of compliance associated with the proposal. However, these anticipated costs of compliance apply only to those licensee providers that choose to engage in balance billing. For those licensee providers that do not balance bill, there will be no costs of compliance with the proposal. For those licensee providers that choose to balance bill, the associated costs of compliance are anticipated to be nominal.

First, there may be a potential increase in the administrative costs associated with providing enrollees the required notice and disclosure statements and maintaining signed notice and disclosure statements. However, the cost to provide and maintain these documents is expected to be negligible. Many licensee providers are not directly responsible for the billing of enrollees, as those duties are typically handled by facility admission staff or other provider groups. In those situations, it is anticipated that the notice and disclosure statements will be included as part of those entity's services. Some licensee providers may utilize billing companies or third party vendors to assist with billing, and it is anticipated that the notice and disclosure statements could be included as part of those company's services, as well. Independent licensee providers subject to the proposal's requirements will need to implement a system for providing and maintaining the notice and disclosure statements if they do not have a system already established to do so. However, providers already routinely provide patients with forms, questionnaires, disclosures, and billing information. Providers are also currently required to maintain health and billing records for patients. The new notice and disclosure statement forms developed by the Department and required by the proposal may be provided and stored in the most cost effective manner chosen by an individual provider. Further, while providers who choose to balance bill may incur nominal new costs associated with providing and storing notice and disclosure statements, these obligations are based in statute. Thus, any new administrative costs associated with the proposal are the direct result of the enactment of SB 1264.

Some providers may also experience a financial impact related to an inability to balance bill. However, the statutory prohibitions against balance billing were enacted by the Texas Legislature in SB 1264. As such, any resulting financial impact is due to statute and not the proposed rules. Further, providers may participate in the dispute resolution process authorized by SB 1264 based on their own estimate of final reimbursement if they do not engage in balance billing. The proposal does not impose any requirement of compliance in this regard.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses and Rural Communities. 2 The Government Code §2006.002(c) and (f) require, that if a pro-

posed rule may have an economic impact on small businesses or micro businesses or rural communities, state agencies must prepare, as part of the rulemaking process, an economic impact statement that assesses the potential impact of the proposed rule on these businesses and communities and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule.

The Government Code §2006.001(a)(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated, and has fewer than 100 employees or less than \$6 million in annual gross receipts. The Government Code §2006.001(a)(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. A rural community is defined as a municipality with a population of less than 25,000.

While there may be some associated costs of compliance, the proposal will only affect those licensee providers that choose to engage in balance billing. The proposal is not expected to affect rural communities. For those providers that choose not to engage in balance billing, there will be no costs of compliance. While a licensee provider may choose to utilize the dispute resolution process authorized by SB 1264 in lieu of balance billing, no licensee provider is required to do so, and any associated costs of compliance in that regard are a result of the enactment of SB 1264 and not this proposal. The costs outlined in the Public Benefit/Cost Note section of this proposal provide sufficient cost information for small or micro businesses to make an informed decision regarding whether to engage in balance billing and become subject to the proposal's requirements.

SB 1264 protects consumers from balance billing, except in a narrow set of circumstances. In the circumstance where a provider may balance bill, SB 1264 requires prior notice and disclosure to the enrollee so the enrollee can engage in informed decision making regarding the medical care, service, or supply. The proposed rules are consistent with the consumer protections of SB 1264. Further, the proposal mirrors rules recently adopted by the Department. Those rules further implement the requirements of SB 1264 by clearly articulating the manner in which notice and disclosure must be provided to an enrollee. Those rules also set a reasonable amount of time for an enrollee to be able to consider his/her options before electing to proceed with a non-covered medical service or supply subject to balance billing. Without these specific requirements, patients could be forced to make difficult financial and health related decisions in an extremely vulnerable state, potentially without even knowing they are entitled to balance billing protections under the law. Further, an enrollee may face significant health consequences if treatment is delayed or refused because of billing disputes between a patient and a provider. To ensure the balance billing protections of SB 1264 are properly implemented for the protection of Texas consumers, the Board finds it to be infeasible to exempt, change, or modify the proposed rules as they apply to small or micro businesses. To do so would come at the expense of the enrollees SB 1264 was intended to protect. Furthermore, establishing different requirements for licensee providers based upon their status as a small or micro business would cause confusion for enrollees and providers alike. Because of these reasons, the Board has determined there are no alternatives to the proposal that would be protective of the health, safety, and environmental and economic welfare of the state, as they relate to small or micro businesses.

Costs Under the Government Code §2001.0045. The Government Code §2001.0045 prohibits agencies from adopting a rule that imposes costs on regulated persons unless the agency repeals a rule that imposes a total cost on regulated persons that is equal to or greater than the total cost imposed on regulated persons by the proposed rule or amends a rule to decrease the total cost imposed on regulated persons by an amount that is equal to or greater than the cost imposed on the persons by the proposed rule. Pursuant to §2001.0045(c), this prohibition does not apply to a rule that is necessary to protect the health, safety, and welfare of the residents of this state or is necessary to implement legislation, unless the legislature specifically states §2001.0045 applies to the rule. The Insurance Code §752.003 and §1467.003 provide that the Government Code §2001.0045 does not apply to a rule proposed and adopted under those sections. Because these rules are proposed under the authority of the Insurance Code §752.003 and §1467.003, these rules are not subject to the requirements of the Government Code §2001.0045. Furthermore, even if §2001.0045 was applicable to these rules, the Board is not required to repeal or amend another rule because the proposed rules are necessary to implement the requirements of SB 1264 and to protect the health and financial welfare of the residents of this state, as previously explained in this preamble, and to implement the requirements of SB 1264.

Government Growth Impact Statement. The Board is required, pursuant to the Government Code §2001.0221 and 34 Texas Administrative Code §11.1, to prepare a government growth impact statement. The Board has determined for each year of the first five years the proposed amendments will be in effect: (i) the proposal does not create or eliminate a government program; (ii) implementation of the proposal does not require the creation of new employee positions or the elimination of existing employee positions, as the proposal is not expected to have an effect on existing agency positions; (iii) implementation of the proposal does not require an increase or decrease in future legislative appropriations to the Board, as the proposal is not expected to have an effect on existing agency positions; (iv) the proposal does not require an increase or decrease in fees paid to the Board; (v) the proposal implements the requirements of SB 1264, effective September 1, 2019; (vi) the proposal modifies an existing regulation; (vii) the proposal does not increase or decrease the number of individuals subject to the rule's applicability; and (viii) the proposal does not have an effect on the state's economy.

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

Request for Public Comment. To be considered, written comments on the proposal or any request for a public hearing must be submitted within thirty days of publication to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.texas.gov, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The amendments are proposed under the authority of the Insurance Code §752.0003(c) and §1467.003 and the Occupations Code §301.151.

Section 752.0003(a) provides that an appropriate regulatory agency that licenses, certifies, or otherwise authorizes a physician, health care practitioner, health care facility, or other health care provider to practice or operate in this state may take disciplinary action against the physician, practitioner, facility, or provider if the physician, practitioner, facility, or provider violates a law that prohibits the physician, practitioner, facility, or provider from billing an insured, participant, or enrollee in an amount greater than an applicable copayment, coinsurance, and deductible under the insured's, participant's, or enrollee's managed care plan or that imposes a requirement related to that prohibition. Section 752.0003(c) provides that a regulatory agency described by subsection (a) or the Commissioner may adopt rules as necessary to implement this section.

Section 1467.003(a) provides that the Commissioner, the Texas Medical Board, and any other appropriate regulatory agency shall adopt rules as necessary to implement their respective powers and duties under this chapter.

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

Cross Reference To Statute. The following statutes are affected by this proposal: the

Insurance Code §§752.0003, 1271.157, 1271.158, 1301.164, 1301.165, 1551.229, 1551.230, 1575.172, 1575.173, 1579.110, 1579.111, the Insurance Code Chapter 1467, and the Occupations Code §301.151.

§217.23. Balance Billing Notice and Disclosure Requirements [Dispute Resolution].

(a) Purpose. The purpose of this section is to implement the requirements of the Insurance Code §§1271.157, 1271.158, 1301.164, 1301.165, 1551.229, 1551.230, 1575.172, 1575.173, 1579.110, and 1579.111 and the Insurance Code Chapter 1467 and notify licensees of their responsibilities under those sections [that chapter].

(b) Definitions and Applicability of Section.

(1) Definitions. Terms defined in the Insurance Code §1467.001 have the same meanings when used in this section, unless the context clearly indicates otherwise. Additionally, for purposes of this section, a "balance bill" is a bill for an amount greater than an applicable copayment, coinsurance, and deductible under an enrollee's health benefit plan, as specified in the Insurance Code §§1271.157(c), 1271.158(c), 1301.164(c), 1301.165(c), 1551.229(c), 1551.230(c), 1575.172(c), 1575.173(c), 1579.110(c), or 1579.111(c).

(2) Applicability. This section only applies to a covered non-emergency health care or medical service or supply provided on or after January 1, 2020, by:

(A) a facility based provider that is not a participating provider for a health benefit plan, if the service or supply is provided at a health care facility that is a participating provider; or

(B) a diagnostic imaging provider or laboratory service provider that is not a participating provider for a health benefit plan, if the service or supply is provided in connection with a health care or medical service or supply provided by a participating provider. Further, this section is limited to providers that are subject to the Board's jurisdiction.

[(2) Applicability. This section applies to any facility-based provider or emergency care provider, as those terms are defined in the Insurance Code §1467.001, who bills an enrollee covered by a preferred provider benefit plan offered by an insurer under the Insurance Code Chapter 1301 or a health benefit plan, other than a health maintenance organization plan, under the Insurance Code Chapters 1551, 1575, or 1579, for out-of-network emergency care, health care, or medical service or supply provided on or after January 1, 2018. This section is limited to facility-based providers and emergency care providers that are subject to the Board's jurisdiction.]

(c) Responsibilities of Licensee.

(1) An out of network provider may not balance bill an enrollee receiving a non-emergency health care or medical service or supply, and the enrollee does not have financial responsibility for a balance bill, unless the enrollee elects to obtain the service or supply from the out of network provider knowing that the provider is out of network and the enrollee may be financially responsible for a balance bill. An enrollee's legal representative or guardian may elect on behalf of an enrollee.

[(1) Mediation.]

[(A) An enrollee, as that term is defined in the Insurance Code §1467.001(3), may request mediation of a settlement of an out-of-network health benefit claim if:]

[(i) the amount for which the enrollee is responsible to a facility-based or emergency care provider, after co-payments, deductibles, and co-insurance, including the amount unpaid by the administrator or insurer, is greater than \$500; and]

[(ii) the health benefit claim is for:]

[(I) emergency care; or]

[(II) a health care or medical service or supply provided by a facility-based provider in a facility that is a preferred provider or that has a contract with the administrator.]

[(B) If an enrollee requests mediation under the Insurance Code Chapter 1467, the facility-based or emergency care provider or their representative must participate in the mediation.]

[(C) Prior to participation in a mediation, all parties, including the facility-based or emergency care provider, or their representative, must participate in an informal settlement teleconference not later than the 30th day after the date on which the enrollee submits the request for mediation. If the informal settlement teleconference is unsuccessful in resolving the matter, a mediation must be conducted in the county in which the health care or medical services were rendered.]

[(D) In a mediation under the Insurance Code Chapter 1467, the parties must:]

[(i) evaluate whether:]

[(I) the amount charged by the facility-based or emergency care provider for the health care or medical service or supply is excessive; and]

[(II) whether the amount paid by the insurer or administrator represents the usual and customary rate for the health care or medical service or supply or is unreasonably low; and]

[(ii) as a result of the amounts described by clause (i) of this subparagraph, determine the amount, after co-payments, deductibles, and co-insurance are applied, for which the enrollee is responsible to the facility-based or emergency care provider.]

[(E) The mediator's fees for a mediation under the Insurance Code Chapter 1467 shall be split evenly and paid by the facility-based or emergency care provider and the insurer or administrator.]

[(F) In the event a mediation is unsuccessful, the matter must be referred to a special judge, as set forth in the Insurance Code §1467.057.]

[(G) A facility-based provider will not be required to participate in mediation to mediate a billed charge if, prior to providing a health care service or supply, the facility-based provider makes a disclosure, as set forth in paragraph (2) of this subsection, and obtains the enrollee's written acknowledgment of that disclosure, so long as the billed amount is less than or equal to the maximum amount projected in the disclosure.]

(2) An enrollee elects to obtain a service or supply only if:

(A) the enrollee has a meaningful choice between a participating provider for a health benefit plan issuer or administrator and an out of network provider. No meaningful choice exists if an out of network provider was selected for or assigned to an enrollee by another provider or health benefit plan issuer or administrator;

(B) the enrollee is not coerced by a provider or health benefit plan issuer or administrator when making the election. A provider engages in coercion if the provider charges or attempts to charge a nonrefundable fee, deposit, or cancellation fee for the service or supply prior to the enrollee's election; and

(C) the out of network provider or the agent or assignee of the provider provides written notice and disclosure to the enrollee and obtains the enrollee's written consent, as specified in paragraph (3) of this subsection.

[(2) Billing Notices.]

[(A) Except in the case of an emergency, and if requested by an enrollee, an out-of-network facility-based provider must provide a complete disclosure to the enrollee, prior to providing the health care or medical service or supply, that:]

[(i) explains that the facility-based provider does not have a contract with the enrollee's health benefit plan;]

[(ii) discloses projected amounts for which the enrollee may be responsible; and]

[(iii) discloses the circumstances under which the enrollee would be responsible for those amounts.]

[(B) Each bill sent to an enrollee by a facility-based or emergency care provider for an out-of-network health benefit claim (balance bill) eligible for mediation under the Insurance Code Chapter 1467 must include a conspicuous, plain-language explanation of the mediation process available under Chapter 1467, as well as the information specified in §1467.0511.]

(3) If an out of network provider elects to balance bill an enrollee rather than participate in the claim dispute resolution process authorized by the Insurance Code Chapter 1467, the out of network provider or agent or assignee of the provider must provide the enrollee with the notice and disclosure statement specified in subparagraph (B) of this paragraph prior to scheduling the non-emergency health care or medical service or supply. To be effective, the notice and disclosure statement must be signed and dated by the enrollee no less than 10 business days before the date the service or supply is performed or provided. The enrollee may rescind acceptance within five business days from the date the notice and disclosure statement was signed, as explained in the notice and disclosure statement form referenced in subparagraph (B) of this paragraph.

(A) Each out of network provider, or the provider's agent or assignee, must maintain a copy of the notice and disclosure statement, signed and dated by the enrollee, for four years if the medical service or supply is provided and a balance bill is sent to the enrollee. The provider must provide the enrollee with a copy of the signed notice and disclosure statement on the same date the statement is received by the provider.

(B) The Texas Department of Insurance has adopted Form AH025 as the notice and disclosure statement to be used under this subsection. The notice and disclosure statement may not be modified, including its format or font size, and must be presented to an enrollee as a standalone document and not incorporated into any other document. The form is available from the Texas Department of Insurance by accessing its website at www.tdi.texas.gov/forms.

[(3) Collection Notices. On receipt of notice from the Texas Department of Insurance that an enrollee has made a request for mediation that meets the requirements of the Insurance Code Chapter 1467, the facility-based or emergency care provider may not pursue any collection efforts against the enrollee for amounts other than co-payments, deductibles, and co-insurance, before the earlier of the date the mediation is completed or the date the request to mediate is withdrawn.]

(4) A provider who seeks and obtains an enrollee's signature on a notice and disclosure statement under this subsection is not eligible to participate in the claim dispute resolution process authorized by the Insurance Code Chapter 1467. This prohibition does not apply if the election is defective or rescinded by the enrollee under paragraph (3) of this subsection.

(d) Complaint Investigation and Resolution. The Board is authorized under the Insurance Code §752.0003 to take disciplinary action against a licensee that violates a law that prohibits the licensee from billing an insured, participant, facility, or enrollee in an amount greater than an applicable copayment, coinsurance, and deductible under the insured's, participant's, or enrollee's managed care plan or that imposes a requirement related to that prohibition. Licensees may also be subject to additional consequences pursuant to the Insurance Code §752.0002. Complaints that do not involve delayed health care or medical care shall be assigned a Priority 4 status, as described in §213.13 of this title (relating to Complaint Investigation and Disposition). After investigation, if the Board determines that a licensee has engaged in improper billing practices or bad faith participation or has committed a violation of the Nursing Practice Act, the Insurance Code Chapter 1467, or other applicable law, the Board will impose appropriate disciplinary action.

[(1) Bad faith:]

[(A) Except for good cause shown, on a report of a mediator and appropriate proof of bad faith mediation, the Board shall impose an administrative penalty.]

[(B) The following conduct constitutes bad faith mediation:]

[(i) failing to participate in the mediation, if participation in the mediation was required:]

[(ii) failing to provide information the mediator believes is necessary to facilitate an agreement; or]

[(iii) failing to designate a representative participating in the mediation with full authority to enter into any mediated agreement.]

[(C) Failure to reach an agreement is not conclusive proof of bad faith mediation.]

[(2) Complaint process. A complaint may be filed with the Board by a mediator against a licensee for bad faith mediation or by an enrollee who is not satisfied with a mediated agreement. Complaints that do not involve delayed health care or medical care shall be assigned a Priority 4 status, as described in §213.13 of this title (relating to Complaint Investigation and Disposition). After investigation, if the Board determines that a licensee has engaged in improper billing practices or has committed a violation of the Nursing Practice Act, Chapter 1467, or other applicable law, the Board will impose appropriate disciplinary action.]

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

Filed with the Office of the Secretary of State on November 10, 2020.

TRD-202004771

Jena Abel

Deputy General Counsel

Texas Board of Nursing

Earliest possible date of adoption: December 27, 2020

For further information, please call: (512) 305-6822



PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 337. DISPLAY OF LICENSE

22 TAC §337.1

The Texas Board of Physical Therapy Examiners proposes amending 22 Texas Administrative Code (TAC) §337.1. Display of License.

The amendment is proposed to require licensees who provide physical therapy services through telehealth, home visits, or other non-traditional modes to provide information on accessing the board's online license verification system.

Fiscal Note

Ralph A. Harper, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners (ECP-TOTE), has determined that for the first five-year period these amendments are in effect there would be no increase or loss of revenue to the state. No fiscal implication to units of local government is anticipated as a result of enforcing or administering the rules.

Public Benefits and Costs

Mr. Harper has also determined that for the first five-year period these amendments are in effect the public benefit will be assurance that physical therapy services provided through telehealth, home visits, or other non-traditional modes are provided by an individual with a valid, unencumbered license.

Local Employment Economic Impact Statement

The amendments are not anticipated to impact a local economy, so a local employment economic impact statement is not required.

Small and Micro-Businesses and Rural Communities Impact

Mr. Harper has determined that there will be no costs or adverse economic effects to small or micro-businesses or rural communities; therefore, an economic impact statement or regulatory flexibility analysis is not required.

Government Growth Impact Statement

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

The proposed rule amendments will neither create nor eliminate a government program.

(2) The proposed rule amendments will neither create new employee positions nor eliminate existing employee positions.

(3) The proposed rule amendments will neither increase nor decrease future legislative appropriations to the agency.

(4) The proposed rule amendments will neither require an increase nor a decrease in fees paid to the agency.

(5) The proposed rule amendment revises an existing regulation by reformatting existing language and adding language to require licensees who provide physical therapy services through telehealth, home visits, or other non-traditional modes to provide information on accessing the board's online license verification system.

(6) The proposed rule amendments will neither repeal nor limit an existing regulation.

(7) The proposed rule amendments will neither increase nor decrease the number of individuals subject to the rule's applicability.

(8) The proposed rule amendments will neither positively nor adversely affect this state's economy.

Takings Impact Assessment

The proposed rule amendments will not impact private real property as defined by Tex. Gov't Code §2007.003, so a takings impact assessment under Tex. Gov't Code §2001.043 is not required.

Requirement for Rule Increasing Costs to Regulated Persons

Tex. Gov't Code §2001.0045, Requirement for Rule Increasing Costs to Regulated Persons, does not apply to this proposed rule amendment.

Public Comment

Comments on the proposed amendment may be submitted to Karen Gordon, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: karen@ptot.texas.gov. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register*.

Statutory Authority

The amendment is proposed under Texas Occupation Code §453.102, which authorizes the Board to adopt rules necessary to implement chapter 453. Additionally, the amendment is proposed under Texas Occupation Code §453.212, which requires license holders to display their license.

Cross-reference to Statute

The proposed amendment implements provisions in Sec. 453.212, Occupations Code that pertains to the display of license by license holders. No other statutes, articles, or codes are affected by these amendments.

§337.1. Display of License.

(a) The original license must be displayed in the licensee's principal place of practice.

(b) For physical therapy services provided through telehealth, home visits, or other non-traditional modes, the licensee must provide information on accessing the board's online license verification system.

(c) Displayed reproduction of the original license is unauthorized.

(d) Reproduction of the original license is authorized for institutional file purpose only. [Displayed reproduction of the original license is unauthorized. The original license must be displayed in the principal place of practice. Reproduction of the original license is authorized for institutional file purpose only.]

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 November 16, 2020.

TRD-202004820

Ralph A. Harper

Executive Director

Texas Board of Physical Therapy Examiners

Earliest possible date of adoption: December 27, 2020

For further information, please call: (512) 305-6900



22 TAC §337.2

The Texas Board of Physical Therapy Examiners proposes amending 22 Texas Administrative Code (TAC) §337.2, concerning Consumer Information Sign.

The amendment is proposed to require licensees who provide physical therapy services through telehealth, home visits, or other non-traditional modes to provide information on directing complaints regarding non-compliance with the Texas Physical Therapy Practice Act/Rules to the Texas Board of Physical Therapy Examiners.

Fiscal Note

Ralph A. Harper, Executive Director of the Executive Council of Physical Therapy & Occupational Therapy Examiners (ECP-TOTE), has determined that for the first five-year period these amendments are in effect there would be no increase or loss of revenue to the state. No fiscal implication to units of local government is anticipated as a result of enforcing or administering the rules.

Public Benefits and Costs

Mr. Harper has also determined that for the first five-year period these amendments are in effect the public benefit will be assurance that consumers of physical therapy services provided through telehealth, home visits, or other non-traditional modes will have information on directing complaints regarding non-compliance with the Texas Physical Therapy Practice Act/Rules to the Texas Board of Physical Therapy Examiners.

Local Employment Economic Impact Statement

The amendments are not anticipated to impact a local economy, so a local employment economic impact statement is not required.

Small and Micro-Businesses and Rural Communities Impact

Mr. Harper has determined that there will be no costs or adverse economic effects to small or micro-businesses or rural communities; therefore, an economic impact statement or regulatory flexibility analysis is not required.

Government Growth Impact Statement

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

- (1) The proposed rule amendments will neither create nor eliminate a government program.
- (2) The proposed rule amendments will neither create new employee positions nor eliminate existing employee positions.
- (3) The proposed rule amendments will neither increase nor decrease future legislative appropriations to the agency.
- (4) The proposed rule amendments will neither require an increase nor a decrease in fees paid to the agency.
- (5) The proposed rule amendment revises an existing regulation by adding language to require licensees who provide physical therapy services through telehealth, home visits, or other non-traditional modes to provide information on directing complaints regarding non-compliance with the Texas Physical Therapy Practice Act/Rules to the Texas Board of Physical Therapy Examiners.
- (6) The proposed rule amendments will neither repeal nor limit an existing regulation.
- (7) The proposed rule amendments will neither increase nor decrease the number of individuals subject to the rule's applicability.
- (8) The proposed rule amendments will neither positively nor adversely affect this state's economy.

Takings Impact Assessment

The proposed rule amendments will not impact private real property as defined by Tex. Gov't Code §2007.003, so a takings impact assessment under Tex. Gov't Code §2001.043 is not required.

Requirement for Rule Increasing Costs to Regulated Persons

Tex. Gov't Code §2001.0045, Requirement for Rule Increasing Costs to Regulated Persons, does not apply to this proposed rule amendment.

Public Comment

Comments on the proposed amendment may be submitted to Karen Gordon, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: karen@ptot.texas.gov. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register*.

Statutory Authority

The amendment is proposed under Texas Occupation Code §453.102, which authorizes the Board to adopt rules necessary to implement chapter 453. Additionally, the amendment is proposed under Texas Occupation Code §453.152, which requires license holders to provide a statement informing consumers that a complaint against a license holder can be directed to the board.

Cross-reference to Statute

The proposed amendment implements provisions in Sec. 453.152, Occupations Code that pertains to informing consumers that a complaint against a license holder can be directed to the board.

§337.2. Consumer Information Sign.

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

(c) For physical therapy services provided through telehealth, home visits, or other non-traditional modes, the licensee must provide information as described in subsection (b) of this section.

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

Filed with the Office of the Secretary of State on November 16, 2020.

TRD-202004821

Ralph A. Harper

Executive Director

Texas Board of Physical Therapy Examiners

Earliest possible date of adoption: December 27, 2020

For further information, please call: (512) 305-6900



CHAPTER 341. LICENSE RENEWAL

22 TAC §341.3

The Texas Board of Physical Therapy Examiners proposes amending 22 Texas Administrative Code (TAC) §341.3, Qualifying Continuing Competence Activities.

The amendments are proposed to clarify the documentation required for continuing competence approval of college or university courses in paragraph (2); to update language for completion of a residency or fellowship and required hours for mentorship of a resident or fellow to align with the standards set forth by the American Board of Physical Therapy Residency and Fellowship Education (ABPTRFE) in paragraph (5)(C) and (D); and to add paragraph (7) which provides a means for licensees to claim continuing competence credit for engaging in non-work related voluntary charity care.

Fiscal Note

Ralph A. Harper, Executive Director of the Executive Council of Physical Therapy & Occupational Therapy Examiners (ECP-TOTE), has determined that for the first five-year period these amendments are in effect there would be no increase or loss of revenue to the state. No fiscal implication to units of local government is anticipated as a result of enforcing or administering the rules.

Public Benefits and Costs

Mr. Harper has also determined that for the first five-year period these amendments are in effect the public benefit will be assurance that physical therapy licensees maintain their competence by engaging in a variety of qualifying continuing competence activities.

Local Employment Economic Impact Statement

The amendments are not anticipated to impact a local economy, so a local employment economic impact statement is not required.

Small and Micro-Businesses and Rural Communities Impact

Mr. Harper has determined that there will be no costs or adverse economic effects to small or micro-businesses or rural communities; therefore, an economic impact statement or regulatory flexibility analysis is not required.

Government Growth Impact Statement

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

- (1) The proposed rule amendments will neither create nor eliminate a government program.
- (2) The proposed rule amendments will neither create new employee positions nor eliminate existing employee positions.
- (3) The proposed rule amendments will neither increase nor decrease future legislative appropriations to the agency.
- (4) The proposed rule amendments will neither require an increase nor a decrease in fees paid to the agency.
- (5) The proposed rule amendment revises an existing regulation with updated language and addition of a qualifying continuing competence category.
- (6) The proposed rule amendments will neither repeal nor limit an existing regulation.
- (7) The proposed rule amendments will neither increase nor decrease the number of individuals subject to the rule's applicability.
- (8) The proposed rule amendments will neither positively nor adversely affect this state's economy.

Takings Impact Assessment

The proposed rule amendments will not impact private real property as defined by Tex. Gov't Code §2007.003, so a takings impact assessment under Tex. Gov't Code §2001.043 is not required.

Requirement for Rule Increasing Costs to Regulated Persons

Tex. Gov't Code §2001.0045, Requirement for Rule Increasing Costs to Regulated Persons, does not apply to this proposed rule amendment.

Public Comment

Comments on the proposed amendments may be submitted to Karen Gordon, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: karen@ptot.texas.gov. Comments must

be received no later than 30 days from the date this proposed amendment is published in the *Texas Register*.

