

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 16. ECONOMIC REGULATION

PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 33. LICENSING

SUBCHAPTER B. FEES AND PAYMENTS

[LICENSE AND PERMIT SURCHARGES]

16 TAC §§33.22, 33.27, 33.30 - 33.32, 33.37 - 33.39

The Texas Alcoholic Beverage Commission (TABC, agency, or commission) proposes new §§33.22, 33.27, 33.30 - 33.32, and 33.37 - 33.39 in Chapter 33, Licensing, Subchapter B, as part of a reorganization of Chapter 33 of the commission's rules. The commission also proposes to change the name of Subchapter B from "License and Permit Surcharges" to "Fees and Payments" to more accurately describe its contents.

Background and Summary of Basis for the Proposed Amendments

In 2019, the Texas Legislature adopted House Bill 1545, which made significant amendments throughout the Alcoholic Beverage Code (Code). HB 1545 further required the commission to adopt a variety of new rules and amend others to implement its provisions. To adopt the necessary new and amended rules, the commission either has or will make changes to every subchapter in existing Chapter 33, Licensing. With these proposed rules and other related rulemaking packages, the commission is taking the opportunity presented by the extensive necessary changes to Chapter 33 to streamline and reorganize Chapter 33 to be more intuitive and user-friendly.

The majority of the proposed amendments are not intended to make substantive changes. Rather, they are intended to move rule provisions to more appropriate places and make other editorial changes for accuracy and consistency. New §33.22(c) would enable the agency to charge administrative fees for license and permit changes; however, no such fees are under consideration at this time.

The rules are proposed pursuant to the commission's general powers and duties under §5.31 of the Code.

Section by Section Discussion

§33.22 Administrative Fees

Subsections (a) and (b) of this rule are moved from current §33.9. Subsection (c) is a new proposed provision that would allow the commission to charge fees for administrative changes that require significant employee resources, such as changes of location or ownership of a permitted entity. Such fees would not be tantamount to permit or license fees. None are proposed at this

time. The purpose of the provision is to authorize the commission to consider charging such fees in the future.

§33.27 Regional Forwarding Centers Fee

This rule is moved from current §35.6(d).

§33.30 Fee for a manufacturer's agent's warehousing permit

This rule is moved from current §33.26.

§33.31 Secondary Permits

This rule is moved from current §33.25.

§33.32 Nonresident Brewer's and Nonresident Manufacturer's Agent's Registration and Fee

This rule is moved from current §33.29(b). This rule will expire on September 1, 2021, when agent registrations cease to exist pursuant to House Bill 1545, 86th L.S.(R)(2019).

§33.37 Refunds of License and Permit Fees

Subsections (a) and (b) of this rule are new and address the circumstances under which an application fee for a new or renewed license or permit will be issued by the commission. The rule reflects current agency practice in this regard.

Subsection (c) of this rule is moved from current 33.5(d).

§33.38 Fees related to Renewals of Licenses and Permits after Expiration

This rule is moved from current §33.6(b) and (c)(1).

§33.39 Food and Beverage Certificate Fee

This rule is moved from current §33.5(d).

Fiscal Note: Costs to State and Local Government

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the proposed rules will be in effect, they are not expected to have a significant fiscal impact upon the agency. There are no foreseeable economic implications anticipated for other units of state or local government due to the proposed rules.

Rural Communities Impact Assessment

The proposed rules will not have any material adverse fiscal or regulatory impacts on rural communities. The rules will apply statewide and have the same effect in rural communities as in urban communities. Likewise, the proposed rules will not adversely affect a local economy in a material way.

Small Business and Micro-Business Assessment/Flexibility Analysis

No material fiscal implications are anticipated for small or micro-businesses due to the proposed rules. Therefore, no Small

Business and Micro-Business Assessment/Flexibility Analysis is required.

Takings Impact Assessment

The proposed rules do not affect a taking of private real property, as described by the Attorney General Paxton's Private Real Property Rights Preservation Act Guidelines. The rulemaking would impose no burdens on private real property because it neither relates to, nor has any impact on, the use or enjoyment of private real property and there is no reduction in value of property as a result of this rulemaking.

Public Benefits and Costs

Ms. Horton has determined that for each year of the first five years that the proposed rules would be in effect, the public would benefit from the more streamlined, user-friendly and intuitively organized rules. There is no increase in costs to the public.

Government Growth Impact Statement

This paragraph constitutes the commission's government growth impact statement for the proposed rules. The analysis addresses the first five years the proposed new rules and amendments would be in effect. The proposed rules neither create nor eliminate a government program. The proposed rules do not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the proposed rules requires neither an increase nor a decrease in future legislative appropriations to the commission. The proposed rules are not expected to result in a significant change in fees paid to the agency, though there may be a nominal increase in the future if the agency chooses to charge administrative fees for certain changes to existing permits and licenses under new §33.22(c). The proposed rules create one new regulation: new §33.22(c) would authorize the commission to charge administrative fees for changes to existing permits. The proposed rules do not expand the applicability of any rules or increase the number of individuals subject to existing rules' applicability beyond current rule requirements.