Statutory Authority

The amended sections are proposed under Texas Occupation Code §453.102, which authorizes the Board to adopt rules necessary to implement chapter 453. Additionally, the amendments are proposed under Texas Occupation Code §453.254, which authorizes the Board to require license holders to complete continuing competence activities specified by the Board.

Cross-reference to Statute

The proposed amendment implements provisions in Sec. 453.254, Occupations Code that pertains to continuing competence requirements for license holders. No other statutes, articles, or codes are affected by these amendments.

§341.3. *Qualifying Continuing Competence Activities.*

Licensees may select from a variety of activities to fulfill the requirements for continuing competence. These activities include the following:

(1) (No change.)

(2) College or university courses.

(A) Courses at regionally accredited US colleges or universities easily recognizable as pertinent to the physical therapy profession and in the areas of ethics, professional responsibility, clinical application, clinical management, behavioral science, science, or risk management.

(i) The course must be at the appropriate educational level for the PT or the PTA.

(ii) All courses in this paragraph [subsection] are subject to the following:

(I) One satisfactorily completed credit hour (grade of C or equivalent, or higher) equals 10 CCUs.

(II) Documentation required for consideration is the course syllabus for each course and a [an official] transcript indicating successful completion of the course.

(III) If selected for audit, the licensee must submit the approval letter from the board-approved organization.

(B) College or university sponsored CE programs (no grade, no official transcript) must comply with paragraph (1)(A) of this section [subsection].

(C) College or university courses that are part of a post-professional physical therapy degree program, or are part of a CAPTE-accredited program bridging from PTA to PT, are automatically approved and are assigned a standard approval number by the board-approved organization. If selected for audit, the licensee must submit a [an official] transcript indicating successful completion of the course.

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

(5) Advanced Training, Certification, and Recognition.

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

(C) Residency or fellowship relevant to physical therapy. The residency or fellowship must be accredited by the American Board of Physical Therapy Residency and Fellowship Education (ABPTRFE). [The Board will maintain and make available a list of recognized residencies and fellowships.] This activity type is automatically approved and is assigned a standard approval number by the board approved organization.

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

(iii) If selected for audit, the licensee must submit a copy of the certificate of graduation indicating [letter notifying the licensee of] completion of the fellowship or residency. [, and a copy of the fellowship certificate.]

(D) Mentorship [Supervision or mentorship] of a resident or fellow in an American Board of Physical Therapy Residency and Fellowship Education (ABPTRFE) accredited [ereditialed] residency or fellowship program. This activity type is automatically approved and is assigned a standard approval number by the board-approved organization.

(i) Mentorship [Clinical supervision] of a resident or a fellow for a minimum of 150 [1500] hours of 1:1 mentoring [or a fellow for a minimum of 1000 hours] is valued at 10 CCUs. The Board will consider partial credit for those mentors who provide mentorship for only a portion of the residency or fellowship.

(ii) (No change.)

(iii) If selected for audit, the licensee must submit a copy of a letter from the accredited [ereditialed] residency or fellowship program confirming participation as a clinical mentor, with the dates and number of mentorship hours [length of time] served as a clinical mentor.

(E) (No change.)

(6) (No change.)

(7) Voluntary charity care. Providing physical therapy services for no compensation as a volunteer of a charitable organization as defined in §84.003 of the Texas Civil Practice and Remedies Code. This activity type is automatically approved and is assigned a standard approval number by the board-approved organization.

(A) Voluntary charity care must be non work-related.

(B) Proof of voluntary charity care can count toward up to one-half (1/2) of the continuing competence requirement.

(C) Ten (10) hours of voluntary charity care equals 1 CCU.

(D) If selected for audit, the licensee must submit a letter indicating the dates and number of hours of voluntary charity care on official charitable organization(s) letterhead.

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 November 16, 2020.

TRD-202004823

Ralph A. Harper

Executive Director

Texas Board of Physical Therapy Examiners

Earliest possible date of adoption: December 27, 2020

For further information, please call: (512) 305-6900



PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 518. UNAUTHORIZED PRACTICE OF PUBLIC ACCOUNTANCY

22 TAC §518.5

The Texas State Board of Public Accountancy (Board) proposes an amendment to §518.5, concerning Unlicensed Entities.

Background, Justification and Summary

CPA firms not licensed in Texas may practice in Texas if the firm is licensed in another state. This amendment distinguishes between a firm practicing in Texas without a license and a firm practicing in Texas through a license issued by another state.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit

The adoption of the proposed amendment clarifies that firms licensed in another state may practice in Texas without a Texas issued license so long as they are licensed in another state.

Probable Economic Cost and Local Employment Impact

Mr. Treacy, Executive Director, has determined that there will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business, Rural Community and Micro-Business Impact Analysis

William Treacy, Executive Director, has determined that the proposed amendment will not have an adverse economic effect on small businesses, rural communities or micro-businesses because the amendment does not impose any duties or obligations upon small businesses, rural communities or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis are not required.

Government Growth Impact Statement

William Treacy, Executive Director, has determined that for the first five-year period the amendment is in effect, the proposed rule: does not create or eliminate a government program; does not create or eliminate employee positions; does not increase or decrease future legislative appropriations to the Board; does not increase or decrease fees paid to the Board; does not create a new regulation; limits the existing regulation; does not increase or decrease the number of individuals subject to the proposed rule's applicability; and does not positively or adversely affect the state's economy.

Takings Impact Assessment

No takings impact assessment is necessary because there is no proposed use of private real property as a result of the proposed rule revision.

The requirement related to a rule increasing costs to regulated persons does not apply to the Texas State Board of Public Accountancy because the rule is being proposed by a self-directed semi-independent agency. (§2001.0045(c)(8))

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 505 E. Huntland Dr., Suite 380, Austin, Texas 78752 or faxed to his attention at (512) 305-7854, no later than noon on December 28, 2020.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses. If the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally, describe how the health, safety, environmental, and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code §901.151 and §901.655 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§518.5. *Unlicensed Entities.*

(a) An unlicensed entity is permitted to state that it has an ownership interest and a business affiliation with a registered CPA firm provided each such statement complies with subsection (b) of this section.

(b) In any letterhead, or in any advertising or promotional statements by an unlicensed entity that refers to accounting, auditing or attest services or any derivative terms associated with those services, there must be a statement that such services are only performed by the affiliated registered CPA firm. This statement must be included in conspicuous proximity to the name of the unlicensed entity and be printed in type not less bold than that contained in the body of the letterhead, advertisement or promotional statement. If the advertisement is in audio format, the statement must be clearly declared in each such presentation.

(c) An unlicensed entity performing attest services is in the unauthorized practice of public accountancy and in violation of the Act and the board's rules except a firm authorized to practice in this state pursuant to §901.461 of the Act (relating to Practice by Certain Out-of-State Firms).

(d) Interpretative Comment: This section clarifies that the mere mention of a business and ownership affiliation with a registered CPA firm on the letterhead, or in advertising or promotional statements, of an unlicensed entity does not violate the Act when done in compliance with the provisions of this section. This section also clarifies that the letterhead, advertising or promotional statements of the unlicensed entity may refer to accounting, auditing or attest services, or any derivative terms associated with those services, without violating §901.453 of the Act (relating to Use of Other Titles or Abbreviations). It also clarifies that all attest services must still be performed exclusively by registered CPA firms in accordance with the Act and all board rules. The definition of "attest services" is set forth in §501.52 of this title (relating to Definitions).

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

Filed with the Office of the Secretary of State on November 12, 2020.

TRD-202004799

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: December 27, 2020

For further information, please call: (512) 305-7842



22 TAC §518.6

The Texas State Board of Public Accountancy (Board) proposes an amendment to §518.6, concerning Administrative Penalty Guidelines for the Unauthorized Practice of Public Accountancy.

Background, Justification and Summary

The proposed amendment addresses the fact that the Board is not required to assess an administrative penalty for every Board rule violation.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit

The adoption of the proposed amendment will make it clear that the Board may choose to impose an administrative penalty or not for rule violations.

Probable Economic Cost and Local Employment Impact

Mr. Treacy, Executive Director, has determined that there will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business, Rural Community and Micro-Business Impact Analysis

William Treacy, Executive Director, has determined that the proposed amendment will not have an adverse economic effect on small businesses, rural communities or micro-businesses because the amendment does not impose any duties or obligations upon small businesses, rural communities or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis are not required.

Government Growth Impact Statement

William Treacy, Executive Director, has determined that for the first five-year period the amendment is in effect, the proposed rule: does not create or eliminate a government program; does not create or eliminate employee positions; does not increase or decrease future legislative appropriations to the Board; does not increase or decrease fees paid to the Board; does not create a new regulation; limits the existing regulation; does not increase

or decrease the number of individuals subject to the proposed rule's applicability; and does not positively or adversely affect the state's economy.

Takings Impact Assessment

No takings impact assessment is necessary because there is no proposed use of private real property as a result of the proposed rule revision.

The requirement related to a rule increasing costs to regulated persons does not apply to the Texas State Board of Public Accountancy because the rule is being proposed by a self-directed semi-independent agency. (§2001.0045(c)(8))

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 505 E. Huntland Dr., Suite 380, Austin, Texas 78752 or faxed to his attention at (512) 305-7854, no later than noon on December 28, 2020.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses. If the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally, describe how the health, safety, environmental, and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code §901.151 and §901.655 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§518.6. Administrative Penalty Guidelines for the Unauthorized Practice of Public Accountancy.

(a) The Board has the sole discretion in determining if a penalty will be assessed as well as the amount of the penalty. If assessed, the penalty [Any administrative penalty assessed under this chapter] will be in accordance with the following guidelines:

(1) an unlicensed individual who uses terms restricted for use by CPAs in violation of §§901.451, 901.452, 901.453 or 901.454 of the Act (relating to Use of Title or Abbreviation for "Certified Public Accountant"; Use of Title or Abbreviation for "Public Accountant"; Use of Other Titles or Abbreviations; and Title Used by Certain Out-of-State or Foreign Accountants) shall pay a penalty of no less than \$1,000.00 and no more than \$5,000.00 for a first offense; and no less than \$5,000.00 and no more than \$25,000.00 for two or more offenses;

(2) an unlicensed entity that uses terms restricted for use by licensed firms in violation of §901.351(a) of the Act (relating to Firm License Required) shall pay a penalty of no less than \$5,000.00 and no more than \$10,000.00 for a first offense; and no more than \$25,000.00 for two or more offenses;

(3) an unlicensed individual who asserts an expertise in accounting through use of the term "accounting service" or any variation of that term shall pay a penalty of no less than \$1,000.00 and no more than \$5,000.00 for a first offense; and no more than \$25,000.00 for two or more offenses;

(4) an unlicensed entity that asserts an expertise in accounting through use of the term "accounting service" or any variation of that term shall pay a penalty of no less than \$5,000.00 and no more than \$10,000.00 for a first offense; and no more than \$25,000.00 for two or more offenses;

(5) an unlicensed individual who claims to provide attest services shall pay a penalty of no less than \$5,000.00 and no more than \$25,000.00;

(6) an unlicensed entity that claims to provide attest services shall pay a penalty of no less than \$5,000.00 and no more than \$25,000.00;

(7) an unlicensed individual who claims to be a CPA shall pay a penalty of no less than \$5,000.00 and no more than \$25,000.00; and

(8) an unlicensed entity that claims to be a CPA firm shall pay a penalty of no less than \$5,000.00 and no more than \$25,000.00.

(b) An offense is counted as a second or more offense when the person has been notified in writing by the board that the person's actions violate the Public Accountancy Act and the person fails to correct the violation(s) within the time required in the written notification.

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 November 12, 2020.

TRD-202004800

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: December 27, 2020

For further information, please call: (512) 305-7842



CHAPTER 519. PRACTICE AND PROCEDURE SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §519.4

The Texas State Board of Public Accountancy (Board) proposes an amendment to §519.4, concerning Conduct and Decorum.

Background, Justification and Summary

The proposed amendment is a grammatical change to revise the word from singular to plural verb.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit

The adoption of the proposed amendment will be a grammatically correct rule.

Probable Economic Cost and Local Employment Impact

Mr. Treacy, Executive Director, has determined that there will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business, Rural Community and Micro-Business Impact Analysis

William Treacy, Executive Director, has determined that the proposed amendment will not have an adverse economic effect on small businesses, rural communities or micro-businesses because the amendment does not impose any duties or obligations upon small businesses, rural communities or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis are not required.

Government Growth Impact Statement

William Treacy, Executive Director, has determined that for the first five-year period the amendment is in effect, the proposed rule: does not create or eliminate a government program; does not create or eliminate employee positions; does not increase or decrease future legislative appropriations to the Board; does not increase or decrease fees paid to the Board; does not create a new regulation; limits the existing regulation; does not increase or decrease the number of individuals subject to the proposed rule's applicability; and does not positively or adversely affect the state's economy.

Takings Impact Assessment

No takings impact assessment is necessary because there is no proposed use of private real property as a result of the proposed rule revision.

The requirement related to a rule increasing costs to regulated persons does not apply to the Texas State Board of Public Accountancy because the rule is being proposed by a self-directed semi-independent agency. (§2001.0045(c)(8))

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 505 E. Huntland Dr., Suite 380, Austin, Texas 78752 or faxed to his attention at (512) 305-7854, no later than noon on December 28, 2020.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses. If the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally, describe how the health, safety, environmental, and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code §901.151 and §901.655 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§519.4. Conduct and Decorum.

(a) Every person, party, witness, attorney, or other representative appearing before the board, board committee or board staff shall comport himself in all proceedings with proper dignity, courtesy, and respect for the board, the executive director, and all other participants. Disorderly conduct will not be tolerated. Attorneys and other representatives of parties shall observe and practice the standards of ethical behavior prescribed for attorneys at law by the State Bar of Texas.

(b) Any person engaging in disorderly conduct or communicating with board members in violation of the prohibitions on ex parte communications [eommunication] may be excluded from any board, committee or staff proceeding and treated as if defaulting on obligations to the board.

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

Filed with the Office of the Secretary of State on November 12, 2020.

TRD-202004801

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: December 27, 2020

For further information, please call: (512) 305-7842



22 TAC §519.7

The Texas State Board of Public Accountancy (Board) proposes an amendment to §519.7, concerning Criminal Offenses that May Subject a Licensee or Certificate Holder to Discipline or Disqualify a Person from Receiving a License.

Background, Justification and Summary

The proposed revision is to add the misdemeanor offense of evading arrest to the list of criminal offenses that could result in a disciplinary action by the Board against a licensee.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit

The adoption of the proposed amendment will put the public on notice that the offense of evading arrest could result in disciplinary action.

Probable Economic Cost and Local Employment Impact

Mr. Treacy, Executive Director, has determined that there will be no probable economic cost to persons required to comply with

the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business, Rural Community and Micro-Business Impact Analysis

William Treacy, Executive Director, has determined that the proposed amendment will not have an adverse economic effect on small businesses, rural communities or micro-businesses because the amendment does not impose any duties or obligations upon small businesses, rural communities or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis are not required.

Government Growth Impact Statement

William Treacy, Executive Director, has determined that for the first five-year period the amendment is in effect, the proposed rule: does not create or eliminate a government program; does not create or eliminate employee positions; does not increase or decrease future legislative appropriations to the Board; does not increase or decrease fees paid to the Board; does not create a new regulation; limits the existing regulation; does not increase or decrease the number of individuals subject to the proposed rule's applicability; and does not positively or adversely affect the state's economy.

Takings Impact Assessment

No takings impact assessment is necessary because there is no proposed use of private real property as a result of the proposed rule revision.

The requirement related to a rule increasing costs to regulated persons does not apply to the Texas State Board of Public Accountancy because the rule is being proposed by a self-directed semi-independent agency. (§2001.0045(c)(8))

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 505 E. Huntland Dr., Suite 380, Austin, Texas 78752 or faxed to his attention at (512) 305-7854, no later than noon on December 28, 2020.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses. If the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally, describe how the health, safety, environmental, and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code §901.151 and §901.655, which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§519.7. Criminal Offenses that May Subject a Licensee or Certificate Holder to Discipline or Disqualify a Person from Receiving a License.

(a) Final conviction or placement on deferred adjudication for a felony, or final conviction or placement on deferred adjudication for the following misdemeanors may subject a licensee or certificate holder to disciplinary action pursuant to §501.90 of this title (relating to Discreditable Acts) or disqualify a person from receiving a license or certificate, or deny a person the opportunity to take the UCPAE pursuant to §511.70 of this title (relating to Grounds for Disciplinary Action of Applicants). Licensees and certificate holders are often placed in a position of trust with respect to client funds and assets. The public including the business community relies on the integrity of licensees and certificate holders in providing professional accounting services or professional accounting work. The board considers a conviction or placement on deferred adjudication for a felony or conviction or placement on deferred adjudication for the following misdemeanor offenses to be evidence of an individual lacking the integrity necessary to be trusted with client funds and assets. The repeated failure to follow state and federal criminal laws directly relates to the integrity required to practice public accountancy. The board has determined that the following list of misdemeanor offenses evidence violations of law that involve integrity and directly relate to the duties and responsibilities involved in providing professional accounting services or professional accounting work, pursuant to the provisions of Chapter 53 of the Occupations Code:

- (1) dishonesty or fraud:
 - (A) Unlawful Use of Criminal Instrument;
 - (B) Unlawful Access to Stored Communications;
 - (C) Illegal Divulgence of Public Communications;
 - (D) Burglary of Coin-Operated or Coin Collection Machines;
 - (E) Burglary of Vehicles;
 - (F) Theft;
 - (G) Theft of Service;
 - (H) Tampering with Identification Numbers;
 - (I) Theft of or Tampering with Multichannel Video or Information Services;
 - (J) Manufacture, Distribution, or Advertisement of Multichannel Video or Information Services Device;
 - (K) Sale or Lease of Multichannel Video or Information Services Device;
 - (L) Possession, Manufacture, or Distribution of Certain Instruments Used to Commit Retail Theft;
 - (M) Forgery;
 - (N) Criminal Simulation;
 - (O) Trademark Counterfeiting;
 - (P) Stealing or Receiving Stolen Check or Similar Sight Order;
 - (Q) False Statement to Obtain Property or Credit or in the Provision of Certain Services;
 - (R) Hindering Secured Creditors;
 - (S) Fraudulent Transfer of a Motor Vehicle;
 - (T) Credit Card Transaction Record Laundering;

(U) Issuance of a Bad Check;
(V) Deceptive Business Practices;
(W) Rigging Publicly Exhibited Contest;
(X) Misapplication of Fiduciary Property or Property of
Financial Institution;

(Y) Securing Execution of Document by Deception;
(Z) Fraudulent Destruction, Removal, or Concealment
of Writing;

(AA) Simulating Legal Process;
(BB) Refusal to Execute Release of Fraudulent Lien or
Claim;

(CC) Fraudulent, Substandard, or Fictitious Degree;
(DD) Breach of Computer Security;
(EE) Unauthorized Use of Telecommunications Ser-
vice;

(FF) Theft of Telecommunications Service;
(GG) Publication of Telecommunications Access De-
vice;

(HH) Insurance Fraud;
(II) Medicaid Fraud;
(JJ) Coercion of Public Servant or Voter;
(KK) Improper Influence;
(LL) Acceptance of Honorarium (by restricted govern-
ment employees);

(MM) Gift to Public Servant by Person Subject to his
Jurisdiction;

(NN) Offering Gift to Public Servant;
(OO) Perjury;
(PP) False Report to Police Officer or Law Enforcement
Employee;

(QQ) Tampering with or Fabricating Physical Evi-
dence;

(RR) Tampering with Governmental Record;
(SS) Fraudulent Filing of Financial Statement;
(TT) False Identification as Peace Officer;
(UU) Misrepresentation of Property;
(VV) Record of a Fraudulent Court;
(WW) Bail Jumping and Failure to Appear;

(XX) False Alarm or Report;
(YY) Engaging in Organized Criminal Activity;
(ZZ) Violation of Court Order Enjoining Organized
Criminal Activity; ~~and~~

(AAA) Failing to file license holder's own tax return;
and

(BBB) Evading arrest;

(2) moral turpitude:

(A) Public Lewdness;

(B) Indecent Exposure;

(C) Enticing a Child;

(D) Improper Contact with Victim;

(E) Abuse of Corpse;

(F) Prostitution;

(G) Promotion of Prostitution;

(H) Obscene Display or Distribution;

(I) Obscenity;

(J) Sale, Distribution, or Display of Harmful Material
to Minor; and

(K) Employment Harmful to Children;

(3) alcohol abuse or controlled substances:

(A) Possession of Substance in Penalty Group 3 (less
than 28 grams), under the Texas Health and Safety Code;

(B) Possession of Substance in Penalty Group 4 (less
than 28 grams), under the Texas Health and Safety Code;

(C) Manufacture, Delivery, or Possession with Intent to
Deliver Miscellaneous Substances, under the Texas Health and Safety
Code;

(D) Manufacture, Delivery, or Possession of Miscella-
neous Substances, under the Texas Health and Safety Code;

(E) Delivery of Marijuana, under the Texas Health and
Safety Code;

(F) Possession of Marijuana, under the Texas Health
and Safety Code;

(G) Possession or Transport of Certain Chemicals with
Intent to Manufacture Controlled Substance (for substance listed in
a Schedule but not in a Penalty Group), under the Texas Health and
Safety Code;

(H) Possession or Delivery of Drug Paraphernalia, un-
der the Texas Health and Safety Code;

(I) Obstructing Highway or Other Passageway; and

(J) Any misdemeanor involving intoxication under the
influence of alcohol or a controlled substance.

(4) physical injury or threats of physical injury to a person:

(A) Assault;

(B) Deadly Conduct;

(C) Terroristic Threat; and

(D) Leaving a Child in a Vehicle.

(b) A licensee or certificate holder is often placed in a posi-
tion of trust with respect to client funds; and the public, including the
business community, relies on the integrity of licensees and certificate
holders in preparing reports and providing professional accounting ser-
vices or professional accounting work. The board considers repeated
violations of criminal laws to relate directly to a licensee or certificate
holder providing professional accounting services or professional ac-
counting work.

(c) A conviction or placement on deferred adjudication for a
violation of any state or federal law that is equivalent to an offense
listed in subsection (a)(1) - (4) of this section is considered to directly
relate to a licensee or certificate holder providing professional account-

ing services or professional accounting work and may subject a certificate or registration holder to discipline by the board.

(d) Misdemeanor convictions in another state will be analyzed by the general counsel to determine if such out of state misdemeanor has an equivalency to Texas law prior to opening a complaint investigation.

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 November 12, 2020.

TRD-202004802

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: December 27, 2020

For further information, please call: (512) 305-7842



SUBCHAPTER C. PROCEEDINGS AT SOAH

22 TAC §519.40

The Texas State Board of Public Accountancy (Board) proposes an amendment to §519.40, concerning General Provisions.

Background, Justification and Summary

Occasionally licensees fail to respond to the public and/or fail to respond to the Board. When this occurs, the Board will seek a default judgment against the licensee. In those cases where this occurs regulatory expenses can be minimized by having the hearing conducted by the Executive Director.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit

The adoption of the proposed amendment will make the public aware of one of the steps in the Board's disciplinary process.

Probable Economic Cost and Local Employment Impact

Mr. Treacy, Executive Director, has determined that there will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business, Rural Community and Micro-Business Impact Analysis

William Treacy, Executive Director, has determined that the proposed amendment will not have an adverse economic effect on small businesses, rural communities or micro-businesses because the amendment does not impose any duties or obligations upon small businesses, rural communities or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis are not required.

Government Growth Impact Statement

William Treacy, Executive Director, has determined that for the first five-year period the amendment is in effect, the proposed rule: does not create or eliminate a government program; does not create or eliminate employee positions; does not increase or decrease future legislative appropriations to the Board; does not increase or decrease fees paid to the Board; does not create a new regulation; limits the existing regulation; does not increase or decrease the number of individuals subject to the proposed rule's applicability; and does not positively or adversely affect the state's economy.

Takings Impact Assessment

No takings impact assessment is necessary because there is no proposed use of private real property as a result of the proposed rule revision.

The requirement related to a rule increasing costs to regulated persons does not apply to the Texas State Board of Public Accountancy because the rule is being proposed by a self-directed semi-independent agency. (§2001.0045(c)(8))

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 505 E. Huntland Dr., Suite 380, Austin, Texas 78752 or faxed to his attention at (512) 305-7854, no later than noon on December 28, 2020.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses. If the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally, describe how the health, safety, environmental, and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code §901.151 and §901.655 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§519.40. General Provisions.

(a) The board appoints SOAH or the executive director as provided for in §519.24(f) of this chapter (relating to Committee Recommendations) to be its finder of fact in contested cases pursuant to §901.508 of the Act (relating to Right to Hearing). The board does not delegate [to the ALJ] and retains for itself the right to determine the sanctions and make the final decision in any contested case.

(b) SOAH hearings of contested cases shall be conducted in accordance with the APA by an ALJ assigned by SOAH. Jurisdiction over the case is acquired by SOAH when the board staff files a request to docket case.

(c) For administrative hearings or proceedings covered by the APA a witness called by the board is entitled to receive reimbursement from the board for meals, lodging and mileage while going to and returning from the place of the hearing or proceeding if the hearing or proceeding is more than 25 miles from the place of residence of the witness, and such reimbursement will be at the rate:

(1) provided by law for state employees if the witness uses their personally owned or leased motor vehicle to attend the hearing or proceeding;

(2) provided by law for state employees if the witness does not use their personally owned or leased motor vehicle to attend the hearing or proceeding; and

(3) for meals and lodging provided by law for state employees.

(d) The board will pay the witness a \$50.00 fee for each day or portion of day the witness appears on behalf of the board at a SOAH docketed administrative hearing or related proceeding the witness attends.

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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J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

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For further information, please call: (512) 305-7842



PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 534. GENERAL ADMINISTRATION

22 TAC §534.7

The Texas Real Estate Commission (TREC) proposes the repeal of 22 TAC §534.7, Vendor Protest Procedures, in Chapter 534, General Administration. The proposed repeal of §534.7 eliminates the agency's use of vendor protest procedures adopted by the Texas Facilities Commission. TREC will replace these vendor protest procedures in rule with a new set of vendor protest procedures that better meet the agency's needs and provide greater transparency to both members of the public and parties seeking to protest.

Vanessa E. Burgess, General Counsel, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the repeal. There is no adverse economic effect anticipated for small businesses, micro-businesses, rural communities, or local or state employment as a result of implementing the proposed repeal. There is no significant economic cost anticipated for persons who are required to comply with the proposed repeal. Accordingly, no Economic Impact Statement or Regulatory Flexibility Analysis is required.

Ms. Burgess also has determined that for each year of the first five years the repeal as proposed is in effect, the public benefits anticipated as a result of enforcing the repeal as proposed will be a process that is easier to follow and understand and that better addresses vendor protest situations that may arise in contracts for a licensing agency like TREC.

For each year of the first five years the proposed repeal is in effect the repeal will not:

-create or eliminate a government program;

-require the creation of new employee positions or the elimination of existing employee positions;

-require an increase or decrease in future legislative appropriations to the agency;

-require an increase or decrease in fees paid to the agency;

-create a new regulation;

-expand an existing regulation;

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

-positively or adversely affect the state's economy.

Comments on the proposal may be submitted to Vanessa E. Burgess, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to general.counsel@trec.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register*.

The repeal is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102, as well as Texas Occupations Code 1105.006, which grants the Texas Real Estate Commission authority to contract and do all other acts incidental to those contracts, and section 2255.076 of the Texas Government Code, which requires state agencies to adopt by rule vendor protest procedures.

The statutes affected by this proposal are Texas Occupations Code, Chapters 1101, 1102, and 1105. No other statute, code or article is affected by the proposed repeal.

§534.7. Vendor Protest Procedures.

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

Filed with the Office of the Secretary of State on November 13, 2020.

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Vanessa Burgess

General Counsel

Texas Real Estate Commission

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For further information, please call: (512) 936-3284



22 TAC §534.7

The Texas Real Estate Commission (TREC) proposes new 22 TAC §534.7, Vendor Protest Procedures, in Chapter 534, General Administration. The proposed new §534.7 creates new vendor protest procedures that better meet the agency's needs than

the previous version. This new rule also more clearly establishes the agency's protest review and appeal process and identifies the roles and requirements of both TREC staff and the protesting party.

Vanessa E. Burgess, General Counsel, has determined that for the first five-year period the proposed new rule is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the section. There is no adverse economic effect anticipated for small businesses, micro-businesses, rural communities, or local or state employment as a result of implementing the proposed new rule. There is no significant economic cost anticipated for persons who are required to comply with the proposed new rule. Accordingly, no Economic Impact Statement or Regulatory Flexibility Analysis is required.

Ms. Burgess also has determined that for each year of the first five years the new rule as proposed is in effect, the public benefits anticipated as a result of enforcing the new rule as proposed will be a process that is easier for both members of the public and protesting parties to follow and understand and is more in line with the types of procurements and contracts of a licensing agency like TREC.

For each year of the first five years the proposed new rule is in effect the new rule will not:

- create or eliminate a government program;
- require the creation of new employee positions or the elimination of existing employee positions;
- require an increase or decrease in future legislative appropriations to the agency;
- require an increase or decrease in fees paid to the agency;
- create a new regulation;
- expand an existing regulation;
- increase or decrease the number of individuals subject to the rule's applicability; or
- positively or adversely affect the state's economy.

Comments on the proposal may be submitted to Vanessa E. Burgess, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to general.counsel@trec.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register*.

The new rule is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102, as well as Texas Occupations Code 1105.006, which grants the Texas Real Estate Commission authority to contract and do all other acts incidental to those contracts, and section 2255.076 of the Texas Government Code, which requires state agencies to adopt by rule vendor protest procedures.

The statutes affected by this proposal are Texas Occupations Code, Chapters 1101, 1102, and 1105. No other statute, code or article is affected by the proposed new rule.

§534.7. Vendor Protest Procedures.

(a) The purpose of this section is to provide a procedure for vendors to protest purchases made by the Texas Real Estate Commission ("Commission") and the Texas Appraiser Licensing and Certification Board (collectively "the agency"). Protests of purchases made by

the Texas Facilities Commission ("TFC") on behalf of the agency are addressed in 1 Texas Administrative Code Chapter 111, Subchapter C (relating to Complaints and Dispute Resolution). Protests of purchases made by the Department of Information Resources (DIR) on behalf of the agency are addressed in 1 Texas Administrative Code Chapter 201, §201.1 (relating to Procedures for Vendor Protests and the Negotiation and Mediation of Certain Contract Disputes and Bid Submission, Opening and Tabulation Procedures). Protests of purchases made by the Statewide Procurement Division of the Comptroller of Public Accounts ("CPA") on behalf of the agency are addressed in 34 Texas Administrative Code Chapter 20, Subchapter F, Division 3 (relating to Protests and Appeals). The rules of TFC, DIR, and the CPA are in the Texas Administrative Code, which is on the Internet website of the Office of the Secretary of State, Texas Register Division at: www.sos.state.tx.us/tac/index.shtml.

(b) Any actual or prospective bidder, offeror, or contractor who believes they are aggrieved in connection with the solicitation, evaluation, or award of a contract may formally protest to the agency. Such protests must be in writing and received in the office of the Director of Finance within ten working days after such aggrieved person knows, or should have known, of the occurrence of the action which is protested. Formal protests must conform to the requirements set forth in subsection (c) of this section. Copies of the protest must be mailed or delivered by the protesting party to all vendors who have submitted bids or proposals for the contract involved.

(c) A formal protest must be sworn and contain:

(1) a specific identification of the statutory provision(s) that the action complained of is alleged to have violated;

(2) a specific description of each act alleged to have violated the statutory provision(s) identified in paragraph (1) of this subsection;

(3) a precise statement of the relevant facts;

(4) an identification of the issue or issues to be resolved;

(5) argument and authorities in support of the protest; and

(6) a statement that copies of the protest have been mailed or delivered to other identifiable interested parties.

(d) The Director of Finance shall have the authority, prior to appeal to the Executive Director or his or her designee, to settle and resolve the dispute concerning the solicitation or award of a contract. The Director of Finance may solicit written responses to the protest from other interested parties.

(e) If the protest is not resolved by mutual agreement, the Director of Finance will issue a written determination on the protest.

(1) If the Director of Finance determines that no violation of rules or statutes has occurred, he or she shall so inform the protesting party and interested parties by letter which sets forth the reasons for the determination.

(2) If the Director of Finance determines that a violation of the rules or statutes has occurred in a case where a contract has not been awarded, he or she shall so inform the protesting party and other interested parties by letter which sets forth the reasons for the determination and any appropriate remedial action.

(3) If the Director of Finance determines that a violation of the rules or statutes has occurred in a case where a contract has been awarded, he or she shall so inform the protesting party and other interested parties by letter which sets forth the reasons for the determination and any appropriate remedial action. Such remedial action may

include, but is not limited to, declaring the purchase void; reversing the award; and re-advertising the purchase using revised specifications.

(f) The Director of Finance's determination on a protest may be appealed by an interested party to the Executive Director or his or her designee. An appeal of the Director of Finance's determination must be in writing and must be received in the office of the Executive Director or his or her designee no later than ten working days after the date of the Director of Finance's determination. The appeal shall be limited to review of the Director of Finance's determination. Copies of the appeal must be mailed or delivered by the appealing party to other interested parties and must contain an affidavit that such copies have been provided.

(g) The General Counsel shall review the protest, Director of Finance's determination, and the appeal and prepare a written opinion with recommendation to the executive director or his designee. The executive director or his or her designee may, in his or her discretion, refer the matter to TREC at a regularly scheduled open meeting or issue a final written determination.

(h) When a protest has been appealed to the Executive Director or his or her designee under subsection (f) of this section and has been referred to the relevant Commission or Board of TREC by the Executive Director or his or her designee under subsection (g) of this section, the following requirements shall apply:

(1) Copies of the appeal, responses of interested parties, if any, and General Counsel recommendation shall be mailed to the TREC members and interested parties. Copies of the general counsel's recommendation and responses of interested parties shall be mailed to the appealing party.

(2) All interested parties who wish to make an oral presentation at TREC's open meeting are requested to notify the office General Counsel at least two working days in advance of the open meeting.

(3) TREC may consider oral presentations and written documents presented by staff, the appealing party, and interested parties. The chairman shall set the order and amount of time allowed for presentations.

(4) TREC's determination of the appeal shall be by duly adopted resolution reflected in the minutes of the open meeting and shall be final.

(i) Unless good cause for delay is shown or the Executive Director or his or her designee determines that a protest or appeal raises issues significant to procurement practices or procedures, a protest or appeal that is not filed timely will not be considered.

(j) In the event of a timely protest or appeal under this section, a protestor or appellant may request in writing that the agency not proceed further with the solicitation or with the award of the contract. In support of the request, the protestor or appellant is required to show why a stay is necessary and that harm to the agency will not result from the stay. If the Executive Director determines that it is in the interest of agency not to proceed with the contract, the Executive Director may make such a determination in writing and partially or fully suspend contract activity.

(k) A decision issued either by TREC in open meeting, or in writing by the Executive Director or his or her designee, shall constitute the final administrative action of the agency.

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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Vanessa Burgess

General Counsel

Texas Real Estate Commission

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For further information, please call: (512) 936-3284



CHAPTER 535. GENERAL PROVISIONS

SUBCHAPTER I. LICENSE RENEWAL

22 TAC §535.91

The Texas Real Estate Commission (TREC) proposes an amendment to 22 TAC §535.91, Renewal of a Real Estate License, in Chapter 535, General Provisions. The proposed amendment to §535.91 corrects a reference within the rule to include the appropriate subsection.

Vanessa E. Burgess, General Counsel, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the sections. There is no adverse economic effect anticipated for small businesses, micro-businesses, rural communities, or local or state employment as a result of implementing the proposed amendment. Accordingly, no Economic Impact Statement or Regulatory Flexibility Analysis is required.

Ms. Burgess also has determined that for each year of the first five years the section as proposed is in effect, the public benefits anticipated as a result of enforcing this section as proposed will be improved clarity and precision of rule references for members of the public and license holders.

For each year of the first five years the proposed amendment is in effect the amendment will not:

- create or eliminate a government program;
- require the creation of new employee positions or the elimination of existing employee positions;
- require an increase or decrease in future legislative appropriations to the agency;
- require an increase or decrease in fees paid to the agency;
- create a new regulation;
- expand, limit or repeal an existing regulation;
- increase or decrease the number of individuals subject to the rule's applicability; or
- positively or adversely affect the state's economy.

Comments on the proposal may be submitted to Vanessa E. Burgess, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to general.counsel@trec.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register*.

The amendment is proposed under Texas Occupations Code §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and

ethics for its license holders to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statute affected by this proposal is Texas Occupations Code, Chapters 1101. No other statute, code or article is affected by the proposed amendment.

§535.91. Renewal of a Real Estate License.

(a) Renewal application.

(1) A real estate license expires on the date shown on the face of the license issued to the license holder.

(2) If a license holder intends to renew an unexpired license, the license holder must, on or before the expiration date of the current license:

(A) file a renewal application through the online process on the Commission's website or on the applicable form approved by the Commission;

(B) submit the appropriate fee required by §535.101 of this title (relating to Fees);

(C) comply with the fingerprinting requirements under the Act; and

(D) except as provided for in subsection (g) of this section, satisfy the continuing education requirements applicable to that license.

(3) The Commission may request additional information be provided to the Commission in connection with a renewal application.

(4) A license holder is required to provide information requested by the Commission not later than the 30th day after the date the commission requests the information. Failure to provide information is grounds for disciplinary action.

(b) Renewal Notice.

(1) The Commission will deliver a license renewal notice to a license holder three months before the expiration of the license holder's current license.

(2) If a license holder intends to renew a license, failure to receive a license renewal notice from the Commission does not relieve a license holder from the requirements of this subsection.

(3) The Commission has no obligation to notify any license holder who has failed to provide the Commission with the person's mailing address and email address or a corporation, limited liability company, or partnership that has failed to designate an officer, manager, or partner who meets the requirements of the Act.

(c) Timely renewal of a license.

(1) A renewal application for an individual broker or sales agent is filed timely if it is received by the Commission, or postmarked, on or before the license expiration date.

(2) A renewal application for a business entity broker is filed timely if the application and all required supporting documentation is received by the Commission, or postmarked, not later than the 10th business day before the license expiration date.

(3) If the license expires on a Saturday, Sunday or any other day on which the Commission is not open for business, a renewal application is considered to be filed timely if the application is received or postmarked no later than the first business day after the expiration date of the license.

(d) Initial renewal of sales agent license. A sales agent applying for the first renewal of a sales agent license must:

(1) submit documentation to the Commission showing successful completion of the additional educational requirements of §535.55 of this chapter (relating to Education and Sponsorship Requirements for a Sales Agent License) no later than 10 business days before the day the sales agent files the renewal application; and

(2) fulfill the continuing education requirements of §535.92(a)(1) and (a)(2) of this subchapter and §535.92(a)(4) [§535.92(a)(3)] of this subchapter (relating to Continuing Education Requirements), if applicable.

(e) Renewal of license issued to a business entity. The Commission will not renew a license issued to a business entity unless the business entity:

(1) has designated a corporate officer, an LLC manager, an LLC member with managing authority, or a general partner who:

(A) is a licensed broker in active status and good standing with the Commission; and

(B) completes any applicable continuing education required under §535.92;

(2) maintains errors and omissions insurance with a minimum annual limit of \$1 million per occurrence if the designated broker owns less than 10 percent of the business entity; and

(3) is currently eligible to transact business in Texas.

(f) Renewal and pending complaints.

(1) The Commission may renew the current license of a license holder that has a complaint pending with the Commission, provided the license holder meets all other applicable requirements of this section.

(2) Upon completion of the investigation of the pending complaint, the Commission may suspend or revoke the license, after notice and hearing in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001.

(g) Renewal with deferred continuing education.

(1) A license holder may renew an active license without completion of required continuing education and may defer completion of any outstanding continuing education requirements for an additional 60 days from the expiration date of the current license if the license holder:

(A) meets all other applicable requirements of this section; and

(B) pays the continuing education deferral fee required by §535.101 of this title at the time the license holder files the renewal application with the Commission.

(2) If after expiration of the 60 day period set out in paragraph (1) of this subsection, the Commission has not been provided with evidence that the license holder has completed all outstanding continuing education requirements, the license holder's license will be placed on inactive status.

(3) To activate an inactive license, the license holder must meet the requirements of Subchapter L of this Chapter.

(4) Credit for continuing education courses for a subsequent licensing period does not accrue until after all deferred continuing education has been completed for the current licensing period.

(h) Denial of Renewal. The Commission may deny an application for renewal of a license if the license holder is in violation of the terms of a Commission order.

(i) Renewal of license for military service member. A license holder on active duty in the United States armed forces is entitled to two years of additional time to renew an expired license without being subject to any increase in fee, any education or experience requirements or examination if the license holder:

(1) provides a copy of official orders or other official documentation acceptable to the Commission showing that the license holder was on active duty during the license holder's last renewal period; and

(2) pays the renewal application fee in effect when the previous license expired.

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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Vanessa Burgess

General Counsel

Texas Real Estate Commission

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For further information, please call: (512) 936-3284



SUBCHAPTER Q. ADMINISTRATIVE PENALTIES

22 TAC §535.191

The Texas Real Estate Commission (TREC) proposes amendments to 22 TAC §535.191, Schedule of Administrative Penalties, in Chapter 535, General Provisions. The proposed amendment corrects a reference within the agency's schedule of administrative penalties that corresponds to statutory changes enacted by the 86th Legislature in SB 624.

Vanessa E. Burgess, General Counsel, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the sections. There is no adverse economic effect anticipated for small businesses, micro-businesses, rural communities, or local or state employment as a result of implementing the proposed amendments. There is no significant economic cost anticipated for persons who are required to comply with the proposed amendments. Accordingly, no Economic Impact Statement or Regulatory Flexibility Analysis is required.

Ms. Burgess also has determined that for each year of the first five years the sections as proposed are in effect, the public benefits anticipated as a result of enforcing this section as proposed will be improved clarity and greater transparency for members of the public and license holders, as well as requirements that are consistent with the statute and easier to understand, apply and process.

For each year of the first five years the proposed amendments are in effect the amendments will not:

-create or eliminate a government program;

-require the creation of new employee positions or the elimination of existing employee positions;

-require an increase or decrease in future legislative appropriations to the agency;

-require an increase or decrease in fees paid to the agency;

-create a new regulation;

-expand, limit or repeal an existing regulation;

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

-positively or adversely affect the state's economy.

Comments on the proposal may be submitted to Vanessa E. Burgess, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to general.counsel@trec.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its license holders to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the proposed amendments.

§535.191. *Schedule of Administrative Penalties.*

(a) The Commission may suspend or revoke a license or take other disciplinary action authorized by the Act in addition to or instead of assessing the administrative penalties set forth in this section.

(b) The administrative penalties set forth in this section take into consideration all of the criteria listed in §1101.702(b) of the Act.

(c) An administrative penalty range of \$100 - \$1,500 per violation per day may be assessed for violations of the following sections of the Act and Rules:

- (1) §1101.552;
- (2) §1101.652(a)(3);
- (3) §1101.652(a)(8);
- (4) §1101.652(a-1)(3);
- (5) §1101.652(b)(23);
- (6) §1101.652(b)(29);
- (7) §1101.652(b)(33);
- (8) 22 TAC §535.21(a);
- (9) 22 TAC §535.53;
- (10) 22 TAC §535.65;
- (11) 22 TAC §535.91(d);
- (12) 22 TAC §535.121;
- (13) 22 TAC §535.154;
- (14) 22 TAC §535.155; and
- (15) 22 TAC §535.300.

(d) An administrative penalty range of \$500 - \$3,000 per violation per day may be assessed for violations of the following sections of the Act and Rules:

- (1) §§1101.652(a)(4) - (7);
- (2) §1101.652(a-1)(2);
- (3) §1101.652(b)(1);
- (4) §§1101.652(b)(7) - (8);
- (5) §1101.652(b)(12);
- (6) §1101.652(b)(14);
- (7) §1101.652(b)(22);
- (8) §1101.652(b)(28);
- (9) §§1101.652(b)(30) - (31);
- (10) §1101.654(a);
- (11) 22 TAC §531.18;
- (12) 22 TAC §531.20;
- (13) 22 TAC §535.2;
- (14) 22 TAC §535.6(c) - (d);
- (15) 22 TAC §535.16;
- (16) 22 TAC §535.17; and
- (17) 22 TAC §535.144.

(e) An administrative penalty range of \$1,000 - \$5,000 per violation per day may be assessed for violations of the following sections of the Act and Rules:

- (1) §1101.351;
- (2) §1101.366(d);
- (3) §1101.557(b);
- (4) §1101.558;
- (5) §§1101.559(a) and (c);
- (6) §1101.560;
- (7) §1101.561(b);
- (8) §1101.615;
- (9) §1101.651;
- (10) §1101.652(a)(2);
- (11) §1101.652(a-1)(1);
- (12) §§1101.652(b)(2) - (6);
- (13) §§1101.652(b)(9) - (11);
- (14) §1101.652(b)(13);
- (15) §§1101.652(b)(15) - (21);
- (16) §§1101.652(b)(24) - (27);
- (17) §1101.652(b)(32);
- (18) 22 TAC §535.141(f) [~~22 TAC §535.141(g)~~];
- (19) 22 TAC §§535.145 - 535.148; and
- (20) 22 TAC §535.156.

(f) The Commission may assess an additional administrative penalty of up to two times that assessed under subsections (c), (d) and

(e) of this section, subject to the maximum penalties authorized under §1101.702(a) of the Act, if a person has a history of previous violations.

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 November 13, 2020.

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Vanessa Burgess

General Counsel

Texas Real Estate Commission

Earliest possible date of adoption: December 27, 2020

For further information, please call: (512) 936-3284



SUBCHAPTER R. REAL ESTATE INSPECTORS

22 TAC §535.216

The Texas Real Estate Commission (TREC) proposes amendments to §535.216, Renewal of License, in Subchapter R of Chapter 535, General Provisions. The proposed amendments implement statutory changes enacted by the 83rd Legislature in HB 2911 stating that applicants for reinstatement of license under Chapter 1102 of the Texas Occupations Code who previously held the same license within the two years preceding the application date are eligible for reinstatement so long as they have completed the required continuing education hours for renewal and satisfy the agency's requirements for honesty, trustworthiness, and integrity. Applicants meeting those criteria are not required to retake the exam for licensure. Additionally, applicants for a real estate inspector license reinstatement must submit evidence of sponsorship by a professional inspector. The Texas Real Estate Inspector Committee recommends these proposed amendments.

Vanessa E. Burgess, General Counsel, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the section. There is no adverse economic effect anticipated for small businesses, micro-businesses, rural communities, or local or state employment as a result of implementing the proposed amendments. There is no significant economic cost anticipated for persons who are required to comply with the proposed amendments. Accordingly, no Economic Impact Statement or Regulatory Flexibility Analysis is required.

There is no significant economic cost anticipated for persons who are required to comply with the proposed amendments. Accordingly, no Economic Impact Statement or Regulatory Flexibility Analysis is required.

Ms. Burgess also has determined that for each year of the first five years the section as proposed is in effect, the public benefit anticipated as a result of the changes is increased efficiency, improved clarity, and compliance with statute.

For each year of the first five years the proposed amendments are in effect the amendments will not:

-create or eliminate a government program;

- require the creation of new employee positions or the elimination of existing employee positions;
- require an increase or decrease in future legislative appropriations to the agency;
- require an increase or decrease in fees paid to the agency;
- create a new regulation;
- expand, limit or repeal an existing regulation;
- increase or decrease the number of individuals subject to the rule's applicability; or
- positively or adversely affect the state's economy.

Comments on the proposal may be submitted to Vanessa E. Burgess, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to general.counsel@trec.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its license holders to fulfill the purposes of Chapters 1101 and 1102.

The statute affected by this proposal is Chapter 1102, Texas Occupations Code. No other statute, code or article is affected by the proposed amendments.

§535.216. *Renewal of License.*

(a) Renewal application.

(1) A license issued by the Commission under Chapter 1102, Occupations Code, expires on the date shown on the face of the license issued to the license holder.

(2) If a license holder intends to renew an unexpired license, the license holder must, on or before the expiration date of the current license:

(A) file a renewal application through the online process on the Commission's website or on the applicable form approved by the Commission;

(B) pay the appropriate fee as required by §535.210 of this title;

(C) comply with the fingerprinting requirements of Chapter 1102, Occupations Code;

(D) satisfy the applicable continuing education requirements of Chapter 1102, Occupations Code, and this subchapter; and

(E) provide proof of financial responsibility as required in Chapter 1102, Occupations Code, on a form approved by the Commission.

(3) An apprentice inspector or a real estate inspector must be sponsored by a licensed professional inspector in order to renew a license on an active status.

(b) Renewal Notice.

(1) The Commission will send a renewal notice to each license holder at least 90 days before the license expiration date.

(2) If a license holder intends to renew a license, failure to receive a renewal notice does not relieve the license holder from responsibility of applying for renewal as required in this section.

(c) Request for information.

(1) The Commission may request a license holder to provide additional information to the Commission in connection with a renewal application.

(2) A license holder must provide the information requested by the Commission within 30 days after the date of the Commission's request.

(3) Failure to provide the information requested within the required time is grounds for disciplinary action under Chapter 1102, Occupations Code.

(d) Renewal on inactive status.

(1) Licensed professional inspectors, real estate inspectors and apprentice inspectors may renew a license on inactive status.

(2) Inspectors are not required to complete continuing education courses as a condition of renewing a license on inactive status, but must satisfy continuing education requirements before returning to active status.

(e) Late Renewal.

(1) If a license has been expired for less than six months, a license holder may renew the license by:

(A) filing a renewal application through the online process on the Commission's website or on the applicable form approved by the Commission;

(B) paying the appropriate late renewal fee as required by §535.210 of this title (related to Fees);

(C) satisfying the applicable continuing education requirements; and

(D) providing proof of financial responsibility on a form approved by the Commission.

(2) To renew a license on active status without any lapse in active licensure, an apprentice or real estate inspector must also submit a Real Estate Apprentice and Inspector Sponsorship Form certifying sponsorship for the period from the day after the previous license expired to the day the renewal license issued, and for the period beginning on the day after the renewal license issued. The same inspector may be the sponsor for both periods. The Commission will renew the license on inactive status for the period(s) in which the apprentice or real estate inspector was not sponsored.

(f) License Reinstatement.

(1) If a license has been expired for more than six months ~~[or more]~~, a license holder may not renew the license. ~~[and must file an original application to reinstate the license and satisfy all requirements for licensure, except as provided in paragraph (3) of this subsection.]~~

(2) A license holder may reinstate an expired license if the license holder: ~~[not continue to practice until the new license is received.]~~

(A) has held a professional inspector or real estate inspector license during the 24 months preceding the date the reinstatement application is filed;

(B) submits evidence satisfactory to the commission of successful completion of the continuing education hours required for the renewal of that license; and

(C) satisfies the commission as to the applicant's honesty, trustworthiness, and integrity.

(3) Applicants for a real estate inspector license must submit evidence of sponsorship by a professional inspector. [If an applicant for reinstatement has held a professional inspector or real estate inspector license during the 24 months preceding the date the application is filed, no examination is required.]

(4) An applicant for reinstatement is not required to take an examination.

(g) Denial of Renewal or Reinstatement. The Commission may deny an application for license renewal or reinstatement if a license holder is in violation of the terms of a Commission order.

(h) Renewal of license for military service member. A license holder on active duty in the United States armed forces is entitled to two years of additional time to renew an expired license without being subject to any increase in fee, any education or experience requirements or examination if the license holder:

(1) provides a copy of official orders or other official documentation acceptable to the Commission showing that the license holder was on active duty during the license holder's last renewal period; and

(2) pays the renewal application fee in effect when the previous license expired.

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 November 13, 2020.

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Vanessa Burgess

General Counsel

Texas Real Estate Commission

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For further information, please call: (512) 936-3284



TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 19. LICENSING AND REGULATION OF INSURANCE PROFESSIONALS

SUBCHAPTER K. CONTINUING EDUCATION, ADJUSTER PRELICENSING EDUCATION PROGRAMS, AND CERTIFICATION COURSES

28 TAC §§19.1006, 19.1010, 19.1011, 19.1029

The Texas Department of Insurance (TDI) proposes to amend 28 Texas Administrative Code (TAC) §§19.1006, 19.1010, 19.1011, and 19.1029, concerning continuing education (CE) requirements of insurance professionals, including agents, adjusters, public insurance adjusters, and managing general agents. The amendments to §19.1029 implement Insurance Code §4004.202(b), concerning CE hours requirements for agents who sell annuities. TDI has also proposed amendments

to §§19.1006, 19.1010, and 19.1011 to modernize and streamline the CE process for insurance professionals. Additionally, TDI proposes amendments to §§19.1006, 19.1011, and 19.1029 to reflect current TDI style guidelines.

EXPLANATION. In response to a TDI initiative to identify rules for updates and changes, stakeholders requested that TDI amend the CE rules to simplify existing requirements and add options for obtaining CE course credit. In response to this, the proposed amendments to §§19.1006, 19.1010, and 19.1011 update the rules to reflect best practices for the CE requirements of insurance professionals.

Amendments to §19.1006 update the CE course topics, providing more detail and choices to make it easier for insurance professionals to obtain individually tailored CE. Amendments to §19.1010 add ways to calculate CE hours and simplify credit hours to include only whole numbers, to align with industry best practices. And amendments to §19.1011 give providers more flexibility in administering a CE exam and makes clear that a CE provider may issue an electronic certificate for CE course completion directly to the insurance professional. These amendments will help ensure that insurance professionals acquire and maintain the expertise to properly serve Texas insureds.

Further, the Legislature amended Insurance Code §4004.202(b) in response to a TDI biennial report that called for additional CE requirements because of increased consumer complaints about complex insurance products. The proposed amendment to §19.1029 will bring the rule into compliance with Insurance Code §4004.202(b).

The proposed amendments to the sections are described in the following paragraphs.

Section 19.1006. Section 19.1006(a) is amended to expand and modernize the nonexclusive list of topics that may be covered as part of a certified continuing education course. The amended list contains 31 topics listed in new paragraphs (1) through (31), including new topics related to financial planning. Subsection (a) is further amended to clarify course content requirements for ethics and consumer protection credit by deleting current paragraphs (1) - (18) and inserting text that tracks those paragraphs into new paragraph (8)(A) - (R).

Section 19.1010. Section 19.1010(a)(1) and §19.1010(a)(2)(B) are amended by deleting the third and second sentences, respectively, referring to partial hour credit for CE courses. Section 19.1010(a)(2)(A) is amended by adding clauses (iii) and (iv), which describe new options for providers to calculate the number of credit hours per course. The options in new clauses (iii) and (iv) supplement the existing options in clauses (i) and (ii), and catchlines are also added to existing clauses (i) and (ii) to describe the content of those clauses.

Section 19.1011. Section 19.1011(d)(1) is amended by deleting the last two sentences of the existing paragraph, which mandate that at least 70% of examination questions or interactive inquiries be based at the application level, while the remainder may be at the knowledge level. The removal of this requirement in §19.1011(d)(1) will allow providers to offer more courses catered to educating novice insurance professionals.