The proposed rules are not anticipated to have any material impact on the state's overall economy.

Comments on the proposed rules may be submitted in writing to Shana Horton, Rules Attorney, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, by facsimile transmission to (512) 206-3498, attention: Shana Horton, or by email to rules@tabc.texas.gov. Written comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed rules on December 22, 2020, at 10:00 a.m. The commission has designated this hearing as the appropriate forum to make oral comments under Government Code §2001.029. DUE TO PUBLIC HEALTH CONCERNS RELATED TO COVID-19, THIS HEARING WILL BE HELD BY VIDEOCONFERENCE ONLY. Interested persons should visit the TABC's public website prior to the meeting date to receive further instructions or call Shana Horton, Rules Attorney, at (512) 487-9905.

The rules are proposed pursuant to the commission's authority under §5.31 of the Code to prescribe and publish rules necessary to carry out the provisions of the Code.

The proposed rules do not impact any other current rules or statutes.

§33.22. Administrative Fees.

(a) This rule relates to §5.31 and §5.55 of the Alcoholic Beverage Code.

(b) The commission will charge fees for online transactions in the amount authorized by the Texas Department of Information Resources for processing online transactions utilizing the Texas.Gov portal.

(c) The commission may charge reasonable administrative fees for changes of address or ownership or other administrative changes not necessarily related to the issuance of certificates, licenses, and permits under Title 3 of the Code.

§33.27. Regional Forwarding Centers Fee.

Licensees and permittees using regional forwarding centers under the authority of §35.6 of this title (relating to Regional Forwarding Centers) shall pay an annual fee of \$1,000 to the commission.

§33.30. Fee for a Manufacturer's Agent's Warehousing Permit.

The annual fee for a manufacturer's agent's warehousing permit under Chapter 55 of the Alcoholic Beverage Code shall be \$750.

§33.31. Secondary Permits.

(a) This section relates to Alcoholic Beverage Code §11.09 and §61.03.

(b) A secondary permit or license which requires the holder to first obtain another permit, including a late hours permit, expires on the same date the primary permit expires.

(c) A temporary permit or license expires on the date indicated on the license or permit or on the same date as the primary permit, whichever occurs earlier.

(d) The fees and surcharges for a secondary or temporary permit or license may not be prorated or refunded.

§33.32. Nonresident Brewer's and Nonresident Manufacturer's Agent's Registration and Fee.

The annual fee to register a nonresident brewer's or nonresident manufacturer's agent shall be \$2,500. This rule expires on September 1, 2021.

§33.37. Refunds of License and Permit Fees.

(a) For an application for an original permit or license or a change of location under Alcoholic Beverage Code §11.08, the commission will refund the permit or license fee if the permit or license is not issued for any reason.

(b) For an application for renewal of an existing permit or license, the commission will refund the permit or license fee if the applicant withdraws the application or the application is denied prior to the expiration of the permit or license. If the application is withdrawn or denied after the permit or license expiration date, the applicant's permit or license fee will not be refunded.

(c) The commission will not prorate or refund fees for issuance of a food and beverage certificate for less than two years.

§33.38. Fees Related to Renewals of Licenses and Permits after Expiration.

(a) In addition to the requirements of Alcoholic Beverage Code §61.48 and §5.50, each applicant who files a license or permit renewal under Alcoholic Beverage Code §6.04 and §61.48, must, prior to the close of business of the thirtieth calendar day after expiration, submit a fee of \$100.

(b) In addition to the requirements of Alcoholic Beverage Code §§11.32, 11.35, and 5.50, and any pertinent rule or procedure of the commission, license and permit renewals which are filed under the Alcoholic Beverage Code, §6.04, must be accompanied by all state fees and surcharges as well as a \$100 fee as authorized by Alcoholic Beverage Code §6.04.

§33.39. Food and Beverage Certificate Fee.

The biennial certificate fee for each location is \$200.00 and must be submitted in the form of a cashier's check, U.S. postal money order, or company check made payable to the Texas Alcoholic Beverage Commission.

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 19, 2020.

TRD-202004901

Shana Horton

Rules Attorney

Texas Alcoholic Beverage Commission

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 487-9905



CHAPTER 45. MARKETING PRACTICES

SUBCHAPTER D. ADVERTISING AND PROMOTION--ALL BEVERAGES

16 TAC §45.103

The Texas Alcoholic Beverage Commission (TABC, agency, or commission) proposes amended §45.103, On-Premises Promotions, as part of its quadrennial rule review under Tex. Gov't Code §2001.0039.