Section 19.1011(e) is amended by deleting the last sentence of the existing subsection, which mandates that only CE course providers may prepare, print, or complete a CE course certificate of completion. Deleting the last sentence and making conforming amendments to the remainder of the subsection will ensure

that while providers must still prepare and complete the certificates of completion, the provider may award electronic certificates that may be printed by the insurance professional.

Section 19.1029. Section 19.1029 is amended to mirror the requirements of Insurance Code §4004.202(b). The existing section relates to CE hours regarding agents who sell annuities, and existing subsection (a) requires four hours of TDI-certified CE per year. Existing subsections (b) and (c) are deleted.

Existing §19.1029(a) is amended by adding a sentence to clarify that the exemptions provided in §19.1004(b) and (c) also apply to insurance professionals certified to sell annuities. The remainder of the existing text of the subsection is divided into new subsections (b) and (c). The text from existing subsection (a) that is incorporated into new subsection (b) is amended to require eight hours of TDI-certified continuing education hours every two years. The text from existing subsection (a) that is incorporated into new subsection (c) is amended to clarify that completion of the annuity certification course required by §19.1028 constitutes four hours of TDI-certified annuity continuing education in the license period during which the certification course is taken. These changes will align the section with the requirements in the Insurance Code and further simplify requirements for insurance professionals engaging in the annuities business.

In addition, the proposed amendments to §§19.1006, 19.1010, 19.1011, and 19.1029 include nonsubstantive editorial and formatting changes to conform the sections to the agency's current style and to improve the rule's clarity. These changes include replacing each instance of "department," replacing or deleting each instance of "shall," and revising the wording where administrative code sections are referenced. "Department" or "the department" is replaced by "TDI," "shall" is replaced by "must" or otherwise replaced or deleted as appropriate, and the words "chapter" and "subchapter" are changed to "title" where they appear in references to administrative code sections. In addition, punctuation and capitalization is revised throughout the existing text where necessary to correct existing errors and for consistency with TDI's current style.

TDI received comments on the CE rules in response to a TDI initiative requesting that stakeholders identify rules for updates or changes. TDI considered those comments when drafting this proposal.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Chris Herrick, deputy commissioner of the Customer Operations Division, has determined that during each year of the first five years the proposed amendments are in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering the sections, other than that imposed by the statute. Mr. Herrick made this determination because the proposed amendments do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed amendments.

Mr. Herrick does not anticipate any measurable effect on local employment or the local economy as a result of this proposal.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amendments are in effect, Mr. Herrick expects that administering the proposed amendments will have the public benefits of ensuring: (i) that TDI's rules conform to Insurance Code §4004.202, promoting increased compliance with CE requirements; (ii) clarification and modernization of existing

CE requirements; and (iii) that insurance professionals acquire and maintain the expertise to properly serve Texas insureds.

Mr. Herrick expects that the proposed amendments will not increase the cost of compliance to regulated persons because insurance professionals will have more choices available for CE courses, CE course providers will have more options for calculating course hours, and there will be clearer CE requirements for insurance professionals regarding annuities. Additionally, the change from four annuity CE hours per year to eight annuity CE hours every two years gives the licensee more flexibility on timing while not requiring any additional hours. The increased number of choices and clarity in fulfilling CE requirements will be a cost saving for insurance professionals, insurers, and course providers, because complying with the CE requirements of Insurance Code, Chapter 4004 will become easier and simpler.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TDI has determined that the proposed amendments will not have an adverse economic effect on small or micro businesses, or on rural communities. Instead, the amendments provide more options for continued education credits, making compliance easier for all businesses, regardless of size. The amendments do not apply to rural communities. As a result, and in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. TDI has determined that the proposed amendments do not impose a cost on regulated persons under Government Code §2001.0045. As discussed under the public benefit and cost note, TDI has determined that the proposed amendments to §§19.1006, 19.1010, 19.1011, and 19.1029 decrease the overall costs on regulated persons. Government Code §2001.0045(c)(2)(B) states that Government Code §2001.0045 does not apply to a rule that is amended to decrease regulated persons' cost for compliance with the rule.

GOVERNMENT GROWTH IMPACT STATEMENT. TDI has determined that for each year of the first five years that the proposed amendments are in effect, the proposed rule:

- 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 agency;
- will not require an increase or decrease in fees paid to the agency;
- will not create a new regulation;
- will expand, limit, or repeal an existing regulation;
- will not increase or decrease the number of individuals subject to the rule's applicability; and
- will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. TDI 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. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. TDI will consider any written comments on the proposal that are received by TDI no later than 5:00 p.m., central time, on December 28, 2020. Send your comments to ChiefClerk@tdi.texas.gov; or to the Office of the Chief Clerk, MC 112-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

To request a public hearing on the proposal, submit a request before the end of the comment period to ChiefClerk@tdi.texas.gov; or to the Office of the Chief Clerk, MC 112-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. The request for public hearing must be separate from any comments and received by the department no later than 5:00 p.m., central time, on December 28, 2020. If TDI holds a public hearing, TDI will consider written and oral comments presented at the hearing.

STATUTORY AUTHORITY. TDI proposes amendments to §§19.1006, 19.1010, 19.1011, and 19.1029 under Insurance Code §§4004.001, 4004.103, 4004.104, 4004.203, and 36.001.

Insurance Code §4004.001 provides TDI with exclusive jurisdiction for all matters relating to the continuing education of agents licensed under the Insurance Code.

Insurance Code §4004.103 provides that the Commissioner may adopt rules establishing other requirements for continuing education program providers.

Insurance Code §4004.104 provides TDI with authority to establish the scope and type of continuing education requirements for each type of licensee.

Insurance Code §4004.203 provides that the Commissioner by rule adopt criteria for continuing education programs used to satisfy the requirements of §4004.202.

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

CROSS-REFERENCE TO STATUTE. Amendments to §§19.1006, 19.1010, and 19.1011 affect Insurance Code §§4004.051, 4004.054, 4004.055, 4004.101, 4004.103, and 4004.105. Amendments to §19.1029 affect Insurance Code §1115.056 and implement Insurance Code §4004.202.

§19.1006. Course Criteria.

(a) To be certified as a continuing education course, the course content must include topics that contribute substantive knowledge relating to the business of insurance and expand the competence of the licensee. [shall be designed to enhance the knowledge, understanding, and/or professional competence of the student as to one or more of the following topics: insurance principles and coverages; applicable laws, and rules; recent and prospective changes in coverages; technical policy provisions and underwriting guidelines and standards; law and the duties and responsibilities of the licensee; consumer protection; or insurance ethics. The course content may also include instruction on management of the licensee's insurance agency.] Ethics and consumer protection course credit, described in paragraph (8) of this subsection, applies [shall apply] equally to all license types. TDI will not approve a course if it does not relate specifically to the business of insurance. Given that restriction, approved topics include, but are not limited to, the following:

- (1) actuarial mathematics, statistics, and probability;
- (2) assigned risk;

- (3) claims adjusting;
- (4) courses leading to and maintaining insurance designations;
- (5) employee benefit plans;
- (6) errors and omissions;
- (7) estate planning/taxation;
- (8) ethics and consumer protection, only if the course also provides instruction consistent with one or more of the following topics:
 - (A) Insurance Code Chapter 541, concerning Unfair Methods of Competition and Unfair or Deceptive Acts or Practices;
 - (B) Insurance Code Chapter 547, concerning False Advertising by Unauthorized Insurers;
 - (C) Insurance Code Chapter 542, Subchapter A, concerning Unfair Claim Settlement Practices;
 - (D) Business and Commerce Code Chapter 17, Subchapter E, concerning Deceptive Trade Practices and Consumer Protection Act;
 - (E) analogous laws as specified by TDI, including:
 - (i) Insurance Code Chapter 1952, Subchapter G, concerning Repair of Motor Vehicles;
 - (ii) Insurance Code Chapter 542, Subchapter B, concerning Prompt Payment of Claims;
 - (iii) Insurance Code Chapter 542, Subchapter D, concerning Notice of Settlement of Claim Under Casualty Insurance Policy;
 - (iv) Insurance Code Chapter 542, Subchapter E, concerning Recovery of Deductible From Third Parties Under Certain Automobile Insurance Policies;
 - (v) §5.501 of this title (relating to Notice Requirements to Claimants Regarding Motor Vehicle Repairs); and
 - (vi) Penal Code Chapter 35, concerning Insurance Fraud;
 - (F) corporate ethics;
 - (G) ethical challenges of licensees;
 - (H) ethical behavior of an insurance company;
 - (I) ethical behavior of an agent or adjuster;
 - (J) duties of the licensee to company, client, and customer;
 - (K) duties of insurer/HMO to agents/clients;
 - (L) fiduciary responsibility;
 - (M) unfair marketing practices;
 - (N) difference between ethics and laws;
 - (O) confidentiality, privacy, and ethics;
 - (P) ethical analysis of the licensee's job;
 - (Q) philosophical approaches to ethics; or
 - (R) business ethics;
- (9) fundamentals/principles of insurance;
- (10) insurance accounting/actuarial considerations;

- (11) insurance contract/policy comparison and analysis;
- (12) insurance fraud;
- (13) insurance laws, rules, regulations, and regulatory up-
dates;
- (14) insurance policy provisions;
- (15) insurance product-specific knowledge;
- (16) insurance rating/underwriting/claims;
- (17) insurance tax laws;
- (18) legal principles;
- (19) long-term care/partnership;
- (20) loss prevention, control, and mitigation;
- (21) managed care;
- (22) principles of risk management;
- (23) proper uses of insurance products;
- (24) real Estate Settlement Procedures Act;
- (25) restoration -- addresses claims, loss control issues, and
mitigation;
- (26) retirement planning;
- (27) securities;
- (28) suitability in insurance products;
- (29) surety bail bond;
- (30) underwriting principles; and
- (31) viaticals/life settlements.

[and the content for ethics and consumer protection topics shall be designed to relate to the business of insurance and provide instruction consistent with one or more of the following topics:]

[(1) Chapter 541 of the Insurance Code, entitled Unfair Methods of Competition and Unfair or Deceptive Acts or Practices;]

[(2) Chapter 547 of the Insurance Code, entitled False Advertising by Unauthorized Insurers;]

[(3) Chapter 542, Subchapter A, entitled Unfair Claim Settlement Practices;]

[(4) Chapter 17, Subchapter E, of the Business and Commerce Code, entitled Deceptive Trade Practices and Consumer Protection Act;]

[(5) Analogous laws as specified by the department, including:]

[(A) Chapter 1952, Subchapter G, of the Insurance Code, entitled Repair of Motor Vehicles;]

[(B) Chapter 542, Subchapter B, of the Insurance Code, entitled Prompt Payment of Claims;]

[(C) Chapter 542, Subchapter D, of the Insurance Code, entitled Notice of Settlement of Claim Under Casualty Insurance Policy;]

[(D) Chapter 542, Subchapter E, of the Insurance Code, entitled Recovery of Deductible From Third Parties Under Certain Automobile Insurance Policies;]

[(E) §5.501 of this title (relating to Notice Requirements to Claimants Regarding Motor Vehicle Repairs); and]

[(F) Insurance Fraud (Penal Code Chapter 35);]

[(6) Corporate ethics;]

[(7) Ethical challenges of licensees;]

[(8) Ethical behavior of an insurance company;]

[(9) Ethical behavior of an agent or adjuster;]

[(10) Duties of the licensee to company, client, and customer;]

[(11) Duties of insurer/HMO to agents/clients;]

[(12) Fiduciary responsibility;]

[(13) Unfair marketing practices;]

[(14) Difference between ethics and laws;]

[(15) Confidentiality, privacy, and ethics;]

[(16) Ethical analysis of the licensee's job;]

[(17) Philosophical approaches to ethics; or]

[(18) Business ethics;]

(b) To be certified as an adjuster prelicensing education course or program, the course content must enhance the student's knowledge, understanding, and/or professional competence regarding the subjects set forth in [§]§19.1017 and §19.1018 of this title (relating to Adjuster Prelicensing Education Course Content and Examination Requirements and Adjuster Prelicensing Examination Topics). Unless specifically stated otherwise, this subchapter applies [shall apply] equally to courses certified for continuing education and adjuster prelicensing purposes.

(c) To be certified as a long-term care partnership certification course, the course content must enhance the student's knowledge, understanding, and professional competence regarding the subjects specified in §19.1022 of this title [subchapter] (relating to Long-Term Care Partnership Certification Course). Unless specifically stated otherwise, this subchapter applies [shall apply] equally to courses certified for continuing education and long-term care partnership certification and long-term care partnership continuing education purposes.

(d) To be certified as a Medicare-related product certification course, the course content must enhance the student's knowledge, understanding, and professional competence regarding the subjects specified in §19.1024 of this title [subchapter] (relating to Medicare-Related Product Certification Course). Unless specifically stated otherwise, this subchapter applies [shall apply] equally to courses certified for continuing education, Medicare-related product certification, and Medicare-related product continuing education purposes.

(e) To be certified as a small employer health benefit plan specialty certification course, the course content must enhance the student's knowledge, understanding, and professional competence regarding the subjects specified in §19.1026 of this title [subchapter] (relating to Small Employer Health Benefit Plan Specialty Certification Course). Unless specifically stated otherwise, this subchapter applies [shall apply] equally to courses certified for continuing education and small employer health benefit plan specialty certification.

(f) To be certified as an annuity certification or continuing education course, the course content must enhance the student's knowledge, understanding, and professional competence regarding the subjects specified in §19.1028(g)(1) - (4) of this title [subchapter] (relating to Annuity Certification Course). Unless specifically stated otherwise, this section applies [shall apply] equally to courses certified for continuing education and annuity certification.

(g) The following course content is [shall] not [be considered] applicable to a licensee's continuing education requirements:

(1) meetings [Meetings] held in conjunction with the regular business of the licensee or courses or training relating to the marketing and business practices of a specific company;

(2) course [Course] content teaching general accounting, speed reading, other general business skills, computer use, or computer software application use;

(3) course [Course] content teaching motivation, goal-setting, time management, communication, sales, or marketing skills;

(4) course [Course] content providing for prelicensing training qualifying examination preparation;

(5) course [Course] content that does not meet the requirement of subsection (a) of this section; and

(6) course [Course] content that is substantially:

(A) a glossary, dictionary, or index of insurance terms without independent distinction as to the application of these terms to the business of insurance through case studies or analysis based on actual or hypothetical factual situations that apply to the business of insurance; or

(B) a recitation of statutes, rules, legal principles, or theories without independent distinction as to the application of these issues to the business of insurance through case studies or analysis based on actual or hypothetical factual situations that apply to the business of insurance.

(h) A single continuing education course may include both ethics and consumer protection credit topics with other topics meeting the requirements of subsection (a) of this section.

§19.1010. Hours of Credit.

(a) Credit hours for courses are determined by the methods set forth in paragraphs (1) - (7) of this subsection.[:]

(1) TDI will award credit for certified classroom courses at the rate of one hour for every 50 minutes of actual instruction contact time. All classroom courses must be at least one hour of credit in length. [~~TDI will award credit for additional partial hours of instruction contact time in half-hour increments with all periods of less than 25 minutes being awarded no additional credit and periods of less than 50 minutes being awarded one half-hour of additional credit.~~] Instruction contact time is considered the amount of time devoted to the actual course instruction and does not include breaks, lunch, dinner, introductions of speakers, explanatory or preparatory instructions, or evaluation of the course. TDI will not certify more than 24 credit hours for any one classroom course.

(2) TDI will award credit for certified classroom equivalent and self study courses as set forth in subparagraphs (A) - (D) of this paragraph.[:]

(A) The provider must determine the number of course hours by using one [either] of the methods described in the following clauses [set forth in clauses (i) or (ii) of this subparagraph].

(i) Average completion time. The provider may determine the number of course hours by calculating the average completion time of the individual course completion times of at least five licensees. If the provider uses this method to determine the number of credit hours, the provider must retain the names, current insurance license numbers, and completion times of all licensees that were used by the provider. A provider using this method may, at its discretion, issue certificates of completion in the number of hours certified by TDI

to the licensees involved in the process and who completed the entire course.

(ii) Average number of credit hours assigned by other states. The provider may determine the number of course hours by calculating the average number of hours of the credit hours assigned by all other states in which the course is certified or approved. A provider may not use this method to determine the number of credit hours unless the course is approved in at least three other states. Providers may not include any hours allowed by other states for sales and marketing topics in calculating the average.

(iii) Word count/difficulty level. Providers using this method must designate the course as one of three difficulty levels: basic, intermediate, or advanced. A basic level course is designed for entry-level practitioners or practitioners new to the subject matter, an intermediate level course is designed for practitioners who have existing competence in the subject area and who seek to further develop and apply their skills, and an advanced course is designed for practitioners who have a strong foundation and high level of competence in the subject matter. Using these course difficulty definitions, the provider may then determine the number of course hours in the following manner. First, divide the total number of words by 180 to equal the documented average reading time. Second, divide the documented average reading time by 50 to equal the credit hours for a basic level course. Third, for intermediate and advanced courses, multiply the number of credit hours by 1.25 and 1.50, respectively, to reach the total number of credit hours for those respective courses. Fractional hours must be rounded up to the nearest whole number if .50 or above, and fractional hours must be rounded down to the nearest whole number if .49 or less.

(iv) Interactive course content. To use this method, the course must be interactive. An interactive course includes regularly occurring opportunities for student participation, engagement, and interaction with or in course activities and information. Examples include but are not limited to question and answer sessions, polling, games, sequencing, and matching exercises. The provider may determine the number of course hours of an interactive course by calculating the run time of the mandatory interactive elements, which include only those elements required to complete the course.

(B) All classroom equivalent and self study courses must be at least one hour of credit, 50 minutes, in length. [~~TDI will award additional partial credit hours in half-hour increments with all periods of less than 25 minutes being awarded no additional credit and periods of less than 50 minutes being awarded one half-hour of additional credit.~~]

(C) Providers may not use the final examination and pre-tests for determining course hours or calculating an average.

(D) TDI will not certify more than 24 credit hours for any one classroom equivalent course or 12 credit hours for any one self study course.

(3) TDI will grant continuing education classroom credit to licensees successfully completing qualifying college, law school, and university insurance classroom courses, as determined by the college, law school, or university. The number of classroom hours of continuing education credit for college, law school, and university insurance courses is the number of classroom instruction contact hours not including examinations, which may be no more than 24 credit hours per course.

(4) TDI will grant 12 self study credit hours to licensees successfully passing qualifying national designation certification program examinations. Should the licensee also participate in and success-

fully complete a certified or qualifying classroom or classroom equivalent course in preparation for the national designation certification program examination, the licensee must choose either the classroom presentation or the national designation certification program examination to count as credit towards the licensee's continuing education requirement.

(5) Licensees who teach any portion of a certified continuing education classroom course may receive hour for hour classroom credit up to the maximum number of credit hours for the course. Licensees who teach courses may also be awarded an equal number of self study hours as credit for course preparation.

(6) TDI will grant continuing education classroom credit to licensees successfully completing qualifying courses certified or approved for classroom, classroom equivalent, or participatory credit by the continuing education authority of a state bar association or state board of public accountancy on an hour for hour basis equal to the credit hours assigned to the course by the certifying state bar association or state board of public accountancy. The state bar association or state board of public accountancy must determine what constitutes successful completion of the course. TDI will not grant licensees self study credit for any course accepted by a state bar association or state board of public accountancy unless the self study course is offered through a registered provider in accordance with this subchapter.

(7) TDI will grant licensees continuing education credit for successfully completing courses certified or approved by the Federal Farm Credit Insurance Corporation on an hour for hour basis as assigned by the Farm Credit Insurance Corporation. The Farm Credit Insurance Corporation must determine what constitutes successful completion of the course.

(b) A provider must not issue certificates of completion to a licensee for partial credit of any course, except to an instructor teaching a portion of the course and who does not attend the full course.

(c) A licensee may not receive credit for teaching or completing the same continuing education course more than once within the same reporting period for compliance with the continuing education requirement.

(d) Providers may advertise and link courses as parts of a whole curriculum, but providers may not require a licensee to purchase more than one continuing education course to receive the credit hours approved for a single course.

§19.1011. Requirements for Successful Completion of Continuing Education Courses.

(a) Providers must [shall] use, at a minimum, actual attendance rosters to certify completion of a certified classroom or one-time-event continuing education course or a certified classroom certification course. TDI [The department] requires each student to attend at least 90% of the course. Providers must [shall] establish a means to ensure that each student attended at least 90% of the course. Attendance records must include, at a minimum, sign-in and sign-out sheets, and the legible names, addresses, and TDI license number of each student in attendance. Providers must [shall] use a written, online, or computer-based final examination to determine completion of all certified classroom certification courses that statutorily require an examination for successful completion of the certified classroom certification course. Providers may establish additional assessment measurements or any other completion requirements for successful completion of a classroom continuing education or classroom certification course, but those requirements must be fully disclosed in the registration materials before the student purchases the course. Providers must [shall] determine successful completion of these additional requirements.

(b) Providers must [shall] use the periodic interactive inquiries to determine completion of certified classroom equivalent continuing education or certification courses. A student must complete all inquiry sections with a minimum score of at least 70% for each section.

(c) Providers must [shall] use a written, online, or computer-based final examination as the means of completion for all certified self-study continuing education or certification courses. TDI [The department] does not require providers to monitor continuing education or certification self-study examinations. Course records for each examination attempt must include, at a minimum, the date the exam was taken, the final examination score, the examination version used, the legible name, address, and the TDI license number of each student.

(d) Self study examinations and classroom equivalent interactive inquiries must [shall] meet the criteria set forth in paragraphs (1) - (12) of this subsection:

(1) the [The] final examination or interactive inquiries must reasonably evaluate the student's understanding of the course content [∴ At least 70% of the examination questions or interactive inquiries must be based at the application level. The remainder of the questions may be based at the knowledge level];

(2) the [The] specific final examination questions and interactive inquiries may not be made available to the student until the test is administered, and providers must [∴ Providers shall] effect security measures to maintain the integrity of the examination;

(3) providers must [Providers shall] maintain a record of each student's final examination in the student's record for four years;

(4) an [An] authorized staff member or computer program must [shall] grade self study final examinations, and the [∴ The] interactive inquiry computer program must [shall] grade interactive inquiries;

(5) providers must [Providers shall] allow students to retake an examination at least one time if a score of 70% or higher is not achieved;

(6) providers must [Providers shall] revise and update self study final examinations and interactive inquiries consistent with the course update/revision;

(7) providers [Providers] requiring a monitored final examination must [shall] establish the rules under which the examination will [shall] be given;

(8) the [The] examination or interactive inquiry periods must consist of questions that do not give or indicate an answer or correct response and are of the following types:

(A) for self study courses:

(i) short essay questions requiring a response of five or more words;

(ii) fill in the blank questions requiring a response from memory and not from an indicated list of potential alternatives; or

(iii) multiple choice questions stemming from an inquiry with at least four appropriate potential responses and for which "all of the above" or "none of the above" is not an appropriate option;

(B) for interactive inquiry periods, multiple choice questions stemming from an inquiry with at least four appropriate potential responses and for which "all of the above" or "none of the above" is not an appropriate option;

(9) each [Each] interactive inquiry period must consist of at least five questions;

(10) ~~each~~ [Each] self study final examination ~~must~~ [shall] consist of at least 10 questions for each hour of credit up to a maximum requirement of 50 questions per course. Providers may, at their discretion, have a greater number of final examination questions;

(11) ~~during~~ [During] examinations and interactive inquiry periods, licensees may use course materials or personal notes, but may not use another person's notes, answers, or otherwise receive assistance in answering the questions from another person; and

(12) ~~licensees must~~ [Licensees shall] mail or deliver the completed self study examination directly to the provider.

(e) Providers ~~must~~ [shall] issue certificates of completion to students who successfully complete a certified course. The provider must prepare the certificate and issue it [the certificate] in a manner ~~that~~ [which shall] ensure that the student receiving the certificate is the student who took the course, issue the certificate within 30 days of completing the course, and complete the certificate to reflect the date the student took the course/examination. [Providers shall not allow a student, or any person or organization other than the provider giving the course, to prepare, print, or complete a certificate of completion.]

(f) Notwithstanding subsections (a) - (e) of this section, licensees must claim continuing education under §19.1020 of this title [chapter] (relating to State and National Association Credit) by sending to TDI [the department], or its designee, upon request, an affirmation acceptable to TDI [the department] containing:

(1) the licensee's name, address, telephone number, and licensee's TDI [department] license number;

(2) the name of the national designation or state or national insurance association providing educational materials or sponsoring educational presentations;

(3) the cumulative number of hours of credit claimed for reviewing the educational materials;

(4) the cumulative number of hours of credit claimed for attending the educational presentations;

(5) a statement that the licensee currently holds the national designation or is a member in good standing of the state or national insurance association; and

(6) A statement that the licensee completed at least the number of hours in these activities the licensee is claiming for continuing education credit.

(g) In addition to the affirmation provided under subsection (f) of this section, TDI [the department] may request a licensee claiming hours under §19.1020 of this title [chapter] to submit a sworn written affirmation to TDI [the department] confirming under oath the information in subsection (f) of this section. Failure to submit a sworn affirmation will result in denial of the claimed hours and may result in disciplinary action under §19.1015 of this title [subchapter] (relating to Failure to Comply) or the Insurance Code.

§19.1029. Annuity Continuing Education.

(a) Licensees who qualify for the exemption provided in §19.1004(b) or (c) of this title (relating to Licensee Exemption from and Extension of Time for Continuing Education) are exempt from the provisions of this section.

(b) During a licensee's two-year licensing period, [In addition to completing the annuity certification course required by §19.1028 of this subchapter (relating to Annuity Certification Course);] a licensee who sells, solicits, or negotiates a contract for an annuity or represents an insurer in relation to an annuity in this state, or intends to sell, solicit, or negotiate a contract for an annuity or represent an insurer in relation

to an annuity in this state must complete at least ~~eight~~ [four] hours of TDI-certified [department certified] annuity continuing education in compliance with this section.

[(b) If a licensee completes the annuity certification course required by §19.1028 of this subchapter before the expiration of the 12th month of the licensee's licensing period, the continuing education required by this section must be completed by the end of the expiration of that licensing period. If a licensee completes the annuity certification course required by §19.1028 of this subchapter after the 12th month of the licensee's licensing period, the continuing education required by this section must be completed before the expiration of the 12th month in the licensing period following the licensing period in which the licensee completed the annuity certification course.]

(c) Completion of the annuity certification course required by §19.1028 of this title (relating to Annuity Certification Course) constitutes four hours of TDI-certified annuity continuing education in the license period during which the certification course is taken.

[(e) For each successive licensing period following the expiration of a licensee's license occurring on or after April 1, 2010, and after a licensee has completed the annuity certification course required by §19.1028 of this subchapter, a licensee subject to the requirements of this section must complete at least four hours of department certified annuity continuing education every twelve months, calculated from the date of the license renewal.]

(d) ~~The TDI-certified~~ [The department certified] continuing education required under subsection (b) [(a)] of this section must:

(1) comply with the requirements of §19.1006 of this title [subchapter] (relating to Course Criteria); and

(2) enhance the student's knowledge, understanding, and professional competence of [the student with regard to] one or more of the subjects described §19.1028(g)(1) - (4) of this title [subchapter].

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 November 13, 2020.

TRD-202004815

James Person

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: December 27, 2020

For further information, please call: (512) 676-6584



CHAPTER 21. TRADE PRACTICES

SUBCHAPTER T. SUBMISSION OF CLEAN CLAIMS

The Texas Department of Insurance proposes to amend 28 TAC §21.2821, concerning reporting requirements, and to repeal §21.2824, concerning applicability. The amendments to §21.2821 expand the claims-related data elements that a managed care carrier (MCC) must report to the department on a quarterly basis and require electronic reporting of these data elements in order to determine carrier compliance with Insurance Code §843.342 and §1301.137. The repeal of §21.2824 removes outdated rule language.