Background and Summary of Basis for the Proposed Amendments

Tex. Gov't Code §2001.0039 requires the agency to review its existing rules every four years and determine whether to readopt, readopt with amendments, or repeal the rule. As part of this regular review, the agency has reviewed §45.103 of its rules, which relates to and restricts the promotion of alcoholic beverages for on-site consumption. The reasons for the initial adoption of the rule continue to exist because it remains in the best interest of the state of Texas and its citizens to regulate promotions to discourage overconsumption of alcoholic beverages. However, amendments are proposed to:

- allow tickets to certain charity events to include more than two alcoholic beverages in the price of a ticket;
- allow Public Entertainment Facilities, such as sports arenas, to sell special tickets or passes that include more than two alcoholic beverages in the price of the ticket or pass; and
- reinforce the legal duty of the seller and server of alcoholic beverages to refuse to serve an intoxicated or underage individual, regardless of the number of alcoholic beverages included with a ticket or pass held by that person.

The amendments are proposed pursuant to the commission's authority under §5.31 of the Code to prescribe and publish rules necessary to carry out the provisions of the Code.

Fiscal Note: Costs to State and Local Government

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the proposed amended rule will be in effect, it is not expected to have a significant fiscal impact upon the agency. There are no foreseeable economic implications anticipated for other units of state or local government due to the proposed amendments.

Rural Communities Impact Assessment

The proposed amendments will not have any material adverse fiscal or regulatory impacts on rural communities. The amended rule will apply statewide and have the same effect in rural communities as in urban communities. Likewise, the proposed amendments will not adversely affect a local economy in a material way.

Small Business and Micro-Business Assessment/Flexibility Analysis

No material fiscal implications are anticipated for small or micro-businesses due to the proposed amendments. Therefore, no Small Business and Micro-Business Assessment/Flexibility Analysis is required.

Takings Impact Assessment

The proposed amendments do not affect a taking of private real property, as described by the Attorney General Paxton's Private Real Property Rights Preservation Act Guidelines. The rulemaking would impose no burdens on private real property because it neither relates to, nor has any impact on, the use or enjoyment of private real property and there is no reduction in value of property as a result of this rulemaking.

Public Benefits and Costs

Ms. Horton has determined that for each year of the first five years that the proposed amendments would be in effect, the public would benefit from the ability to purchase a charity event ticket or event facility season pass that includes more than two alcoholic beverages, rather than paying separately for each transaction. The amendments will assist organizers of charity events by reducing administrative efforts related to the sale of alcoholic beverages at such events. The public will benefit from the clear statement of the responsibility of the server to refuse to serve an alcoholic beverage to an intoxicated or underage person, regardless of the ticket or pass that person holds. The statement acts as additional notice to servers of their legal responsibility and may assist the TABC in enforcement actions against those servers who fail to meet the requirement, thereby enhancing public health and safety. The amendments do not increase costs to the public.

Government Growth Impact Statement

This paragraph constitutes the commission's government growth impact statement for the proposed amendments. The analysis addresses the first five years the proposed amendments would be in effect. The proposed amendments neither create nor eliminate a government program. The proposed amendments do not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the proposed amended rules requires neither an increase nor a decrease in future legislative appropriations to the commission. The proposed

amendments are not expected to result in a significant change in fees paid to the agency. The proposed amendments do not create new regulations, expand the applicability of any rules, or increase the number of individuals subject to existing rules' applicability beyond current rule requirements.

The proposed amendments are not anticipated to have any material impact on the state's overall economy.

Comments on the proposed amendments may be submitted in writing to Shana Horton, Rules Attorney, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, by facsimile transmission to (512) 206-3498, Attention: Shana Horton, or by email to rules@tabc.texas.gov. Written comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed amendments on December 22, 2020, at 10:00 a.m. The commission has designated this hearing as the appropriate forum to make oral comments under Government Code §2001.029. DUE TO PUBLIC HEALTH CONCERNS RELATED TO COVID-19, THIS HEARING WILL BE HELD BY VIDEOCONFERENCE ONLY. Interested persons should visit the TABC's public website prior to the meeting date to receive further instructions or call Shana Horton, Rules Attorney, at (512) 487-9905.

The amendments are proposed pursuant to the commission's authority under §5.31 of the Code to prescribe and publish rules necessary to carry out the provisions of the Code.

The proposed amendments do not impact any other current rules or statutes.

§45.103. On-Premises Promotions.