EXPLANATION. Under Insurance Code §843.342 and §1301.137, carriers are required to pay a penalty and applicable interest for the late payment of clean claims. The proposed amendments to §21.2821 expand the data reporting requirements under the prompt pay reporting system so that the department can adequately determine compliance, lower the frequency of some reporting to reduce the regulatory burden on carriers, and provide for the data to be entered directly into the department's new electronic database to improve efficiency and limit the possibility of data entry errors. The repeal of §21.2824 removes language regarding applicability that is outdated.

In order to verify that the amount paid is correct, the amended rule would require that the quarterly report from managed care carriers required under §21.2821(a) include the total number of reported late-paid claims and the dollar value corresponding to those claims. This dollar value would be submitted for each time frame (i.e., claims paid late between one and 45 days, claims paid late between 46 and 90 days, and claims paid late 91 days or greater). The rule also would require the carrier to submit a list of penalty and certain interest payments, with associated claim numbers, so that the department can verify the amounts and tie the penalty and interest payments to actual claims paid.

The amended rule also requires that carriers report the number of complaints received regarding failure to pay a clean claim timely. This report will gather the number of such complaints received by a managed care carrier, which may not have been submitted to the department as formal complaints. Complaint numbers can be an indication of the quality of a carrier's claims payment processes.

While the rule currently requires quarterly reporting of data, it does not address reporting of penalty and interest payments for late-paid claims. In practice, carriers have been reporting penalty and interest data monthly since the dissolution of the Texas Health Insurance Risk Pool and transfer of its obligations and authority to the department. With these proposed rule amendments, monthly reporting will no longer be necessary; carriers will begin reporting the data quarterly. The department expects that the reduction in frequency of reporting will reduce the carriers' burden of compliance over time.

The proposed amendments also require carriers to submit their quarterly reports electronically by entering the data directly into the department's new electronic prompt pay reporting database in order to reduce the possibility of data entry errors, enhance the department's oversight capabilities, and increase efficiency.

Without the requirements to report the claims' dollar value, provide the claims numbers from which the penalty amount is derived, and engage in electronic data entry by the reporter, the only verification of compliance that the department can perform is to spot-check claims and claims payments via market-conduct and quality-of-care examinations. The new requirements will allow the department to better determine compliance with Insurance Code §843.342 and §1301.137.

Section 21.2821. Reporting Requirements. Amendments to this section require the reporting of additional data elements relating to the late payment of clean claims.

An amendment to subsection (a) revises the subsection to specify that, in addition to submitting quarterly claims payment information, an MCC must submit related penalty and interest payment information and information regarding complaints.

Amendments to the section also add new subsection (e), which lists and describes the information that an MCC must provide in the report required by subsection (a) of the section to satisfy the expanded data reporting requirements. The information required by the new subsection includes the following:

- the total dollar amount of clean claims the MCC reported after the end of the applicable statutory claims payment period, broken down by relevant time period;
- the penalty dollar amount of each clean claim the MCC paid late to noninstitutional preferred providers, broken down by relevant time period;
- the penalty dollar amount of each clean claim the MCC paid late to institutional preferred providers, broken down by relevant time period;
- the amount of interest, based on the penalty dollar amount, that the MCC paid to the department for certain late-paid clean claims that the MCC paid to a noninstitutional preferred provider;
- a list of each claim number the MCC paid late and the associated penalty dollar amount;
- a list of each claim number and the associated amount of interest paid to the department for certain late-paid clean claims; and
- the total number of complaints received by an MCC for failure to pay a claim.

The amendments to the section add a new subsection (f), which requires that the quarterly report required by subsection (a) of the section be submitted electronically in a format acceptable to the department as specified on the department's website.

Finally, the amendments to the section add a new subsection (g), which provides that the new reporting requirements in subsections (e) and (f) apply to reports submitted under §21.2821(a) beginning with the report required to be submitted by May 15, 2021, for the months of January, February, and March of that year.

Section 21.2824. Applicability. The department proposes the repeal of §21.2824. The repeal of §21.2824 removes outdated provisions regarding applicability.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Debra Diaz-Lara, associate commissioner, Life and Health Division, has determined that during each year of the first five years the proposed amendments are in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering the sections, other than that imposed by the statute. Ms. Diaz-Lara made this determination because the proposed amendments do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed amendments.

Ms. Diaz-Lara does not anticipate any measurable effect on local employment or the local economy as a result of this proposal.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amendments are in effect, Ms. Diaz-Lara expects that the proposed amendments will have the public benefits of ensuring that the department can better evaluate compliance with §843.342 and §1301.137, conserving agency resources, and reducing the regulatory burden and costs imposed on MCCs with the expansion of electronic reporting and the submission of claims-related information on a quarterly rather than a monthly basis. The proposed amendments will

also benefit the public by enabling the department, through the analysis of complaints reported electronically to the department, to better identify problems associated with a carrier's failure to pay clean claims timely.

Ms. Diaz-Lara expects that the proposed amendments will impose an initial economic cost on MCCs that must implement the expanded reporting in compliance with the proposed rule. The initial cost will involve reprogramming computer systems to provide for reporting of the additional claims-related data required by the proposed amendments. Carriers are already collecting the additional data elements to be reported. Once the systems are reprogrammed, the burden of reporting claims-related data to comply with the rule on an ongoing basis is expected to remain static.

It is not feasible for the department to ascertain the actual cost of reprogramming computer systems to comply with the proposed amendments; MCCs are better suited to determine them. Every carrier has unique internal processes, resources, and technical capabilities that are not feasible for the department to evaluate. The exact method of compliance is a business decision, including the decision to employ staff or contract for some of these services.

Approximately 136 MCCs electronically report their monthly claims-related data to the department. Fewer than five carriers submit their reports by mail. While there may be initial costs to implement electronic reporting for those carriers currently reporting by mail, those costs are expected to be minimal and to involve reporting electronically through a spreadsheet system.

Though costs to each carrier will depend on the volume and degree of complexity of the claims-related information the carrier reports to the department, the department estimates the following possible needs: individual employee compensation for an administrative assistant at \$16.82 per hour, computer programmer at \$41.59 per hour, and a computer and information systems manager at \$71.34 per hour for one to 20 hours of work to revise an insurer's internal procedures. The department also estimates individual employee compensation for an administrative assistant at \$16.82 per hour and a computer programmer at \$41.59 per hour for one to 20 hours of work to create, modify, and test the code and scripts to run computer applications. These wages are based on the latest State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor (DOL, May 2019) at www.bls.gov/oes/current/oes_tx.htm.

Once carriers have made the programming changes, the reporting system will be automated and repetitive for each quarterly report. The reduction in reporting frequency from monthly to quarterly is expected to significantly reduce the compliance burden for carriers, which the department anticipates will more than offset initial programming costs, resulting in an overall reduction in costs for compliance with the rule.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. The department has determined that the proposed amendments will not have an adverse economic effect on small or micro businesses or on rural communities. The new amendments will not create an increase in cost of compliance. Although insurers may have initial programming costs associated with the rule change, the department expects the decreased frequency of reporting will more than offset those initial costs, as discussed in the Public Benefit and Cost Note section. 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 while this proposal may impose an initial cost on regulated persons, these initial costs will be more than offset by savings that result from a reduction in reporting frequency. Additionally, under Government Code §2001.0045(c)(2), the department is not required to repeal or amend another rule because the proposed rule amendments will reduce the burden or responsibilities imposed on regulated persons.

GOVERNMENT GROWTH IMPACT STATEMENT. The department has determined that for each year of the first five years that the proposed amendments are in effect, the proposed rule:

- will not create a government program;
- will not require the creation of new 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 create a new regulation;
- will expand an existing regulation;
- will not increase the number of individuals subject to the rule's applicability; and
- will not positively or 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. As a result, this proposal 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 that are received by the department no later than 5:00 p.m., central time, on December 28, 2020. Send your comments to ChiefClerk@tdi.texas.gov, or to the Office of the Chief Clerk, MC 112-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

To request a public hearing on the proposal, submit a request before the end of the comment period to ChiefClerk@tdi.texas.gov; or to the Office of the Chief Clerk, MC 112-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. The request for public hearing must be separate from any comments and received by the department no later than 5:00 p.m., central time, on December 28, 2020. If the department holds a public hearing, the department will consider written and oral comments presented at the hearing.

28 TAC §21.2821

STATUTORY AUTHORITY. The department proposes amendments to §21.2821 under Insurance Code §§843.151, 1301.007, and 36.001.

Insurance Code §843.151 provides that the Commissioner may adopt reasonable rules as necessary and proper to implement Chapter 843.

Insurance Code §1301.007 requires that the Commissioner adopt rules as necessary to implement Chapter 1301 and to ensure reasonable accessibility and availability of preferred provider services to residents of this state.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the department's powers and duties under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. The proposed amendments to 28 TAC §21.2821 implement Insurance Code §843.151 and §1301.007.

§21.2821. Reporting Requirements.

(a) An MCC must submit to the department quarterly claims payment and related penalty and interest payment information, and information regarding complaints, in compliance with the requirements of this section.

(b) The MCC must submit the report required by subsection (a) of this section to the department on or before:

- (1) May 15th for the months of January, February, and March of each year;
- (2) August 15th for the months of April, May, and June of each year;
- (3) November 15th for the months of July, August, and September of each year; and
- (4) February 15th for the months of October, November, and December of each preceding calendar year.

(c) The report required by subsection (a) of this section must include, at a minimum, the following information:

- (1) number of claims received from noninstitutional preferred providers;
- (2) number of claims received from institutional preferred providers;
- (3) number of clean claims received from noninstitutional preferred providers
- (4) number of clean claims received from institutional preferred providers;
- (5) number of clean claims from noninstitutional preferred providers paid within the applicable statutory claims payment period;
- (6) number of clean claims from noninstitutional preferred providers paid on or before the 45th day after the end of the applicable statutory claims payment period;
- (7) number of clean claims from institutional preferred providers paid on or before the 45th day after the end of the applicable statutory claims payment period;
- (8) number of clean claims from noninstitutional preferred providers paid on or after the 46th day and before the 91st day after the end of the applicable statutory claims payment period;
- (9) number of clean claims from institutional preferred providers paid on or after the 46th day and before the 91st day after the end of the applicable statutory claims payment period;
- (10) number of clean claims from noninstitutional preferred providers paid on or after the 91st day after the end of the applicable statutory claims payment period;

(11) number of clean claims from institutional preferred providers paid on or after the 91st day after the end of the applicable statutory claims payment period;

(12) number of clean claims from institutional preferred providers paid within the applicable statutory claims payment period;

(13) number of claims paid under the provisions of §21.2809 of this title (relating to Audit Procedures);

(14) number of requests for verification received under §19.1719 of this title (relating to Verification for Health Maintenance Organizations and Preferred Provider Benefit Plans);

(15) number of verifications issued under §19.1719 of this title;

(16) number of declinations of requests for verifications under §19.1719 of this title;

(17) number of certifications of catastrophic events sent to the department;

(18) number of calendar days business was interrupted for each corresponding catastrophic event;

(19) number of electronically submitted, affirmatively adjudicated pharmacy claims received by the MCC;

(20) number of electronically submitted, affirmatively adjudicated pharmacy claims paid within the 18-day statutory claims payment period;

(21) number of electronically submitted, affirmatively adjudicated pharmacy claims paid on or before the 45th day after the end of the 18-day statutory claims payment period;

(22) number of electronically submitted, affirmatively adjudicated pharmacy claims paid on or after the 46th day and before the 91st day after the end of the 18-day statutory claims payment period; and

(23) number of electronically submitted, affirmatively adjudicated pharmacy claims paid on or after the 91st day after the end of the 18-day statutory claims payment period.

(d) An MCC must annually submit to the department, on or before August 15th, at a minimum, information related to the number of declinations of requests for verifications from July 1st of the prior year to June 30th of the current year, in the following categories:

- (1) policy or contract limitations:
 - (A) premium payment time frames that prevent verifying eligibility for a 30-day period;
 - (B) policy deductible, specific benefit limitations, or annual benefit maximum;
 - (C) benefit exclusions;
 - (D) no coverage or change in membership eligibility, including individuals not eligible, not yet effective, or for whom membership is canceled;
 - (E) preexisting condition limitations; and
 - (F) other;
- (2) declinations due to an inability to obtain necessary information to verify requested services from the following persons:
 - (A) the requesting physician or provider;
 - (B) any other physician or provider; and

(C) any other person.

(e) In addition to the information reported under subsection (c) of this section, the report required by subsection (a) of this section must also include, at a minimum, the following information:

(1) the total dollar amount of the claims described in each of the following subparagraphs:

(A) clean claims from noninstitutional preferred providers paid on or before the 45th day after the end of the applicable statutory claims payment period;

(B) clean claims from institutional preferred providers paid on or before the 45th day after the end of the applicable statutory claims payment period;

(C) clean claims from noninstitutional preferred providers paid on or after the 46th day and before the 91st day after the end of the applicable statutory claims payment period;

(D) clean claims from institutional preferred providers paid on or after the 46th day and before the 91st day after the end of the applicable statutory claims payment period;

(E) clean claims from noninstitutional preferred providers paid on or after the 91st day after the end of the applicable statutory claims payment period; and

(F) clean claims from institutional preferred providers paid on or after the 91st day after the end of the applicable statutory claims payment period;

(2) the penalty dollar amount that the MCC paid to an institutional preferred provider for each clean claim that the MCC paid to the institutional preferred provider:

(A) on or before the 45th day after the end of the applicable statutory claims payment period;

(B) on or after the 46th day and before the 91st day after the end of the applicable statutory claims payment period; and

(C) on or after the 91st day after the end of the applicable statutory claims payment period;

(3) the penalty dollar amount that the MCC paid to a noninstitutional provider for each clean claim that the MCC paid to the noninstitutional preferred provider:

(A) on or before the 45th day after the end of the applicable statutory claims payment period;

(B) on or after the 46th day and before the 91st day after the end of the applicable statutory claims payment period; and

(C) on or after the 91st day after the end of the applicable statutory claims payment period;

(4) the amount of interest, based on the penalty dollar amount, that the MCC paid to the department for each clean claim that the MCC paid to the noninstitutional preferred provider on or after the 91st day after the end of the applicable statutory claims payment period;

(5) a list of each claim number and the associated penalty dollar amount as reported under subsection (e), paragraphs (2) and (3) of this section;

(6) a list of each claim number and the associated amount of interest paid as reported under subsection (e)(4) of this section; and

(7) the total number of complaints received by the MCC for failure to pay a clean claim timely.

(f) The quarterly report required in subsection (a) of this section must be submitted electronically as specified on the department's website.

(g) Subsections (e) and (f) of this section apply to reports submitted under subsection (a) of this section beginning with the report required to be submitted by May 15, 2021, for the months of January, February, and March of that year.

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 November 12, 2020.

TRD-202004785

James Person

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: December 27, 2020

For further information, please call: (512) 676-6587



28 TAC §21.2824

STATUTORY AUTHORITY. The department proposes the repeal of §21.2824 under Insurance Code §36.001.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the department's powers and duties under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. The proposed repeal of §21.2824 implements Insurance Code §36.001.

§21.2824. *Applicability.*

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 November 12, 2020.

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James Person

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: December 27, 2020

For further information, please call: (512) 676-6587



PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 180. MONITORING AND ENFORCEMENT

SUBCHAPTER A. GENERAL RULES FOR ENFORCEMENT

28 TAC §180.1

The Texas Department of Insurance, Division of Workers' Compensation (DWC) proposes an amendment to §180.1, Definitions. The purpose of this amendment is to align the rule with Texas Labor Code §408.0043, Professional Specialty Certification Required for Certain Review, as amended by Senate Bill (SB) 1742, 86th Legislature, Regular Session (2019), effective September 1, 2019. The Legislature added subparagraph (c) to §408.0043 to require that when a health care service is requested, ordered, provided, or to be provided by a physician, a physician performing a peer review, utilization review, or independent review must be of the same or a similar specialty as that physician.

EXPLANATION. Amended §180.1(4) adds to the definition of appropriate credentials the language from Labor Code §408.0043(c) that requires a physician who performs a peer review, utilization review, or independent review of health care services to have the same or similar specialty as the physician that requests or performs the health care services. Amended §180.1(4) cites the credential requirements for dentists under Labor Code §408.0044 and chiropractors under Labor Code §408.0045. An insurance carrier, independent review organization, or utilization review agent must determine on a case-by-case basis whether a physician reviewer's credentials are consistent with the specialty of the physician who requested or performed the health care service under review and the type of health care service that is under review. The required comparison of the requesting physician's credentials to the reviewing physician's credentials is consistent with existing Texas Department of Insurance (TDI) requirements in 28 Texas Administrative Code §12.202 for independent review and 28 TAC §19.1706 for utilization review of group health services.

The amendment is limited to certain reviews of physician-requested or physician-provided health care services by physicians performing utilization review, independent review, or peer reviews. The amendment does not alter the appropriate credentials for utilization review, independent review, or peer review of health care services requested or provided by other types of health care providers. In these situations, existing DWC and TDI rules governing medical necessity disputes (28 TAC §133.308), peer reviewers (28 TAC §180.22(g)), and utilization review personnel (28 TAC §19.2006) continue to apply. In these situations, the reviewer must continue to have the appropriate credentials, including the "certifications, education, training, and experience to provide the health care that an injured employee is receiving or is requesting to receive." In addition, this amendment does not alter the appropriate credentials for designated doctors, doctors performing required medical examinations, or doctors serving as members of the medical quality review panel.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Deputy Commissioner of Health & Safety, Matthew Zurek, has determined that, for each year of the first five years the amended rules will be in effect, there will be no measurable fiscal impact to state and local governments as a result of enforcement or administration of the amendment. There will be no measurable effect on local employment or the local economy because of the amendment.

The amendment to §180.1 reflects the statutory changes SB 1742 made to Labor Code §408.0043 and does not impose any additional requirements that could produce a fiscal impact.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amendment is in effect, Deputy Commissioner Zurek expects that it will have the public benefit of

improved matching of reviewers with the same or similar credentials as the requesting physician, which may result in fewer disputes about the approval or denial of health care services.

ANTICIPATED COSTS TO COMPLY WITH THE PROPOSAL. Deputy Commissioner Zurek anticipates that, for each of the first five years the proposed amendment is in effect, there will be indeterminate costs to those required to comply with the proposal. Any costs resulting from the proposed amendment would be a direct result of the statutory change.

Government Code §2001.0045 requires a state agency to offset any costs on regulated individuals associated with a proposed rule. However, DWC has determined that this proposed rule will impose indeterminate costs on system participants as a result of the statutory change. Under §2001.045(c)(9), this requirement does not apply to a rule necessary to implement legislation.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. Under Government Code §2006.002(c), if a proposed rule may have an adverse economic effect on small businesses, micro businesses, or rural communities, state agencies must prepare, as part of the rulemaking process, an economic impact statement that assesses the potential impact of the proposed rule and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. DWC has determined that the proposed amendment will not have an adverse economic effect on small or micro businesses or rural communities because it simply implements statutory requirements. Therefore, DWC is not required to prepare a regulatory flexibility analysis.

GOVERNMENT GROWTH IMPACT STATEMENT. DWC has determined that for each of the first five years that the proposed amendment is in effect, the proposed rule will not:

- create or eliminate a government program;
- require the creation of new employee positions or the elimination of existing employee positions;
- require an increase or decrease in future legislative appropriations to DWC;
- require an increase or decrease in fees paid to DWC;
- create a new regulation;
- limit or repeal an existing regulation; or
- positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. DWC has determined that no private real property interests are affected by this proposal. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. If you would like to comment on the proposal or request a public hearing, you must submit your comments or hearing request by 5:00 p.m., Central time, on December 28, 2020. Email your comments or hearing requests to RuleComments@tdi.texas.gov or mail them to Cynthia Guillen, Texas Department of Insurance, Division of Workers' Compensation, DWC Legal Services, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. If DWC holds a hearing, DWC will consider written comments and public testimony presented at the hearing.

STATUTORY AUTHORITY. DWC proposes amended §180.1 under the following statutory authority:

Labor Code §401.011 provides general definitions of the Texas Workers' Compensation Act.

Labor Code §402.00111 provides that the commissioner of workers' compensation will exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner will administer and enforce this title, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to DWC or the commissioner.

Labor Code §402.061 provides that the commissioner of workers' compensation will adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

Labor Code §408.021 provides that the injured employee is entitled to all health care reasonably required by the injury that cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the injured employee's ability to return to or retain employment.

Labor Code §408.027 provides how the health care provider must submit a claim for payment and how the carrier must pay, reduce, deny, or determine to audit the health care provider's requests for health care services.

Labor Code §408.0043 outlines the professional specialty certification requirements of doctors, other than chiropractors or dentists, to perform health care services, including utilization reviews, independent reviews, or peer reviews.

Insurance Code §4201.054 provides that the commissioner of workers' compensation regulates all persons who perform utilization review of medical benefits and has rulemaking authority to implement such regulation under Title 5 of the Labor Code.

§180.1. Definitions.

The following words and terms, when used in this chapter, will [shall] have the following meanings:

(1) Act--The Texas Workers' Compensation Act, Labor Code, Title 5, Subtitle A.

(2) Administrative violation--A violation, failure to comply with, or refusal to comply with the Act, or a rule, order, or decision of the commissioner. This term is synonymous with the terms "violation" or "violate."

(3) Agent--A person who [with whom] a system participant uses [utilizes] or contracts with for the purpose of providing claims service or fulfilling duties under the Labor Code Title 5 and rules. The system participant who uses [utilizes] or contracts with the agent may also be responsible for the administrative violations of that agent.

(4) Appropriate credentials--The certifications[certification(s)], education, training, and experience to provide the health care that an injured employee is receiving or is requesting to receive. Under Texas Labor Code §408.0043, a physician who performs a peer review, utilization review, or independent review of health care services requested, ordered, provided, or to be provided by a physician must be of the same or similar specialty as the physician who requested, ordered, provided, or will provide the health care service. A dentist must meet the requirements of Texas Labor Code §408.0044. A chiropractor must meet the requirements of Texas Labor Code §408.0045.

(5) Commissioner--The commissioner of workers' compensation.

(6) Complaint--A written submission to the division alleging a violation of the Act or rules by a system participant.

(7) Compliance Audit (also Performance Review)--An official examination of compliance with one or more duties under the Act and rules. A compliance audit does not include monitoring or review activities involving the Medical Advisor or the Medical Quality Review Panel.

(8) Conviction or convicted--

(A) A system participant is considered to have been convicted when:

(i) a judgment of conviction has been entered against the system participant in a federal, state, or local court;

(ii) the system participant has been found guilty in a federal, state, or local court;

(iii) the system participant has entered a plea of guilty or nolo contendere (no contest) that has been accepted by a federal, state, or local court;

(iv) the system participant has entered a first offender or other program and judgment of conviction has been withheld; or

(v) the system participant has received probation or community supervision, including deferred adjudication.

(B) A conviction is still a conviction until and unless overturned on appeal even if:

(i) it is stayed, deferred, or probated;

(ii) an appeal is pending; or

(iii) the system participant has been discharged from probation or community supervision, including deferred adjudication.

(9) Department--Texas Department of Insurance.

(10) Division--Texas Department of Insurance, Division of Workers' Compensation.

(11) Emergency--As defined in §133.2 of this title (relating to Definitions). This definition does not apply to "emergency" as used in the term "ex parte emergency cease and desist orders."

(12) Frivolous--That which does not have a basis in fact or is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(13) Frivolous complaint--A complaint that does not have a basis in fact or is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(14) Immediate post-injury medical care--That health care provided on the date that the injured employee first seeks medical attention for the workers' compensation injury.

(15) Notice of Violation (NOV)--A notice issued to a system participant by the division when the division has found that the system participant has committed an administrative violation and the division seeks to impose a sanction in accordance with Labor Code, Title 5 or division rules.

(16) Peer Review--An administrative review by a health care provider performed at the insurance carrier's request without a physical examination of the injured employee.

(17) Remuneration--Any payment or other benefit made directly or indirectly, overtly or covertly, in cash or in kind, including, but not limited to, forgiveness of debt.

(18) Rules--The division's rules adopted under Labor Code, Title 5.

(19) Sanction--A penalty or other punitive action or remedy imposed by the commissioner on an insurance carrier, representative, injured employee, employer, or health care provider, or any other person regulated by the division under the Act, for an administrative violation.

(20) SOAH--The State Office of Administrative Hearings.

(21) System Participant--A person or their agent subject to the Act or a rule, order, or decision of the commissioner.

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 November 10, 2020.

TRD-202004769

Kara Mace

Deputy Commissioner of Legal Services

Texas Department of Insurance, Division of Workers' Compensation

Earliest possible date of adoption: December 27, 2020

For further information, please call: (512) 804-4703



TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 5. FUNDS MANAGEMENT

(FISCAL AFFAIRS)

SUBCHAPTER D. CLAIMS PROCESSING-- PAYROLL

34 TAC §5.36

The Comptroller of Public Accounts proposes the repeal of §5.36, concerning deductions for paying membership fees to certain law enforcement employee organizations.

The repeal of §5.36 is being proposed because it is being amended into §5.46 in a separate proposal. Other than the types of employee organizations to which §5.36 and §5.46 apply, these two sections contain similar provisions.

Tom Currah, Chief Revenue Estimator, has determined that repeal of the rule will have no significant fiscal impact to the state government, units of local government, or individuals. There would be no significant anticipated economic cost to the public.

Mr. Currah also has determined during the first five years that the proposed rule repeal is in effect, the repeal: 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. The repeal of §5.36 is being proposed because it is being amended into §5.46 in a separate proposal.

The proposed rule repeal would have no fiscal impact on small businesses or rural communities.

Comments on the proposal 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*.

The repeal is proposed under Government Code, §659.110, which authorizes the comptroller to adopt rules to administer the eligible state employee organization membership fee deduction program authorized by Government Code, Chapter 659, Subchapter G, concerning supplemental deductions.

The repeal implements Government Code, §§659.101 and 659.1031 - 659.110.

§5.36. Deductions for Paying Membership Fees to Certain Law Enforcement Employee Organizations.

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 November 16, 2020.

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Victoria North

General Counsel for Fiscal and Agency Affairs

Comptroller of Public Accounts

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For further information, please call: (512) 475-0387



34 TAC §5.46

The Comptroller of Public Accounts proposes amendments to §5.46, concerning deductions for paying membership fees to employee organizations.

In response to Attorney General Opinion No. KP-0310 (2020), the amendments in subsection (b) require forms authorizing or canceling payroll deductions for state employee organization membership fees to be submitted directly to the employer by the state employee and not by the state employee organization; in subsection (e), add consent language to the authorization form to ensure the employee's consent is voluntary; and, in subsection (i)(3), authorize a state agency, upon receipt of a timely submitted reconciling items report, to provide a state employee organization with personal contact information for each employee identified in the reconciling items report for whom the organization does not already have personal contact information.

The amendments also incorporate into this section the provisions of §5.36, concerning deductions for paying membership fees to certain law enforcement employee organizations. Other than the types of employee organizations to which §5.36 and §5.46 apply, these two sections contain similar provisions. Section 5.36 is being proposed for repeal in a separate proposal.

Additionally, the amendments change the section title to "Deductions for Paying Membership Fees to Certain State Employee Organizations"; update the section's language to make it easier to read, remove unnecessary language, and correct citations; revise the "employer" and "fiscal year" definitions in subsection (a)(3) and (4) respectively; delete the "pay identification number" definition in subsection (a)(10); in subsection (a)(13), revise the "state agency" definition to better mirror the definitions

in Government Code, §403.0165 and §659.101, and add the citation for the Position Classification Act; add a "Texas identification number" definition in new subsection (a)(15); require a state employee to submit a cancellation form or notice, as well as the authorization form, to the employer's human resource officer or payroll officer in subsections (b)(1)-(3), and (e)(1); provide that the comptroller and a state agency are not responsible for providing a state employee's membership information to a state employee organization in subsection (b)(1)(E); combine the requirements for authorization and cancellation forms or notices into subsection (b)(2); in subsection (b)(2)(D), require a state agency to inform the applicable eligible organization if a state employee member submits a cancellation form or notice; provide in subsections (c)(1)(E) and (d)(1)(E) that an eligible organization's receipt of the authorization form, cancellation form, or cancellation notice is not a prerequisite to the authorization or cancellation becoming effective; in subsection (e), require all authorization forms to contain the employee's consent for the employer to provide certain personal information to the organization only for the purpose of informing the employee organization about the payroll deduction, remove the size requirement for cancellation forms, and add submission instructions to authorization and cancellation forms; in subsection (f)(2)(E), require an organization to specify whether it requests certification under Government Code, §403.0165 or §659.1031; delete subsection (f)(2)(F) because the statute addresses the withholding of administrative fees; change "payee identification number" to "Internal Revenue Service employer identification number" in subsection (f)(2)(H); in new subsection (g)(2), add language from §5.36 regarding the certification of a state employee organization under Government Code, §659.1031; remove the requirement that notices and detail reports must be sent by mail in subsections (g)(3)(A), (i) and (l); in subsection (i), require the reconciling items report, personal contact information, and detail report to be submitted in a secure manner under new subsection (i)(3)(B), and subsections (i)(3)(D)(v) and (l)(3)(A); require the comptroller to transmit deducted membership fees to an eligible organization by electronic funds transfer, and delete language concerning payment made by warrants; change "head" to "chief administrator" in subsection (j); require an eligible organization to notify the comptroller if there is a change to the organization's electronic funds transfer information in new subsection (k)(2)(E); change "payee identification number" to "Texas identification number" in subsection (k)(4) to use current terminology; in subsection (l), combine subsection (l)(3)(C) and (D) because they contain the same requirements.

If these amendments become effective, a state employee with an existing authorization for a payroll deduction under the current section will not be required to submit a new authorization form. However, a state employee who authorizes a payroll deduction under this section on or after the date these amendments become effective will be required to submit a properly completed authorization form in accordance with the requirements of the amended section.

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

Mr. Currah also has determined that the proposed amendment would have no significant fiscal impact on the state government, units of local government, or individuals. The proposed amendment would benefit the public by improving the clarity and implementation of the section. There would be no significant anticipated economic cost to the public. The proposed amendment would have no fiscal impact on small businesses or rural communities.

Comments on the proposal 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*.

The amendments are proposed under Government Code, §403.0165, which authorizes the comptroller to adopt rules to administer payroll deductions for certain state employee organizations, and Government Code, §659.110, which authorizes the comptroller to adopt rules to administer the eligible state employee organization membership fee deduction program authorized by Government Code, Chapter 659, Subchapter G, concerning supplemental deductions.

The amendments implement Government Code, §§403.0165, 659.101, and 659.1031-659.110.

§5.46. Deductions for Paying Membership Fees to Certain State Employee Organizations.

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

(1) Comptroller--The Comptroller of Public Accounts for the State of Texas.

(2) Eligible organization--A state employee organization that the comptroller has certified in accordance with this section and whose certification has not been terminated.

(3) Employer--A state agency that employs a ~~one or more~~ state employee who authorizes a deduction under this section ~~[employees]~~.

(4) Fiscal year--The accounting period for the state government which begins on September 1 and ends on August 31 ~~[fiscal year of the State of Texas]~~.

(5) Holiday--A state or national holiday as specified by ~~[the]~~ Government Code, §§662.001-662.010. The term does not include a holiday that the General Appropriations Act prohibits state agencies from observing.

(6) Include--Is a term of enlargement and not of limitation or exclusive enumeration. The use of the term does not create a presumption that components not expressed are excluded.

(7) Institution of higher education--Has the meaning assigned by ~~[the]~~ Education Code, §61.003.

(8) May not--Is a prohibition. The term does not mean "might not" or its equivalents.

(9) Membership fee--The dues or fee that a state employee organization requires a state employee to pay to maintain membership in the organization.

~~[(10) Payee identification number--The 14-digit number that the comptroller assigns to each direct recipient of a payment made by the comptroller for the State of Texas.]~~

(10) ~~[(11)]~~ Salary or wage leveling agreement--A contract or other agreement between a state employee and the ~~[employee's]~~ employer that requires the employer to pay the employee's total annual salary or wages over 12 months even though the employee is not scheduled to work each of those months.

(11) ~~[(12)]~~ Salary or wages--Base salary or wages, longevity pay, or hazardous duty pay.

(12) ~~[(13)]~~ State agency--A department, commission, ~~[council,]~~ board, office, agency, or other entity of Texas state government, including an institution of higher education.

(13) ~~[(14)]~~ State employee--An employee of a ~~[Texas]~~ state agency. The term includes an elected or appointed official, a part-time employee, an hourly employee, a temporary employee, an employee who is not covered by Government Code, Chapter 654 (the Position Classification Act) ~~[of 1961]~~, and a combination of the preceding. The term excludes an independent contractor and an ~~[the]~~ employee of an independent contractor.

(14) ~~[(15)]~~ State employee organization--An association, union, or other organization that advocates the interests of state employees concerning grievances, compensation, hours of work, or other conditions or benefits of employment.

(15) Texas identification number--The 14-digit number that the comptroller assigns to each direct recipient of a payment made by the comptroller.

(16) Workday--A calendar day other than Saturday, Sunday, or a holiday.

(b) Deductions.

(1) Authorization of deductions.

(A) A state employee may authorize one or more monthly deductions from the employee's salary or wages to pay membership fees to eligible organizations.

(B) Neither a ~~[No]~~ state agency nor a ~~[or]~~ state employee organization may state or imply that a state employee is required to authorize a deduction under this section.

(C) A state employee may provide an authorization only if the employee:

(i) properly completes an authorization form; and

(ii) submits the form to the employer's human resource officer or payroll officer ~~[eligible organization to which the membership fees will be paid].~~

(D) Neither the comptroller nor a state agency is liable or responsible for any damages or other consequences resulting from a state employee's authorization of ~~[employee authorizing]~~ an incorrect amount of a deduction under ~~[authorized by]~~ this section.

(E) Except as provided in subsection (i)(3) of this section, neither the comptroller nor a state agency is responsible for providing a state employee's membership information to an eligible organization.

(2) Change ~~[Manual change]~~ in the amount of a deduction or cancellation of a deduction.

(A) At any time, a state employee may authorize a change in the amount to be deducted under this section from the employee's salary or wages or cancel a deduction under this section.

(B) A state employee may authorize a change in the amount of a deduction or a cancellation of a deduction under this section only if the employee:

(i) properly completes an authorization form, cancellation form, or cancellation notice, as appropriate; and

(ii) submits the form or notice to the employer's human resource officer or payroll officer ~~[affected eligible organization].~~

(C) Neither the comptroller nor a state agency is liable or responsible for any damages or other consequences resulting from a state employee's change of ~~[employee changing]~~ the amount of a deduction or cancellation of a deduction under ~~[authorized by]~~ this section.

(D) If a state employee submits a cancellation form or cancellation notice to the employer's human resource officer or payroll officer, the state agency must notify the affected eligible organization.

(3) Automatic change in the amount of a deduction.

(A) An ~~[A state employee may authorize the employee's]~~ employer may ~~[to]~~ change the amount of a deduction under this section from the employee's salary or wages without requiring the employee to submit a new ~~[first submitting an]~~ authorization form only if: ~~[for the change.]~~

(i) the employee's current authorization form authorizes the employer to change the amount of a deduction under this section from the employee's salary or wages without requiring the employee to submit a new authorization form; and

(ii) the change is needed because the eligible organization to which the employee authorized a deduction has changed the amount of membership fees it charges to state employees.

~~[(B)]~~ A state employee may provide an authorization under subparagraph (A) of this paragraph only for a change that is needed because an eligible organization has changed the amount of membership fees it charges to state employees. An employee may not provide the authorization for a change that is needed because the employee's salary or wages have increased or decreased.]

(B) ~~[(C)]~~ Even if a state employee provides the authorization under subparagraph (A) of this paragraph, the ~~[employee's]~~ employer may require the employee to submit a properly completed authorization form to the employer before the employer changes the amount of a deduction under this section from the employee's salary or wages.

(C) ~~[(D)]~~ A state employee may provide the authorization under subparagraph (A) of this paragraph only if the employee:

(i) properly completes an authorization form that enables state employees to provide the authorization; and

(ii) submits the form to the employer's human resource officer or payroll officer ~~[affected eligible organization].~~

(D) ~~[(E)]~~ When an eligible organization wants to change the amount of membership fees it charges to state employees that are authorized under subparagraph (A) of this paragraph, the organization must provide prior written notification of the change to the comptroller. If the comptroller receives the notification on the first calendar day of a month, ~~[then]~~ the change is effective for the salary or wages paid to state employees on the first workday of the second month following the month in which the comptroller receives the notification. If the comptroller receives the notification after the first calendar day of a month, ~~[then]~~ the change is effective for the wages and salaries paid to state employees on the first workday of the

third month following the month in which the comptroller received the notification.

(4) Sufficiency of salary or wages to support a deduction.

(A) A state employee is solely responsible for ensuring that the employee's salary or wages are sufficient to support a deduction authorized by this section.

(B) If a state employee's salary or wages are sufficient to support only part of a deduction authorized by this section, ~~[then]~~ no part of the deduction may be made.

(C) The amount that could not be deducted from a state employee's salary or wages because they were insufficient to support the deduction may not be made up by deducting the amount from subsequent payments of salary or wages to the employee.

(5) Timing of deductions.

(A) Except as provided in subparagraph (B) of this paragraph, a deduction authorized by this section must be made from the salary or wages that are paid on the first working day of a month.

(B) If a state employee does not receive a payment of salary or wages on the first working day of a month, ~~[then]~~ the employer ~~[of the employee]~~ may designate the payment of salary or wages to the employee from which a deduction authorized by this section will be made. A deduction authorized by this section may be made only once each month.

(6) Regularity of deductions.

(A) This subparagraph applies to a state employee who is scheduled by the ~~[employee's]~~ employer to work each month of a year. A deduction authorized by this section must be calculated so that the total membership fee paid by a state employee per year is spread evenly over 12 monthly deductions.

(B) This subparagraph applies to a state employee who is not scheduled by the ~~[employee's]~~ employer to work each month of a year.

(i) If a state employee has entered into a salary or wage leveling agreement, ~~[then]~~ a deduction authorized by this section must be calculated so that the total membership fee paid by the employee per year is spread evenly over the months the employee will be paid under the agreement.

(ii) If a state employee has not entered into a salary or wage leveling agreement, ~~[then]~~ a deduction authorized by this section must be calculated so that the total membership fee paid by the employee per year is spread evenly over the months the employee will be paid.

~~[(C) The eligible organization to which a state employee authorizes a deduction under this section is responsible for calculating the deduction amount in accordance with this paragraph. The eligible organization is also responsible for instructing the state employee about how to enter the correct deduction amount on the authorization form.]~~

(7) Retroactive deductions.

(A) In this paragraph, "retroactive deduction" means a deduction authorized by this section to the extent the purpose of the deduction is:

(i) to correct an error made in a previous month that resulted in the amount of money deducted being less than the amount authorized by a state employee; or

(ii) to catch up on the amount of membership fees owed by a state employee to an eligible organization because a deduction authorized by this section was not made in one or more previous months.

(B) A retroactive deduction is prohibited unless:

(i) an error described in subparagraph (A)(i) of this paragraph was committed by the employer ~~[of the employee]~~; and

(ii) the eligible organization that received the erroneous deduction consents to the retroactive deduction.

~~[(8) Cancellation of deductions.]~~

~~[(A) A state employee may cancel at any time a deduction authorized by this section.]~~

~~[(B) A state employee may cancel a deduction authorized by this section to an eligible organization only if the employee:]~~

~~[(i) properly completes a cancellation form and submits the form to the organization or the employee's employer; or]~~

~~[(ii) provides other written notice of the cancellation to the organization or the employee's employer.]~~

~~[(C) If a state employee submits a cancellation form or other written notice of cancellation to the employee's employer, then the agency must include a copy of the form or notice with the next detail report that the agency sends to the affected eligible organization.]~~

~~[(D) Neither the comptroller nor a state agency is liable or responsible for any damages or other consequences resulting from a state employee cancelling a deduction authorized by this section.]~~

~~(8)~~ ~~[(9)]~~ Interagency transfers of state employees. A state employee who transfers from one state agency to a second state agency must be treated by the second state agency as if the employee has not yet authorized any deductions under this section.

(c) Effectiveness of authorization forms.

(1) Effective date of authorization forms.

(A) This subparagraph applies if a state agency receives a state employee's properly completed authorization form on the first calendar day of a month.

(i) The first deduction authorized by this section must be made from the employee's salary or wages that are paid on the first workday of the first month following the month in which the agency receives the form.

(ii) If an authorization form is submitted to change the amount of a deduction authorized by this section, ~~[then]~~ the change is effective with the deduction made on the first workday of the first month following the month in which the agency receives the form.

(B) This subparagraph applies if a state agency receives a state employee's properly completed authorization form after the first calendar day of a month.

(i) The first deduction authorized by this section must be made from the employee's salary or wages that are paid on the first workday of the second month following the month in which the agency receives the form. However, the agency may consent for the first deduction to occur from the salary or wages that are paid on the first workday of the first month following the month in which the agency receives the form.

(ii) If an authorization form is submitted to change the amount of a deduction authorized by this section, ~~[then]~~ the change is effective with the deduction made on the first workday of the second month following the month in which the agency receives the form.

ond month following the month in which the agency receives the form. However, the agency may consent for the change to be effective with the deduction made on the first workday of the first month following the month in which the agency receives the form.

(C) If the first calendar day of a month is not a workday, ~~[then]~~ the first workday following the first calendar day is the deadline for the receipt of properly completed authorization forms.

(D) A state employee is ~~[Eligible organizations are]~~ solely responsible for ensuring that a properly completed authorization form is ~~[forms are]~~ received by the employer by the deadline.

~~(E) An eligible organization's receipt of the authorization form is not a prerequisite to the authorization becoming effective.~~

(2) Return of authorization forms.

(A) A state agency shall return an authorization form to the state employee who ~~[eligible organization that]~~ submitted the form if:

(i) the form is incomplete, contains erroneous data, or is otherwise insufficient; and

(ii) a deficiency listed in clause (i) of this subparagraph makes it impossible for the agency to establish the deduction in accordance with the form.

~~[(B) A state agency shall return an authorization form to the eligible organization that submitted the form if the form is for an individual who is not employed by the agency.]~~

~~(B) [(C)]~~ A state agency may either accept an authorization form from or return an authorization form to the state employee who ~~[eligible organization that]~~ submitted the form when the form postpones the first deduction authorized by this section beyond the effective date determined under paragraph (1) of this subsection. If the agency accepts the authorization form, ~~[then]~~ the agency may not make the deduction effective before the effective date specified on the form.

~~(C) [(D)]~~ A state agency shall state in writing the reason for the return of an authorization form. The statement must be attached to the form being returned.

~~[(3) Copies of authorization forms: An eligible organization is solely responsible for making a copy of each authorization form before the organization submits the form to the appropriate state agency.]~~

(d) Effectiveness of cancellation forms and cancellation notices.

(1) Effective date of cancellation forms and cancellation notices.

(A) This subparagraph applies if a state agency receives a state employee's properly completed cancellation form or cancellation notice on the first calendar day of a month. A state employee's cancellation of a deduction authorized by this section is effective for the salary or wages paid to the employee on the first workday of the first month following the month in which the agency receives the cancellation form or cancellation notice.

(B) This subparagraph applies if a state agency receives a state employee's properly completed cancellation form or cancellation notice after the first calendar day of a month. A state employee's cancellation of a deduction authorized by this section is effective for the salary or wages paid to the employee on the first workday of the:

(i) [for the salary or wages paid to the employee on the first workday of the] second month following the month in which the agency receives the cancellation form or cancellation notice; or

(ii) [for the salary or wages paid to the employee on the first workday of the] first month following the month in which the agency receives the cancellation form or cancellation notice if the agency consents to this effective date.

(C) If the first calendar day of a month is not a workday, ~~[then]~~ the first workday following the first calendar day is the deadline for the receipt of properly completed cancellation forms or cancellation notices.

(D) A state employee is solely ~~[State employees and eligible organizations are]~~ responsible for ensuring that properly completed cancellation forms and cancellation notices are received by the deadline.

~~(E) An eligible organization's receipt of the cancellation form or cancellation notice is not a prerequisite to the cancellation becoming effective.~~

(2) Return of cancellation forms and cancellation notices.

(A) A state agency shall return a cancellation form or cancellation notice to the state employee who ~~[or the eligible organization that]~~ submitted the form or notice if:

(i) the form or notice is incomplete, contains erroneous data, or is otherwise insufficient; and

(ii) a deficiency listed in clause (i) of this subparagraph makes it impossible for the agency to cancel the deduction in accordance with the form or notice.

~~[(B) A state agency shall return a cancellation form or cancellation notice to the state employee or the eligible organization that submitted the form or notice if the form or notice is for an individual who is not employed by the agency.]~~

~~[(C) If a state agency returns a cancellation form or cancellation notice to an eligible organization, then the agency must promptly mail or deliver a copy of the returned form or notice to the state employee who completed it.]~~

~~(B) [(D)]~~ A state agency shall state in writing the reason for the return of a cancellation form or cancellation notice. The statement must be attached to the form being returned.

~~[(3) Copies of cancellation forms and cancellation notices: A state employee or eligible organization is responsible for making a copy of the employee's cancellation form or cancellation notice before the employee or organization submits the form to the employee's employer.]~~

(e) Authorization and cancellation forms.

(1) The comptroller's approval of authorization and cancellation forms.

(A) An eligible organization may not distribute or provide an authorization or cancellation form to a state employee until the organization has received the comptroller's written approval of the form.

(B) As a condition for retaining its eligibility, an eligible organization must produce an authorization form and a cancellation form that comply with the comptroller's requirements and this section. The organization must produce the forms within a reasonable time after the organization receives its certification from the comptroller.

(C) The comptroller may approve an eligible organization's authorization form if the form:

(i) clearly informs state employees that a properly completed authorization form must be submitted to the employer's human resource officer or payroll officer to authorize a deduction;

(ii) clearly informs state employees that a copy of the properly completed authorization form should be provided to the organization to notify the organization that the employee has authorized a deduction;

(iii) contains the following statement: "I understand that I cannot be compelled to be a member of a state employee organization or to pay dues to a state employee organization as a condition of employment with the state. I also understand that I may change or cancel this authorization at any time by providing written notice to my employer. I voluntarily authorize a monthly payroll deduction in the amount shown above from my salary or wages for membership fees to the state employee organization listed above and agree to comply with the comptroller's rules concerning this deduction. Additionally, I agree that my name, social security number, personal contact information, and the amount of my payroll deduction for membership fees may be provided to the state employee organization listed above only for the purpose of informing the state employee organization about the payroll deduction."; and

(iv) complies with this section and the comptroller's other requirements for format and substance.

(D) [(C)] The comptroller may [not] approve the [authorization or] cancellation form of an eligible organization if the form [unless]:

(i) clearly informs state employees that a properly completed cancellation form must be submitted to the employer's human resource officer or payroll officer to cancel the deduction [the form is at least 8 1/2 inches wide];

(ii) clearly informs state employees that a copy of the properly completed cancellation form should be provided to the organization to notify the organization that the employee has cancelled the deduction; [the form is at least 11 inches long; and]

(iii) [the cancellation form] clearly informs state employees that they are not required to state a reason for a cancellation; and

(iv) [the form] complies with the comptroller's other requirements for format and substance.

(E) [(D)] An eligible organization must revise an authorization or cancellation form upon request from the comptroller. The organization may not distribute or otherwise make available to state employees a revised form until the organization has received the comptroller's written approval of the form.

(2) Distribution of authorization or cancellation forms.

(A) An eligible organization must provide an authorization or cancellation form to a state employee or state agency promptly after receiving:

(i) an oral or written request for the form from the employee or agency; or

(ii) an oral or written request to provide the form to the employee from the comptroller or the [employee's] employer.

(B) A state agency may maintain a supply of cancellation forms and distribute the forms to its state employees upon request.

An eligible organization shall promptly provide the forms to the agency upon request.

(f) Procedural requirements for certifying state employee organizations.

(1) Request for certification.

(A) The comptroller may not certify a state employee organization under this section unless the comptroller receives a written request for certification from an individual who is authorized by the organization to make the request.

(B) The comptroller may not certify a state employee organization under this section if the comptroller receives the organization's request for certification after June 2nd of a fiscal year.

(2) Requirements for requests for certification. A request for certification submitted to the [The] comptroller by [may not certify] a state employee organization must contain [unless the organization's request for certification includes]:

(A) the organization's complete name;

(B) the street address of the headquarters of the organization;

(C) the mailing address of the headquarters of the organization, if different from the street address;

(D) the full name, title, telephone number, and mailing address of the organization's primary contact;

(E) a specific request for certification as an eligible organization, specifying whether the organization is requesting certification under Government Code, §403.0165 or §659.1031;

[(F) a specific agreement to pay the administrative fees charged by the comptroller under this section;]

(F) [(G)] a specific acceptance of the requirements of this section as they exist at the time the request is made or as adopted or amended thereafter;

(G) [(H)] the organization's Internal Revenue Service employer [payee] identification number [of the organization]; and

(H) [(I)] any [the] other information that the comptroller deems necessary.

(g) Substantive requirements for certifying state employee organizations. The comptroller may certify a state employee organization under this section if the organization satisfies the requirements of paragraph (1) or (2) of this subsection.

(1) Certification of a state employee organization under Government Code, §403.0165 [Membership].

(A) The comptroller may [not] certify a state employee organization if the organization: [unless it submits persuasive evidence to the comptroller that the organization had a membership of at least 4,000 state employees throughout the 18 months preceding the month in which the comptroller receives the organization's request for certification.]

(i) [(B)] submits persuasive evidence to the comptroller that the organization had a membership of at least 4,000 state employees throughout the 18 months preceding the month in which the comptroller receives the organization's request for certification (an [An] example of the evidence that the comptroller may review is a membership roster containing the name of each state employee who is a member of the organization, the date each employee joined the or-

ganization, and the date through which each employee's membership fees are paid); [-]

(ii) [(2) Statewide activities. The comptroller may not certify a state employee organization unless it] demonstrates to the comptroller that the organization conducts activities on a statewide basis (an [- A state employee] organization may satisfy this requirement by submitting any relevant evidence, including newsletters, news articles, correspondence, and membership rosters containing the names and addresses of the organization's members); [-]

(iii) demonstrates[(3) Membership fee structure. (A) The comptroller may not certify a state employee organization unless it proves] to the comptroller that the organization had a membership fee structure for state employees throughout the 18 months preceding the month in which the comptroller receives the organization's request for certification (an [- A state employee] organization may satisfy this requirement by submitting relevant evidence, including dated enrollment forms from state employees, documentation about the fees structure, and financial records); [-]

(iv) [(B) The comptroller may not certify a state employee organization unless it] demonstrates to the comptroller that the membership fees collected from state employees will be equal to an average of at least one-half of the membership fees received by the organization nationwide (an [- A state employee] organization may satisfy this requirement by submitting financial records that compare the membership fees to be received from state employees with the membership fees received from other individuals throughout the nation); and[-]

(v) [(4) Electronic funds transfers. The comptroller may not certify a state employee organization unless: (A) the organization] has submitted to [a request to be paid through electronic funds transfers under rules adopted by] the comptroller a completed direct deposit form for the organization.[-; and]

[(B) the comptroller has approved the request.]

[(5) Exception.]

(B) [(A)] The comptroller shall certify a state employee organization under this paragraph that demonstrates to the satisfaction of the comptroller that the organization had a membership of at least 4,000 state employees on April 1, 1991. The organization is not required to satisfy any of the other substantive requirements of this paragraph [subsection] except for subparagraph (A)(v) [paragraph (4)] of this paragraph. A state employee organization may demonstrate that the organization had a membership of at least 4,000 state employees on April 1, 1991, only by submitting to the comptroller: [subsection.]

[(B) A state employee organization may demonstrate that the organization had a membership of at least 4,000 state employees on April 1, 1991, only by:]

(i) [submitting] a membership roster containing the name of each state employee who was a member of the organization on April 1, 1991;

(ii) the date each employee joined the organization; and

(iii) the date through which each employee's membership fees were paid as of April 1, 1991.

(2) Certification of a state employee organization under Government Code, §659.1031. The comptroller may certify a state employee organization if the organization:

(A) submits persuasive evidence to the comptroller that the organization had a membership of at least 2,000 active or retired state employees who hold or have held certification from the Texas

Commission on Law Enforcement under Occupations Code, Chapter 1701, Subchapter G; and

(B) has submitted a completed direct deposit form for the organization to the comptroller.

(3) [(6)] Notifications.

(A) The comptroller shall notify [mail a notice to] a state employee organization about the comptroller's approval or disapproval of the organization's request for certification by no later than the 30th day after the comptroller receives the request if the request is complete in all respects.

(B) The comptroller shall notify each state agency of the comptroller's certification of a state employee organization by no later than the 30th day after the comptroller makes the certification.

(h) Effective date of certification. The first deduction to pay a membership fee to an eligible organization may be made from salary or wages paid on the first workday of the second month following the month in which the comptroller certifies the organization.

(i) Payments of deducted membership fees.

(1) Payments by the comptroller through electronic funds transfers. The comptroller shall pay deducted membership fees to an eligible organization by electronic funds transfer [unless it is infeasible to do so].

[(2) Payments through warrants issued by the comptroller.]

[(A) This paragraph applies only if it is infeasible for the comptroller to pay deducted membership fees to an eligible organization by electronic funds transfer.]

[(B) The comptroller shall pay deducted membership fees by warrant.]

[(C) The comptroller must issue one warrant for each combination of state agency, eligible organization, and payroll voucher submitted by the agency if the agency has at least one state employee from whose salary or wages a deduction is made under this section. The comptroller must make the warrant payable to the organization.]

[(D) The comptroller must make each warrant available for pick-up by the state agency whose employees' membership fees are being paid by the warrant. The agency must mail or deliver the warrant to the payee of the warrant by no later than the 10th calendar day of the month. If the 10th calendar day of a month is not a workday, then the first workday following the 10th calendar day is the deadline for the mailing or delivery of warrants.]

(2) [(3)] Payments by institutions of higher education.

(A) This paragraph applies only to membership fees in eligible organizations that have been deducted from salaries or wages that the comptroller does not pay directly to state employees of institutions of higher education.

(B) An institution of higher education shall pay deducted membership fees to an eligible organization by electronic funds transfer unless it is infeasible to do so.

(C) If it is infeasible for an institution of higher education to pay deducted membership fees to an eligible organization by electronic funds transfer, then the institution shall pay the fees by check. The check must be mailed or delivered to the organization by no later than the 20th calendar day of the month following the month when the salary or wages from which the deductions were made were earned. If the 20th calendar day of a month is not a workday, then the

first workday following the 20th calendar day is the deadline for the mailing or delivery of checks.

(3) ~~[(4)]~~Reconciliation ~~[Payment reconciliation and discrepancies]~~.

(A) An eligible organization shall reconcile the detail report provided by a state agency under subsection (1)(3) of this section with:

(i) the amount of membership fees paid to the organization under this subsection; and [-]

(ii) the organization's membership information.

(B) An eligible organization must submit to the agency, in a secure manner, a reconciling items report, which identifies: ~~[all]~~

(i) any discrepancies between the detail report provided by a state agency under subsection (1)(3) of this section and the actual amount of membership fees received under this subsection; and [-]

(ii) the name of any employee listed in the detail report provided by a state agency under subsection (1)(3) of this section for whom the organization does not already have personal contact information.

(C) The organization must ensure that the agency receives the organization's reconciling items report ~~[of the discrepancies]~~ by no later than the 60th calendar day after the day on which the agency submitted ~~[mailed]~~ the detail report to the organization. If the 60th calendar day is not a workday, ~~[then]~~ the first workday following the 60th calendar day is the deadline.

(D) ~~[(C)]~~ A state agency that receives a reconciling items report ~~[of discrepancies]~~ from an eligible organization shall investigate the reconciling items described in the organization's reconciling items report, ~~[discrepancy]~~ and notify the organization of the action to be taken to eliminate the reconciling items ~~[discrepancy]~~. A reconciling item ~~[discrepancy]~~ may be eliminated by:

(i) making a retroactive deduction if it is authorized by subsection (b)(7) of this section;

(ii) recovering an excessive payment to an eligible organization of amounts deducted under this section from a subsequent payment to the organization;

(iii) recovering an excessive payment to an eligible organization of amounts deducted under this section by obtaining a refund from the organization in accordance with subsection (k)(7) of this section; ~~[or]~~

(iv) the agency making corrections to the detail report if the report is incorrect; ~~or~~[-]

(v) providing the organization, in a secure manner, with personal contact information for each employee identified in the reconciling items report for whom the organization does not already have personal contact information.

(4) ~~[(5)]~~ Subordinate units of eligible organizations.

(A) A chapter or other subordinate unit of an eligible organization may receive directly from the comptroller or an institution of higher education a payment of deducted membership fees if the fees were deducted under authorization forms that authorized the payment of the fees to the chapter or other subordinate unit of the organization.~~[-]~~

~~[(i)]~~ the fees were deducted under authorization forms that authorized the payment of the fees to the organization; and]

~~[(ii)]~~ the organization is credited on the accounting records of the State of Texas for the payment.]

(B) A request to pay deducted membership fees to a chapter or subordinate unit instead of the parent eligible organization must be submitted to the comptroller by the organization.

(C) The comptroller may grant a request under subparagraph (B) of this paragraph only if the membership fee structure of the chapter or subordinate unit is the same as the membership fee structure of the parent eligible organization.

(D) The comptroller's granting of a request under subparagraph (B) of this paragraph is not a certification of the chapter or subordinate unit as an eligible organization.

(E) The comptroller may require an eligible organization to submit proof that an entity is a chapter or other subordinate unit of the organization before a payment of deducted membership fees is paid directly to the entity. The comptroller may periodically require the organization to submit proof that the entity is still a chapter or other subordinate unit of the organization as a condition for continuing to pay deducted membership fees directly to the entity.

(j) Solicitation. This section does not prohibit ~~[Nothing in this section prohibits]~~ the chief administrator ~~[head]~~ of a state agency from permitting or prohibiting solicitation by eligible organizations on the premises of the agency.

(k) Responsibilities of eligible organizations.

(1) Disseminating information.

(A) An eligible organization is solely responsible for the dissemination of relevant information to its representatives and employees.

(B) An eligible organization must ensure that its representatives and employees comply with the requirements of this section.

(2) Notification to the comptroller. An eligible organization must notify the comptroller in writing immediately after a change occurs to:

(A) the organization's name;

(B) the street address of the headquarters of the organization;

(C) the mailing address of the headquarters of the organization, if different from the street address; ~~[or]~~

(D) the full name, title, telephone number, or mailing address of the organization's primary contact; ~~or~~[-]

(E) the organization's electronic funds transfer information.

(3) Primary contact. The individual that a state employee organization designates as its primary contact must represent the organization for the purposes of:

(A) communicating with the comptroller, including receiving and responding to correspondence from the comptroller; and

(B) disseminating information, including information about the requirements of this section, to representatives of the organization.

(4) Texas ~~[Payee]~~ identification number. The Texas ~~[payee]~~ identification number of an eligible organization must appear on all correspondence from the organization to the comptroller or a state agency.

(5) Acceptance ~~[and submission]~~ of authorization forms. A state agency must accept an authorization form from a state employee if a refusal to accept the form would violate a law of the United States or the State of Texas.

~~[(A) An eligible organization must accept an authorization form from a state employee if a refusal to accept the form would violate a law of the United States or the State of Texas.]~~

~~[(B) An eligible organization must make a reasonable effort to ensure that the appropriate state agency receives the original of a state employee's authorization form within a reasonable time after the organization receives the form.]~~

(6) Acceptance ~~[and submission]~~ of cancellation forms and cancellation notices. A state agency must accept a cancellation form or cancellation notice from a state employee unless:

~~[(A) An eligible organization must accept a cancellation form or cancellation notice from a state employee unless:]~~

(A) [(i)] the employee is not a member of the organization; or

(B) [(ii)] the employee did not properly complete the cancellation form.

~~[(B) An eligible organization must make a reasonable effort to ensure that the appropriate state agency receives the original of a state employee's cancellation form or cancellation notice within a reasonable time after the organization receives the form or notice.]~~

(7) Refunding excessive payments of amounts deducted under this section.

(A) An eligible organization shall refund a payment of amounts deducted under this section to the extent the amount exceeds the amount that should have been paid to the organization if:

(i) the organization receives a written request for the refund from a state agency;

(ii) the agency provides reasonable evidence of the overpayment to the organization; and

(iii) no subsequent payments of amounts deducted under this section are anticipated to be made to the organization.

(B) If a refund is required by subparagraph (A) of this paragraph, the organization must ensure that the appropriate state agency receives the refund by no later than the 30th calendar day after the later of:

(i) the date on which the organization receives the agency's written request for the refund; and

(ii) the date on which the organization receives the agency's reasonable evidence of the overpayment.

(l) Responsibilities of state agencies.

(1) Reports of violations. A state agency may report to the comptroller a violation of this section that the agency believes an eligible organization or its representatives or employees might have committed. A report must be made in writing, and a copy of the report must be mailed to the organization at the same time that the original of the report is mailed to the comptroller.

(2) Authorization forms. A state agency:

(A) may accept authorization forms only if they comply with this section;

(B) must ensure that the identifying information for an eligible organization on an authorization form is the same as the identifying information on the notification document received from the comptroller under subsection ~~(g)(3)(B)~~ [(g)(6)(B)] of this section; and

(C) may not accept an authorization form that contains an obvious alteration without the state employee's written consent to the alteration.

(3) Detail reports to eligible organizations.

(A) ~~[This subparagraph applies to the employer of one or more state employees from whose salary or wages deductions authorized by this section are made.]~~ An employer must submit, in a secure manner, a detail report each month to each eligible organization that receives the deductions. ~~[The report must be submitted in the manner required by the organizations unless the employer is incapable of complying with the requirement.]~~

(B) A detail report to an eligible organization for a month must contain ~~[include]~~:

(i) the name, in alphabetical order, and social security number of each state employee from whose salary or wages a deduction was authorized by this section for the month, regardless of whether the deduction was actually made; and

(ii) the amount of the deduction made for each employee.

(C) An employer ~~[This subparagraph applies when the comptroller or an institution of higher education pays membership fees to an eligible organization by warrant or check. The appropriate state agency]~~ must submit ~~[mail]~~ the detail report for the payment to the organization by no later than the 20th calendar day of the month in which the payment was made. If the 20th calendar day is not a workday, then the first workday following the 20th calendar day is the deadline for submitting ~~[mailing]~~ the report.

~~[(D) This subparagraph applies when the comptroller or an institution of higher education pays membership fees to an eligible organization by electronic funds transfer. The appropriate state agency must mail the detail report for the payment to the organization by no later than the 20th calendar day of the month in which the payment was made. If the 20th calendar day is not a workday, then the first workday following the 20th calendar day is the deadline for mailing the report.]~~

(m) Termination of certification.

(1) Termination by the comptroller.

(A) The comptroller may terminate the certification of an eligible organization only if the organization violates subsection ~~(e)(1)~~ of this section.

(B) The comptroller may determine the effective date of a termination under this paragraph. No deduction authorized by this section may be made to an eligible organization on or after the effective date of a termination under this paragraph.

(C) When the comptroller terminates the certification of an eligible organization, the comptroller shall send written notice of the termination to the organization via certified mail, return receipt requested.

(2) Termination by eligible organizations.

(A) An eligible organization may terminate its participation in the deduction program authorized by this section only by terminating its certification.

(B) An eligible organization may terminate its certification by providing written notice of termination to the comptroller. However, an organization may not provide written notice of termination to the comptroller until the organization has provided written notice of termination to each state employee from whose salary or wages a membership fee to the organization is being deducted.

(C) An eligible organization's termination of its certification is effective beginning with the salary or wages that are paid on the first workday of the third month following the month in which the comptroller receives the organization's proper notice of termination.

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 November 16, 2020.

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Victoria North

General Counsel for Fiscal and Agency Affairs

Comptroller of Public Accounts

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For further information, please call: (512) 475-0387



TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 806. PURCHASES OF PRODUCTS AND SERVICES FROM PEOPLE WITH DISABILITIES

The Texas Workforce Commission (TWC) proposes amendments to Chapter 806, relating to Purchases of Products and Services from People with Disabilities, as follows:

Subchapter A. General Provisions Regarding Purchases of Products and Services from People with Disabilities, §806.2

Subchapter D. Community Rehabilitation Programs, §806.41

Subchapter E. Products and Services, §806.53

TWC proposes new sections to Chapter 806, relating to Purchases of Products and Services from People with Disabilities, as follows:

Subchapter B. Advisory Committee Responsibilities, Meeting Guidelines, §806.23

Subchapter D. Community Rehabilitation Programs, §806.42

TWC proposes adding new Subchapter J to Chapter 806, relating to Purchases of Products and Services from People with Disabilities, as follows:

Subchapter J. Transition and Retention Plans, §§806.100 - 806.104

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the amendments to the Chapter 806 rules is to:

--implement Senate Bill (SB) 753, 86th Texas Legislature, Regular Session (2019); and

--provide program clarification and improvement opportunities.

Senate Bill 753

SB 753 amended the Texas Human Resources Code, Chapter 122, relating to the Purchasing from People with Disabilities (PPD) program, by adding the following sections:

--Section 122.0075, which requires Community Rehabilitation Programs (CRPs) that participate in the PPD program and that pay subminimum wage to develop, with the assistance of TWC, a Transition and Retention Plan (TRP) to increase the wages of their workers with disabilities to the federal minimum wage by September 1, 2022, and to address specifically how they will retain workers after the increase in wages to at least the federal minimum wage.

--Section 122.0076, which requires all CRPs that participate in the PPD program to pay each worker with a disability at least the federal minimum wage.

Transition and Retention Plan

Texas Human Resources Code, §122.0075 requires TWC to assist CRPs that currently pay subminimum wage in developing their TRPs and to provide:

--information about certified benefits counselors to ensure that workers are informed of work incentives and the potential impact that the increase in wages may have on a worker's eligibility for pertinent federal or state benefit programs; and

--a referral to a certified benefits counselor to any worker with a disability who requests a referral.

Texas Human Resources Code, §122.0075 requires the TRP to ensure, to the fullest extent possible, that each worker with a disability is retained by the CRP after the program increases wages to at least the federal minimum wage. The section also requires CRPs that cannot retain all workers with a disability after the wage increase to work with TWC and other relevant governmental entities to obtain job training and employment services to help the workers find other employment that pays at least the federal minimum wage. The section further allows TWC, at the worker's request, to help the worker who is not retained by the CRP to secure employment that pays at least the federal minimum wage.

Additionally, Texas Human Resources Code, §122.0075(f) allows, but does not require, TWC to extend the period for compliance with the minimum wage requirements in Texas Human Resources Code, §122.0076 for not more than 12 months if the CRP:

--requests the extension by March 1, 2022;

--has demonstrated to TWC that an extension would be in the best interest of the CRP's employees with disabilities;

--has worked with TWC to develop a TRP and made meaningful progress toward meeting the minimum wage requirements; and

--submits a revised plan to TWC detailing how the extension will allow the CRP to meet the minimum wage requirements.

TWC must decide on the request for an extension no later than May 1, 2022. The requirements of Texas Human Resources Code, §122.0075 expire on September 1, 2023.

CRP Minimum Wage Requirements

Texas Human Resources Code, §122.0076(a) requires all CRPs participating in the PPD program to pay each worker with a disability at least the federal minimum wage for any work relating to products or services purchased by the CRP through the PPD program. Texas Human Resources Code, 122.0076(d) states that the minimum wage requirement does not apply to a CRP's eligibility before the later of:

--September 1, 2022; or

--the date of the extension granted by TWC under Texas Human Resources Code, §122.0075(f).

Texas Human Resources Code, §122.0076(b) allows, but does not require, TWC to exempt a CRP worker with a disability from the minimum-wage requirements if TWC determines, based on the worker's circumstances, that requiring the minimum wage would result in the:

--CRP not being able to retain the worker with a disability;

--worker not being successful in obtaining work with a different employer; and

--worker not being able to obtain employment at a higher wage than the CRP could pay.

Program Clarification and Improvement Opportunities

Workforce Innovation and Opportunity Act Referrals to CRPs

The Chapter 806 rule amendments address issues related to the percent of a CRP's direct labor hours that must be performed by individuals with disabilities, particularly in relation to Workforce Innovation and Opportunity Act (WIOA) of 2014 referrals.

Texas Human Resources Code, §122.013(c)(3) requires TWC to establish, by rule, the minimum percentage of employees with disabilities that an organization must employ to be considered a CRP for the PPD program. Section 806.53 requires CRPs to certify compliance with the requirement that, for each contract, individuals with disabilities perform 75 percent of each CRP's total hours of direct labor that are necessary to deliver services and products.

WIOA and its implementing regulations established that employment outcomes in the Vocational Rehabilitation (VR) program must be in competitive integrated employment (CIE). The components of a CIE setting are defined further in 34 Code of Federal Regulations (CFR) Part 361. Successful employment outcomes that are reported by state VR agencies under WIOA must meet the definition of CIE.

Based on these WIOA provisions, an employer that must meet a requirement that 75 percent of its direct labor hours be performed by individuals with disabilities will have difficulty meeting the integrated location criteria in WIOA. The VR program may not refer customers to PPD CRPs for employment opportunities unless the opportunities meet WIOA requirements.

Similarly, the 75 percent requirement limits a CRP's options to offer CIE opportunities to workers with disabilities who wish to work in an integrated setting.

Chapter 806 will maintain the 75 percent of direct hours requirement. However, these rule amendments allow the Commission to approve a percentage different from 75 percent at the time of the CRP's initial certification and subsequent re-certifications for a CRP that proposes to participate in the PPD program and offer employment opportunities for individuals with disabilities that meet the WIOA definition of CIE or such other reasons.

Other Program Clarification and Improvement Opportunities

The Chapter 806 rule amendments also address:

--CRP's compliance with state law and regulations;

--communication with the PPD Advisory Committee;

--Commission approval of products and services;

--determination of a worker with a disability;

--use of contract labor; and

--clarifying appreciable contribution and value added by individuals with disabilities.

Rule Review

Texas Government Code, §2001.039 requires that every four years each state agency review and consider for readoption, revision, or repeal each rule adopted by that agency. TWC has assessed whether the reasons for adopting or readopting the rules continue to exist. TWC finds that the rules in Chapter 806 are needed, reflect current legal and policy considerations, and reflect current TWC procedures. The reasons for initially adopting the rules continue to exist; therefore, TWC proposes to readopt Chapter 806, Purchases of Products and Services from People with Disabilities, with the amendments described in this proposed rulemaking.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER A. GENERAL PROVISIONS REGARDING PURCHASES OF PRODUCTS AND SERVICES FROM PEOPLE WITH DISABILITIES

TWC proposes amendments to Subchapter A, as follows:

§806.2. Definitions

Section 806.2 is amended to add the following definitions:

Individual with Disabilities is defined as an individual with a disability recognized under the Americans with Disabilities Act and employed by a CRP or an entity selected by a CRP.

Minimum wage is defined as the wage under Section 6, Fair Labor Standards Act of 1938 (29 USC §206).

SUBCHAPTER B. ADVISORY COMMITTEE RESPONSIBILITIES, MEETING GUIDELINES

TWC proposes amendments to Subchapter B, as follows:

§806.23. Submitting Reports and Input to the Commission

Current §806.21 addresses the role of the PPD Advisory Committee and requires the committee to provide input and recommendations to the Commission on the PPD program. However, the section does not address how the PPD Advisory Committee's advice, activity, or recommendations that result from its meetings will be communicated to the Commission.

New §806.23 establishes requirements for the PPD Advisory Committee for submitting reports and input to the Commission. The new section requires the PPD Advisory Committee to:

--meet semiannually, with at least one meeting each fiscal year to review and, if necessary, recommend changes to program objectives, performance measures, and criteria established under §806.21(b); and

--prepare and submit to the Commission a report containing any findings and recommendations within 60 days of the completion of the meeting.

SUBCHAPTER D. COMMUNITY REHABILITATION PROGRAMS

TWC proposes amendments to Subchapter D, as follows:

§806.41. Certification and Recertification of Community Rehabilitation Programs

Several provisions of §806.41 are amended relating to the certification and recertification of CRPs.

Compliance with State Laws and Regulations

Section 806.41 is amended to add the requirement that CRPs maintain compliance with Unemployment Insurance tax, wage claims, and state licensing, regulatory, and tax requirements.

New §806.41(q) requires CRPs to:

- be clear of any debts related to Unemployment Insurance taxes or wage claims; and
- meet the state licensing, regulatory, and tax requirements applicable to the CRP.

Additionally, §806.41(e) is amended to add a reference to this new requirement and add that failure to maintain compliance shall result in revocation of the CRP's certification to participate in the PPD program. Section 806.41(i) is also amended to add a reference to this requirement for continuation in the program.

Determinations of an Individual with a Disability

Section 806.41(e)(2) requires CRPs to provide documentation of approved disability determinations. However, Chapter 806 does not address the qualifications of individuals who make the determination that a worker has a disability. As a result, standards are inconsistent among CRPs regarding the determination of an individual who qualifies as a worker with a disability. Additionally, some CRPs make their own determination of whether an individual meets the definition of a worker with a disability.

Section 806.41(e)(5) is added to require that a CRP must ensure that disability determinations are conducted by:

- an individual meeting the qualifications necessary to make such determinations; and
- an independent, non-CRP entity.

The intent of this change is to require that a determination that a worker has a disability be made by an independent, non-CRP entity or individual, including a medical professional, a VR counselor, or another individual who has expertise in diagnosing or providing services to individuals with disabilities.

Direct Labor Hours

Section 806.41(f)(9) is amended to include in the CRP's notarized statement that the CRP will comply with the Commission's approved percentage different from 75 percent of the CRP's total direct labor hours. Section 806.41(f)(9) is also amended to remove the waiver provisions of the 75 percent requirement as a waiver is no longer necessary if the CRP requests and is approved for a different percentage.

Section 806.41(f)(10) is added to state that if the CRP intends to seek a required minimum percentage other than the 75 percent of the CRP's total hours of direct labor for a contract, the CRP must submit the request with their application for approval. The request must include a rationale consistent with one or more criteria in §806.53(a)(4) and (b)(3) as applicable.

Section 806.41(i) is amended to include the requirements of §806.41(f)(10) in the recertification process.

Other Changes

Additionally, new §806.41(e)(6) adds the requirement that a CRP must provide all communication, training, and planning materials to employees in an accessible format.

§806.42. Minimum Wage and Exemption Requirements

New §806.42 sets forth the requirements of Texas Human Resources Code, §122.0076(b) (as added by SB 753) related to the minimum wage. Texas Human Resources Code, §122.0076(b) allows, but does not require, TWC to exempt a CRP worker with a disability from the minimum wage requirements if TWC determines, based on the worker's circumstances, that requiring the minimum wage would result in the:

- CRP not being able to retain the worker with a disability;
- worker not being successful in obtaining work with a different employer; and
- worker not being able to obtain employment at a higher wage than the CRP is able to pay.

SB 753 prohibited the minimum wage requirement from applying to a CRP's eligibility to participate in the PPD program before the later of:

- September 1, 2022; or
- the date an extension of the minimum wage as allowed under the new §806.103.

New §806.42 reflects the requirements of SB 753.

New §806.42(a) requires that a CRP participating in the PPD program shall pay each worker with a disability employed by the program at least the minimum wage for any work relating to any products or services purchased from the CRP through the program.

New §806.42(b) allows TWC to exempt a CRP from the requirements of §806.42 with respect to a worker with a disability if TWC determines an exemption is warranted. TWC may consider the following factors in making the determination:

- requiring the CRP to pay the worker at the minimum wage would result in:
 - the CRP not being able to retain the worker with a disability;
 - the worker would not have success obtaining work with a different employer;
 - the worker, based on the worker's circumstances, would not be able to obtain employment at a higher wage than the CRP would be able to pay the worker, notwithstanding the requirements of §806.42;
 - the CRP's efforts to retain the worker;
 - the CRP's efforts to assist the worker in finding other employment, including other employment at a higher wage than the CRP will pay;
 - whether the exemption is temporary or indefinite; and
 - whether employment services provided by other entities that serve individuals who have significant intellectual or developmental disabilities are available and could assist the worker to obtain employment at or above minimum wage.

New 806.43(c) states that the minimum wage requirements do not apply to a CRP's eligibility to participate before the later of:

--September 1, 2022; or

--the date an extension granted under §806.103.

SUBCHAPTER E. PRODUCTS AND SERVICES

TWC proposes amendments to Subchapter E, as follows:

§806.53. Recognition and Approval of Community Rehabilitation Program Products and Services

Approval of Products and Services

Section 806.53(a) is amended to remove the requirement that the Commission approve a CRP's products and services. The amended section assigns the approval of products and services to TWC's executive director or deputy director.

The intent of the rule change is to streamline and shorten the period for review and approval and support timelier deployment of a CRP's products and services. The Commission will continue to provide guidance on products and services but will delegate the actual approval of a CRP's products and services to the executive director or deputy executive director.

Direct Labor Hours

Section 806.53(a) and (b) are amended to allow the Commission to establish a percentage different from 75 percent after considering factors including, but not limited to, a CRP's proposal to participate in the PPD program and offer employment opportunities for individuals with disabilities that meet the WIOA definition of CIE at the time of the CRP's initial certification and subsequent re-certifications.

Clarifying Appreciable Value Added by Individuals with Disabilities

Section 806.2(1) defines appreciable contribution as "...the substantial work effort contributed by individuals with disabilities in the reforming of raw materials, assembly of components or packaging of bulk products in more saleable quantities, by which value is added into the final product offered for sale or through which the individuals with disabilities develop new job skills that have not been previously attained through other jobs."

Section 806.2(11) defines value added as "The labor of individuals with disabilities applied to raw materials, components, goods purchased in bulk form resulting in a change in the composition or marketability of component materials, packaging operations, and/or the servicing tasks associated with a product. Pass-throughs are not allowed; therefore, solely affixing a packaging label to a commodity does not qualify."

Section 806.53(b)(2) states that "Appreciable contribution and value added to the product by individuals with disabilities must be determined to be substantial on a product-by-product basis, based on requested documentation provided to the Agency upon application for a product to be approved for the state use program."

Section 806.53(e) is added to provide criteria for determining if duties performed by individuals with disabilities qualify as value added as required under §806.53(b)(2). New §806.53(e) requires that before the inclusion of a product or service in the program, a CRP must describe the product or service that will be provided through the program in sufficient detail for TWC to determine the item's suitability for inclusion in the program.

Rule language further states that TWC may consider those factors deemed necessary to the determination of the program suitability of a product or service, including, but not limited to, state and federal statutes governing state agencies, geographic saturation of CRPs providing like products and services, and whether the products and services will generate sufficient demand to provide employment for individuals with disabilities.

SUBCHAPTER J. Transition and Retention Plans

TWC proposes adding new Subchapter J, as follows:

New Subchapter J sets forth rules for Transition and Retention Plans (TRPs) required by SB 753.

§806.100. Scope and Purpose

New §806.100 provides the scope and purpose of Subchapter J.

New §806.100(a) states that the purpose of the subchapter is to set forth the rules relating to a CRP's TRP, as required by Texas Human Resources Code, §122.0075, to meet the minimum wage requirements of Texas Human Resources Code, §122.0076.

New §806.100(b) states that the subchapter applies to a CRP that is participating in the state use program and pays workers with disabilities employed by the CRP wages that are less than the federal minimum wage under Section 6, Fair Labor Standards Act of 1938.

New §806.100(c) includes the expiration date of September 1, 2023, for the subchapter, which mirrors the expiration date of Texas Human Resources Code, §122.0075.

§806.101. Requirements for Transition and Retention Plans

SB 753 requires TWC to assist CRPs in developing the TRP by providing workers with information about and referrals to VR counselors to ensure that workers are informed of work incentives as well as the potential impact that the increase in wages may have on eligibility for federal and state benefit programs.

However, SB 753 did not specify requirements for the TRP regarding the milestones, documentation, resources, or reports needed to demonstrate that the CRP is making progress toward meeting the minimum wage and staff retention requirements--a necessary component of granting extensions, as discussed in new §806.102.

New §806.101 includes due dates and other requirements of the TRP.

New §806.101(a) requires that a CRP subject to Subchapter J shall submit a TRP no later than sixty days from the effective date of these rules.

New §806.101(b) requires that the TRP include the full transition goal, including full retention of workers, placement of workers in job training, and fully assisting workers in need of placement goal to meet the wage requirements no later than January 1, 2022.

It is the intent of the Commission that CRPs have full retention of workers with disabilities at the minimum wage or above the placement of workers in job training, or full assistance to workers in need of placement. CRPs not meeting this goal should consider requesting an extension.

New §806.101(c) requires that the TRP contain the following elements:

--Worker Assessment (Employee Receiving Subminimum Wages), including:

- Wage difference / Minimum Wage pay gap
- Line of business employed
- Current skills
- Person-Centered Planning and Career Counseling
- Disability Benefits Impact Analysis based on wage increase
- Opportunities to transfer skills to other state use contract with CRP
- Participation in the assessment by the employee's VR counselor, if the employee is a participant in the VR program at the time of the assessment.
- Goals, including:
 - Raise wages for worker paid subminimum wage to Federal minimum wage or more by September 1, 2022
 - Retain workers of the CRP as the CRP moves through the transition plan
 - Milestones: Achieved by reporting progress in reaching specific actions in the TRP through benchmarks and strategies:
 - Benchmarks to include the following:
 - Number and percentage of workers provided wage increases by a designated point in time
 - Number and percentage of workers provided assessment and counseling by a certain date
 - Number and percentage of workers entering and completing training
 - Strategies necessary to achieve goals including:
 - CRP evaluation of existing line of business for price and added value adjustment consider increasing price to pay for increase in wages
 - Requesting assistance from WorkQuest in developing new lines of business to provide employment opportunities to workers receiving sub minimum wage
 - CRP pursuing partnerships to expand lines of business and increase wages of workers paid subminimum wages.
 - Reports: Monthly or quarterly
 - Retention status
 - Progress on benchmarks and strategies
 - Wages
 - Hours Worked

In accordance with Texas Human Resources Code, §122.0075(b)(2), new §806.101(d) requires TWC to assist the CRP in developing the TRP by providing information about certified benefits counselors and by providing a referral to a certified benefits counselor for any CRP employee who requests a referral.

New §806.101(e) requires TWC to review the progress of each TRP at intervals established by TWC and provide technical assistance as necessary and upon request from the CRP.

§806.102. Extensions for Transition and Retention Plans

SB 753 allows, but does not require, TWC to extend the deadline for compliance with the minimum wage requirements for no more

than 12 months if the CRP requests the extension by March 1, 2022, and TWC approves by May 1, 2022.

For TWC to grant an extension, SB 753 requires that the CRP:

- has demonstrated to TWC that an extension would be in the best interest of the CRP's employees with disabilities;
- has worked with TWC to develop a TRP and made meaningful demonstrable progress toward meeting the minimum wage requirements; and
- has submitted a revised plan to TWC detailing how the extension will allow the CRP to meet the minimum wage requirements.

Extensions may not be for more than 12 months; therefore, the Commission has the option to grant extensions of fewer than 12 months or grant extension dates specifically requested by a CRP. To ensure consistent implementation of TRPs, the Commission may grant a standard 12-month extension from May 1, 2022, to April 30, 2023, to CRPs requesting and meeting the requirements for an extension.

New §806.102(a) contains the statutory requirement that no later than March 1, 2022, a CRP may request an extension of the TRP.

New §806.102(b) requires TWC to approve or deny all extension requests no later than April 1, 2022. The April 1 date is chosen to allow a CRP to request a reconsideration of a denial, and to have the denial decision resolved, by the statutorily required date of May 1, 2022.

New §806.102(c) states the requirements for granting an extension as required in SB 753, namely that the CRP shall:

- demonstrate that an extension would be in the best interest of the CRP's employees with disabilities;
- have requested assistance and worked with the TWC before requesting an extension;
- have made meaningful progress toward meeting the minimum wage requirement; and
- have submitted a revised TRP to the TWC detailing how the extension will allow the CRP to meet the minimum wage requirements.

Finally, SB 753 does not address whether a CRP may appeal if TWC does not grant an extension. TWC's Chapter 823 Integrated Complaints, Hearings, and Appeals rules do not apply to the PPD program.

New §806.102(d) establishes a separate informal reconsideration process to grant a CRP additional time to demonstrate that an extension is warranted. The new rule language allows a CRP to request that TWC reconsider extension denials provided the request is made no later than April 10, 2022.

New §806.102(e) requires the TWC executive director to review and make a determination on reconsideration requests.

New §806.102(f) requires TWC to make a final decision on all reconsideration requests no later than May 1, 2022.

§806.103. Withdrawal from the Program

New §806.103 provides the requirements for a CRP to notify TWC of its intent to withdraw from the PPD program if a CRP does not intend to meet the minimum wage requirements and determines that it will not seek any exemptions under Texas Human Resources Code, §122.0076, if eligible.

New §806.103(a) states that a CRP shall notify TWC no later than March 1, 2022, if the CRP intends to voluntarily withdraw from the program.

New §806.103(b) states that any CRP that has not withdrawn voluntarily from the program, does not have an extension or approved exemptions in place and is not meeting the minimum wage requirements on September 1, 2022, or by the granted extension date, will be involuntarily removed by revocation of the CRP's certification to participate in the program.

The effective date of the withdrawals will be September 1, 2022, which is the statutory deadline for CRPs to meet the minimum wage requirement. This time frame allows for a transition period for transferring contracts under the PPD.

§806.104. New CRPs during the TRP Period

Texas Human Resources Code, §122.0076(d) states that the requirement in Texas Human Resources Code, §122.0076(a) that all CRPs pay at least the minimum wage does not apply to a CRP's eligibility to participate in the PPD program before September 1, 2022, or to the extension date granted by TWC, whichever date is later. However, any entity applying for CRP certification before September 1, 2022, during the TRP period must either pay at or above the minimum wage or have a plan to pay at or above the minimum wage by September 1, 2022, unless the workers employed by the CRP are eligible for an exemption, as described §806.102.

CRPs paying subminimum wage and entering the PPD program after the proposed implementation start date in July 2020 will have less time to transition and retain workers effectively to meet the September 1, 2022, statutory deadline.

New §806.104 requires all CRPs not meeting minimum wage requesting certification after the date to request an extension pursuant to §806.102(a)--March 1, 2022--shall be required to meet the minimum wage requirements no later than September 1, 2022.

PART III. IMPACT STATEMENTS

Chris Nelson, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules.

There are no estimated cost reductions to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to individuals required to comply with the rules.

There is no anticipated adverse economic impact on small businesses, microbusinesses, or rural communities as a result of enforcing or administering the rules.

Based on the analyses required by Texas Government Code, §2001.024, TWC has determined that the requirement to repeal or amend a rule, as required by Texas Government Code,

§2001.0045, does not apply to this rulemaking. Additionally, Texas Labor Code, §352.101 requires the Commission to adopt rules necessary to integrate the vocational rehabilitation programs, including recommending adopting rules to implement the integration. Therefore, the exception identified in Texas Government Code, §2001.0045(c)(9) also applies.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the US Constitution or the Texas Constitution, §17 or §19, Article I, or restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action, and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect. The Commission completed a Takings Impact Analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to:

--implement SB 753; and

--provide program clarification and improvement opportunities.

The proposed rulemaking action will not create any additional burden on private real property. The proposed rulemaking action will not affect private real property in a manner that would require compensation to private real property owners under the US Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Government Growth Impact Statement

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

--the rules will not create or eliminate a government program;

--implementation of the rules will not require the creation or elimination of employee positions;

--implementation of the rules will not require an increase or decrease in future legislative appropriations to TWC;

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

--the rules will not create a new regulation;

--the rules will not expand, limit, or eliminate an existing regulation;

--the rule will not change the number of individuals subject to the rules; and

--the rule will not positively or adversely affect the state's economy.

Economic Impact Statement and Regulatory Flexibility Analysis

TWC has determined that the proposed rules will not have an adverse economic impact on small businesses or rural communi-

ties, as the proposed rules place no requirements on small businesses or rural communities.

Mariana Vega, Director, Labor Market and Career Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

Cheryl Fuller, Director, Vocational Rehabilitation Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be to implement SB 753; and provide program clarification and improvement opportunities.

PART IV. COORDINATION ACTIVITIES

In the development of this rulemaking for publication and public comment, TWC sought the involvement of Texas' 28 Local Workforce Development Boards (Boards). TWC provided the Policy Concept regarding the rulemaking to the Boards for consideration and review on July 14, 2020. During the rulemaking process, TWC considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

Comments on the proposed rules may be submitted to TWCPolicyComments@twc.texas.gov. Comments must be received no later than 30 days from the date this proposal is published in the *Texas Register*.

TWC hereby certifies that the proposal has been reviewed by legal counsel and found to be within TWC's legal authority to adopt.

SUBCHAPTER A. GENERAL PROVISIONS REGARDING PURCHASES OF PRODUCTS AND SERVICES FROM PEOPLE WITH DISABILITIES

40 TAC §806.2

The amendments are proposed under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed amendments implement the requirements of newly enacted Texas Human Resources Code, §122.075 and §122.076 and enable increased opportunities for competitive integrated employment as defined by 34 CFR §361.5(c)(9).

§806.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise. "Agency" and "Commission" are defined in §800.2 of this title[,] (relating to Definitions).

(1) Appreciable contribution--The term used to refer to the substantial work effort contributed by individuals with disabilities in the reforming of raw materials, assembly of components, or packaging of bulk products in more saleable quantities, by which value is added into the final product offered for sale or through which the individuals with disabilities develop new job skills that have not been previously attained through other jobs.

(2) Advisory committee--The Purchasing from People with Disabilities Advisory Committee, established by the Commission, as described in Texas Human Resources Code, §122.0057.

(3) Central nonprofit agency (CNA)--An entity designated as a central nonprofit agency under contract pursuant to Texas Human Resources Code, §122.019.

(4) Chapter 122--Texas Human Resources Code, Chapter 122 [of the Texas Human Resources Code], relating to Purchasing from People with Disabilities.

(5) Community rehabilitation program (CRP)--A government or nonprofit private program operated under criteria established by the Commission and under which individuals with severe disabilities produce products or perform services for compensation.

(6) Comptroller--The Comptroller of Public Accounts.

(7) Direct labor--All work required for preparation, processing, and packaging of a product, or work directly relating to the performance of a service, except supervision, administration, inspection, or shipping products.

(8) Disability--A disability recognized under the Americans with Disabilities Act [A mental or physical impairment, including blindness] that impedes a person who is seeking, entering, or maintaining gainful employment.

(9) Exception--Any product or service approved for the state use program purchased from a vendor other than a CRP because the state use product or service does not meet the applicable requirements as to quantity, quality, delivery, life cycle costs, and testing and inspection requirements pursuant to Texas Government Code, §2155.138 and §2155.069 or as described in Texas Human Resources Code, §122.014 and §122.016.

(10) Individual with Disabilities--An individual with a disability recognized under the Americans with Disabilities Act and employed by a CRP or an entity selected by a CRP.

(11) Minimum wage--The wage under Section 6, Fair Labor Standards Act of 1938 (29 USC §206).

(12) [(+0)] State use program--The statutorily authorized mandate requiring state agencies to purchase, on a noncompetitive basis, the products made and services performed by individuals with disabilities, which have been approved by the Agency pursuant to Texas Human Resources Code, Chapter 122 and which also meet the requirements of Texas Government Code, §2155.138 and §2155.069. This program also makes approved products and services available to be purchased on a noncompetitive basis by any political subdivision of the state.

(13) [(+4)] Value added--The labor of individuals with disabilities applied to raw materials, components, goods purchased in bulk form resulting in a change in the composition or marketability of component materials, packaging operations, and/or the servicing tasks associated with a product. Pass-throughs are not allowed; therefore, solely affixing a packaging label to a commodity does not qualify.

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**SUBCHAPTER B. ADVISORY COMMITTEE
RESPONSIBILITIES, MEETING GUIDELINES**

40 TAC §806.23

The new rule is proposed under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed new rule implements the requirements of newly enacted Texas Human Resources Code, §122.075 and §122.076 and enable increased opportunities for competitive integrated employment as defined by 34 CFR §361.5(c)(9).

§806.23. Submitting Reports and Input to the Commission.

(a) The advisory committee shall meet semiannually, with at least one meeting each fiscal year to review and, if necessary, recommend changes to program objectives, performance measures, and criteria established under §806.21(b) of this subchapter.

(b) The advisory committee shall prepare and submit to the Commission a report containing any findings and recommendations under subsection (a) of this section within 60 days of the completion of the meeting.

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**SUBCHAPTER D. COMMUNITY
REHABILITATION PROGRAMS**

40 TAC §806.41, §806.42

The amended rule and new rule are proposed under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed amendments and new rule implement the requirements of newly enacted Texas Human Resources Code, §122.075 and §122.076 and enable increased opportunities for competitive integrated employment as defined by 34 CFR §361.5(c)(9).

§806.41. Certification and Recertification of Community Rehabilitation Programs.

(a) No applicant for certification may participate in the state use program prior to the approval of certification.

(b) The Commission may recognize programs that are accredited by nationally accepted vocational rehabilitation accrediting organizations and approve CRPs that have been approved by a state's habilitation or rehabilitation agency.

(c) The Commission may delegate the administration of the certification process for CRPs to a CNA.

(d) An applicant for CRP certification must be a government or nonprofit private program operated under criteria established by the Commission and under which individuals with severe disabilities produce products or perform services for compensation.

(e) A certified CRP must:

(1) maintain payroll, human resource functions, accounting, and all relevant documentation showing that the employees who produce products or perform services under the state use program are individuals with disabilities;

(2) ensure that documentation includes approved disability determination forms that are signed by the individual and document the relevant disability, in addition to determining program eligibility, and that shall be subject to review at the request of the Agency or the CNA under authority from the Commission, with adherence to privacy and confidentiality standards applicable to such CRP and employee records; ~~and~~

(3) maintain and dispose of records or documents required by the Agency, including contracts with other entities, in accordance with generally accepted accounting principles, and all laws relevant to the records;[-]

(4) maintain compliance with requirements in subsection (q) of this section, related to Unemployment Insurance tax, wage claims, state licensing, regulatory, and tax requirements. Failure to maintain compliance shall result in revocation of the CRP's certification to participate in the PPD program;

(5) ensure that disability determinations conducted under paragraph (2) of this subsection are conducted by:

(A) an individual meeting the qualifications necessary to make such determinations; and

(B) an independent, non-CRP entity; and

(6) provide all communication, training, and planning materials to employees in an accessible format.

(f) An applicant for certification must submit a completed application and the required documents to the Agency through the CNA for the state use program. Upon receipt, the CNA will verify the completeness and accuracy of the application. No application will be considered without the following documents:

(1) Copy of the IRS nonprofit determination under §501(c), when required by law;

(2) Copy of the Articles of Incorporation issued by the Secretary of State, when required by law;

(3) List of the board of directors and officers with names, addresses, and telephone numbers;

(4) Copy of the organizational chart with job titles and names;

(5) Proof of current insurance coverage in the form of a certificate of insurance specifying each and all coverages for the CRP's liability insurance, auto insurance for vehicles owned or leased by the CRP for state use contract purposes, and workers' compensation insurance coverage or legally recognized equivalent coverage, if applicable. Such insurance shall be carried with an insurance company authorized to do business in the State of Texas, and written notice of cancellation or any material change in insurance coverage will be provided to the CNA 10 business days in advance of cancellation or change;

(6) Fire inspection certificate issued within one year of the formal consideration of the CRP application, if required by city, county, or state regulations, for each location where customers will be served or where individuals with disabilities will be employed, or a statement of unavailability from the appropriate city, county, or state entity;

(7) Copy of the building inspection certificate or certificate of occupancy, if required by city, county, or state regulations, for each location where customers will be served or where individuals with disabilities will be employed, or a statement of unavailability from the appropriate city, county, or state entity;

(8) Copy of the wage exemption certificate (WH-228) if below minimum wages will be paid to customers or to individuals with disabilities who will be employed, and a statement of explanation of circumstances requiring subminimum wages;

(9) Notarized statement that the CRP agrees to maintain compliance with either the 75 percent minimum percentage or other approved minimum percentage approved by the Commission. The required percentage being that percentage [the requirement that at least 75 percent] of the CRP's total hours of direct labor, for each contract, necessary to perform services or reform raw materials, assemble components, manufacture, prepare, process and/or package products that will be performed by individuals with documented disabilities consistent with the definition set forth in this chapter[: If a CRP intends to seek a waiver from the 75 percent requirement of the CRP's total hours of direct labor for a contract, the waiver request must be submitted with the application for approval]; [and]

(10) If a CRP intends to seek a required minimum percentage other than the 75 percent of the CRP's total hours of direct labor for a contract, the CRP must submit the request, which shall include a rationale consistent with one or more criteria in §806.53(a)(4) and (b)(3) of this chapter as applicable, with their application for approval; and

(11) ~~[(40)]~~ An applicant for certification must attest that it either has already developed or will develop, within 90 days of certification, a person-centered plan for each individual with a disability it employs that clearly documents attainable employment goals and describes how the CRP will:

(A) help the individual reach his or her ~~[their]~~ employment goals; and

(B) match the individual's skills and desires with the task(s) being performed for the CRP.

(g) The Agency shall review each complete application and all required documentation and, if acceptable, forward its recommendations to the Commission for approval. Once approved, the Agency will notify the CRP in writing and assign the CRP a certification number.

(h) A CRP may protest a recommendation of non-approval pursuant to the Agency's appeal process in §806.61 of this chapter.

(i) To continue in the program, each CRP must be recertified by the Commission every three years. The recertification process requires submission of all previously requested documentation, a review

of reports submitted to the CNA, and a determination that the CRP has maintained compliance with the stated requirements of the state use program, including requirements described in subsection (q) of this section relating to compliance with unemployment taxes, wage claims, and state licensing, regulatory, and tax requirements. If a CRP intends to seek a required minimum percentage other than the 75 percent of the CRP's total hours of direct labor, the CRP must submit the request, which shall include a rationale consistent with one or more criteria in §806.53(a)(4) and (b)(3) of this chapter as applicable, with their recertification. The Commission shall establish a schedule for the recertification process and the CNA shall assist each CRP as necessary to attain recertification. The CRP, after notification, shall submit within 30 days the application for recertification and required documents to the CNA. If the CRP fails to do so, the Agency may request a written explanation and/or the appearance of a representative of the CRP before the Agency. If the CRP fails to respond in a timely manner, the Agency may consider the suspension of all state use program contracts until the recertification process has been completed and approval has been attained.

(j) The CRP shall submit quarterly wage and hour reports to the CNA. These reports are due no later than the last day of the month following the end of the quarter. If the CRP fails to submit reports on time, the Agency may request a representative of the CRP to appear before the Agency. The Agency may consider the suspension of the CRP's state use program contracts if compliance is not achieved in a consistent and timely manner.

(k) CRPs shall maintain compliance with the state use program regarding percentage requirements related to administrative costs, supply costs, wages, and hours of direct labor necessary to perform services and/or produce products. Compliance will be monitored by the CNA and/or the Agency, and violations will be reported promptly to the Agency. A violation will result in a warning letter from the CNA or Agency, which will then offer assistance as needed to achieve compliance. A CRP that fails to meet compliance requirements, without a waiver from the Agency, for two quarters in any four-quarter period, shall submit a written explanation and a representative of the CRP will be requested to appear before the Agency. State use program contracts may be suspended and/or certification revoked if compliance is not immediately and consistently maintained. To attain reinstatement, the CRP must apply for recertification following the procedures outlined in this chapter.

(l) The Agency may review or designate a CNA or third party to review any CRP participating in the state-use program to verify compliance with the requirements outlined in this chapter.

(m) A CRP must not serve, in whole or part, as an outlet or front for any entity whose purpose is not the employment of individuals with disabilities.

(n) A CRP shall report to the Agency any state agency that is not using the program to benefit individuals with disabilities.

(o) A CRP shall promptly report any conflict of interest or receipt of benefit or promise of benefit to the Agency. The Agency will consider such reports on an individual basis. Verified instances of conflict of interest by a CRP may result in suspension of the CRP's eligibility to participate in the state use program and/or revocation of certification.

(p) The Commission, the Agency, individual members, the State of Texas, or any other Texas state agency will not be responsible for any loss or losses, financial or otherwise, incurred by a CRP should its product or services not be approved for the state use program as provided by law.

(q) A CRP shall:

(1) be clear of any debts related to Unemployment Insurance taxes or wage claims; and

(2) meet the state licensing, regulatory, and tax requirements applicable to the CRP.

§806.42. Minimum Wage and Exemption Requirements.

(a) A CRP participating in the program administered under this chapter shall pay each worker with a disability employed by the program at least the federal minimum wage for any work relating to any products or services purchased from the CRP through the program administered under this chapter.

(b) The Agency may exempt a CRP from the requirements of this section with respect to a worker with a disability if the Agency determines an exemption is warranted. The Agency may consider the following factors in making the determination:

(1) whether requiring the CRP to pay the worker at the minimum wage would result in:

(A) the CRP not being able to retain the worker with a disability;

(B) the worker not having success obtaining work with a different employer;

(C) the worker, based on the worker's circumstances, not being able to obtain employment at a higher wage than the CRP would be able to pay the worker, notwithstanding the requirements of this section;

(2) the CRP's efforts to retain the worker;

(3) the CRP's efforts to assist the worker in finding other employment, including other employment at a higher wage than the CRP will pay;

(4) whether the exemption is temporary or indefinite;

(5) whether employment services provided by other entities that serve individuals who have significant intellectual or developmental disabilities are available and could assist the worker to obtain employment at or above minimum wage.

(c) Subsection (a) of this section does not apply to a CRP's eligibility to participate in the state use program before the later of:

(1) September 1, 2022; or

(2) the date an extension is granted under §806.103 of this chapter.

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

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SUBCHAPTER E. PRODUCTS AND SERVICES

40 TAC §806.53

The amendments are proposed under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed amendments implement the requirements of newly enacted Texas Human Resources Code, §122.075 and §122.076 and enable increased opportunities for competitive integrated employment as defined by 34 CFR §361.5(c)(9).

§806.53. Recognition and Approval of Community Rehabilitation Program Products and Services.

(a) A CRP desiring to provide services under the state use program must comply with the following requirements to obtain approval from the Agency's executive director or deputy executive director [Commission]:

(1) A minimum of 35 percent of the contract price of the service must be paid to the individuals with disabilities who perform the service in the form of wages and benefits;

(2) Supply costs for the service must not exceed 20 percent of the contract price of the service;

(3) Administrative costs allocated to the service must not exceed 10 percent of the contract price for the service. The minimum percentage required by the Agency [At least 75 percent] of the hours of direct labor for each contract[.] necessary to perform a service[.] must be performed by individuals with disabilities;

(4) The Commission [Agency] may establish a different percentage other than 75 percent for each CRP at the time of initial certification or subsequent re-certifications if the Commission [Agency] determines that a percentage other than 75 percent [greater than the 75 percent] for the offered service is reasonable based on consideration of factors, including, but not limited to:

(A) past practices in a particular area;

(B) whether other CRPs providing the same or similar services have required or achieved a different percentage [the 75 percent] requirement; [and]

(C) whether the Commission has established a policy goal to encourage employment of individuals with disabilities in a particular field; and

(D) the CRP proposes to offer employment opportunities for individuals with disabilities that meet the WIOA definition of CIE;

(5) Any necessary subcontracted services shall be performed to the maximum extent possible by other CRPs and in a manner that maximizes the employment of individuals with disabilities; and

(6) A detailed report will be submitted to the Agency providing breakdown of 100 percent of contract dollars for services.

(b) A CRP must comply with the following requirements to obtain approval [from the Commission] for state use products:

(1) Either 75 percent or the minimum percentage required by the Commission [At least 75 percent] of the hours of direct labor, for each contract, necessary to reform raw materials, assemble components, manufacture, prepare, process, and/or package a product, must be performed by individuals with disabilities;

(2) Appreciable contribution and value added to the product by individuals with disabilities must be determined to be substantial

on a product-by-product basis, based on requested documentation provided to the Agency upon application for a product to be approved for the state use program; [and]

(3) The Commission [Agency] may establish a different percentage from 75 percent for each CRP at the time of initial certification or subsequent re-certifications if the Commission [Agency] determines that a percentage different from [greater than] the 75 percent for the offered product is reasonable based on consideration of factors, including, but not limited to:

(A) past practices in a particular area;

(B) whether other CRPs providing the same or similar products have required or achieved a different percentage [the 75 percent] requirement;

(C) whether the Commission has established a policy goal to promote workplace integration for individuals with disabilities;

(D) whether the Commission has established a policy goal to encourage employment of individuals with disabilities in a particular field; [and]

(E) the CRP proposes to offer employment opportunities for individuals with disabilities that meet the WIOA definition of CIE; and

(4) A detailed report will be submitted to the Agency providing breakdown of 100 percent of contract dollars for products.

(c) The rules governing the approval of products to be offered by a CRP apply to all items that a CRP proposes to offer to state agencies or political subdivisions, regardless of the method of acquisition by the agency, whether by sale or lease. A CRP must own any product it leases. A proposal by a CRP to rent or lease a product to a state agency is a proposal to offer a product, not a service, and the item offered must meet the requirements of these rules. If the product is offered for lease by the CRP, the unit cost of the product, for purposes of applying the standards set forth in these rules, is the total cost to the state agency of leasing the product over its expected useful life.

(d) Raw materials or components may be obtained from companies operated for profit, but a CRP must own any product that it offers for sale to state agencies or political subdivisions through the state use program and make an appreciable contribution to the product that accounts for a substantial amount of the value added to the product.

(e) Prior to the inclusion of a product or service in the program, a CRP must describe the product or service that will be provided through the program in sufficient detail for the Agency to determine the item's suitability for inclusion in the program. The Agency may consider those factors deemed necessary to the determination of the program suitability of a product or service, including, but not limited to, state and federal statutes governing state agencies, geographic saturation of CRPs providing like products and services, and whether the products and services will generate sufficient demand to provide employment for individuals with disabilities.

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SUBCHAPTER J. TRANSITION AND RETENTION PLANS

40 TAC §§806.100 - 806.104

The new rules are proposed under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed new rules implement the requirements of newly enacted Texas Human Resources Code, §122.075 and §122.076 and enable increased opportunities for competitive integrated employment as defined by 34 CFR §361.5(c)(9).

§806.100. Scope and Purpose.

(a) The purpose of this subchapter is to set forth the rules relating to a CRP's Transition and Retention Plan (TRP), as required by Texas Human Resources Code, §122.0075, to meet the minimum wage requirements of Texas Human Resources Code, §122.0076.

(b) This subchapter applies to a CRP that is participating in the state use program and pays workers with disabilities employed by the CRP wages that are less than the federal minimum wage under Section 6, Fair Labor Standards Act of 1938.

(c) This subchapter expires September 1, 2023.

§806.101. Requirements for Transition and Retention Plans.

(a) A CRP subject to this subchapter shall submit a TRP no later than sixty days from the effective date of these rules.

(b) The TRP shall include the full transition goal, including full retention of workers, placement of workers in job training, and fully assisting workers in need of placement goal, to meet the wage requirements no later than January 1, 2022.

(c) The TRP shall contain the following elements:

(1) Worker Assessment (Employee Receiving Subminimum Wages) including the following:

(A) Wage difference/Minimum Wage pay gap;

(B) Line of business employed;

(C) Current skills;

(D) Person-Centered Planning and Career Counseling;

(E) Disability Benefits Impact Analysis based on wage increase;

(F) Opportunities to transfer skills to other state use contracts with CRP; and

(G) Participation in the assessment by the employee's Vocational Rehabilitation counselor, if the employee is a participant in the Vocational Rehabilitation program at the time of the assessment.

(2) Goals, including the following:

(A) Raise wages for workers paid subminimum wage to the federal minimum wage, or more, by September 1, 2022.

(B) Retain CRP workers as the CRP moves through the transition plan.

(3) Milestones: Achieved by reporting progress in reaching specific actions in the TRP through benchmarks and strategies:

(A) Benchmarks, including the following:

(i) Number and percentage of workers provided wage increases by a designated point in time;

(ii) Number and percentage of workers provided assessment and counseling by a certain date; and

(iii) Number and percentage of workers entering and completing training.

(B) Strategies necessary to achieve goals, including:

(i) CRP evaluation of existing line of business for price and added value adjustment consider increasing the price to pay for increase in wages;

(ii) Requesting assistance from WorkQuest in developing new lines of business to provide employment opportunities to workers receiving subminimum wage; and

(iii) CRP pursuing partnerships to expand lines of business and increase wages of workers who are paid subminimum wages.

(C) Reports: Monthly or quarterly:

(i) Retention status;

(ii) Progress on benchmarks and strategies;

(iii) Wages;

(iv) Hours worked.

(d) The Agency shall assist the CRP in developing the TRP by providing information about certified benefits counselors and by providing a referral to a certified benefits counselor for any CRP employee who requests a referral.

(e) The Agency shall review the progress of each TRP based on intervals established by the Agency, and provide technical assistance as necessary and upon request from the CRP.

§806.102. Extensions for Transition and Retention Plans.

(a) No later than March 1, 2022, a CRP may request an extension of the TRP.

(b) The Agency shall approve or deny all extension requests no later than April 1, 2022.

(c) To be granted an extension, the CRP shall:

(1) demonstrate that an extension would be in the best interest of the CRP's employees with disabilities;

(2) have requested assistance and worked with the Agency prior to requesting an extension;

(3) have made meaningful progress toward meeting the minimum wage requirements; and

(4) have submitted a revised TRP to the Agency detailing how the extension will allow the CRP to meet the minimum wage requirements.

(d) No later than April 10, 2022, a CRP may request that the Agency reconsider an extension denial.

(e) The Agency executive director shall review and make a determination on reconsideration requests.

(f) The Agency shall make the final decision on all reconsideration requests no later than May 1, 2022.

§806.103. Withdrawal from the Program.

(a) A CRP shall notify the Agency no later than March 1, 2022, if the CRP intends to voluntarily withdraw from the program.

(b) Any requirements on September 1, 2022, or by the granted extension date, will be involuntarily removed by revocation of the CRP's certification to participate in the program.

§806.104. New CRPs during the TRP Period.

A CRP not meeting the minimum wage requirement that requests certification after the date to request an extension pursuant to §806.102(a) of this subchapter shall be required to meet the minimum wage requirements no later than September 1, 2022.

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