(a) This rule is adopted to prohibit those practices by on-premise establishments that are reasonably calculated to result in excessive consumption of alcoholic beverages by consumers. Such practices constitute a manner of operation contrary to the public welfare, health and safety of the people in violation of §§11.61(b)(7) and 61.71(a)(17) of the Alcoholic Beverage Code. Nothing in this section shall be construed to relieve a person serving alcoholic beverages from responsibility under the Alcoholic Beverage Code and commission rules to refrain from serving alcoholic beverages to an intoxicated or underage consumer.

(b) Excessive consumption of alcoholic beverages shall be determined by the standard of public intoxication articulated in §49.02 of the Penal Code.

(c) Licensees and permittees authorized to sell or serve alcoholic beverages for on-premises consumption may not:

(1) serve, sell, or offer to serve or sell, two or more open containers of alcoholic beverages at a price less than the number of containers actually sold or served;

(2) increase the volume of alcohol contained in a drink without increasing proportionally the price thereof;

(3) serve or offer to serve more than one free alcoholic beverage to any identifiable segment of the population during the course of one business day. Licensees and permittees may, however, without prior advertising, give one free alcoholic beverage to individual consumers in celebration of birthdays, anniversaries or similar events;

(4) sell, serve, or offer to sell or serve an undetermined quantity of alcoholic beverages for a fixed price or "all you can drink" basis;

(5) sell, serve, or offer to sell or serve, alcoholic beverages at a reduced price to those consumers paying a fixed "buy in" price;

(6) sell, serve, or offer to sell or serve, alcoholic beverages at a price contingent on the amount of alcoholic beverages consumed by an individual;

(7) reduce drink prices after 11:00 p.m.;

(8) sell, serve or offer to sell or serve more than two drinks to a single consumer at one time;

(9) impose an entry fee, cover or door charge for the purpose of recovering financial losses incurred by the licensee or permittee because of reduced or low drink prices;

(10) conduct, sponsor or participate in, or allow any person on the licensed premises to conduct, sponsor or participate in, any game or contest to be determined by the quantity of alcoholic beverages consumed by an individual or group, or where alcoholic beverages or reduced price alcoholic beverages are awarded as prizes;

(11) engage in any practice, whether listed in this rule or not, that is reasonably calculated to induce consumers to drink alcoholic beverages to excess, or that would impair the ability of the licensee or permittee to monitor or control the consumption of alcoholic beverages by consumers.

(d) The provisions of subsections (c)(1) through (c)(8) [(e)(7)] of this section do not apply where:

(1) the permittee or licensee has entered into an agreement under the terms of which all or a portion of the licensed premises are utilized for a private party or a meeting of a particular organization; [or]

(2) the event is a private party, charity event held on a hotel premises, or temporary charitable event authorized by Alcoholic Beverage Code §109.58 [a caterer's other temporary permit or license is used for, a private party or a meeting of a particular organization]; or

(3) the licensed premises is a Public Entertainment Facility, as defined by Alcoholic Beverage Code §108.73 and the person to whom the alcoholic beverages are served holds a ticket or other pass that includes alcoholic beverages in the price of the ticket or pass.

(e) Notwithstanding the provisions of (c)(1) through (c)(7) of this section, licensees and permittees may:

(1) offer free or reduced-price food or entertainment at any time, provided the offer is not based on the purchase of an alcoholic beverage;

(2) include alcoholic beverages as part of a meal or hotel/motel package;

(3) sell, serve or deliver wine by the bottle to individual consumers during the sale or service of a meal to the consumer; or

(4) sell, serve or deliver alcoholic beverages in pitchers, carafes, buckets or similar containers to two or more consumers at one time.

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 19, 2020.

TRD-202004880



PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 120. LICENSED DYSLLEXIA THERAPISTS AND LICENSED DYSLLEXIA PRACTITIONERS

16 TAC §§120.21 - 120.23, 120.25, 120.90

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 120, §§120.21 - 120.23, 120.25, and 120.90, regarding the Dyslexia Therapy Program. These proposed changes are referred to as "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC Chapter 120 implement Texas Occupations Code, Chapter 403, Licensed Dyslexia Practitioners and Licensed Dyslexia Therapists.

The proposed rules make changes recommended by Department staff to allow individuals certified by the Academic Language Therapy Association (ALTA) to apply for a license without providing documentation of their education; to clarify courses that qualify for continuing education credit; to allow telehealth services without an initial in-person meeting; and to correct cross-references. The proposed rules also make changes recommended by the Education and Examination Workgroup of the Dyslexia Therapy Advisory Committee to update the names of the examinations approved by the Department and to allow continuing education credit for the human trafficking prevention training course required for license renewal. The proposed rules are necessary to remove unnecessary burdens in obtaining and renewing a license; to designate the appropriate examinations required for licensure; to increase the availability of telehealth services; and to provide clarity.

The proposed rules were presented to and discussed by the Dyslexia Therapy Advisory Committee at its meeting on October 27, 2020. The Advisory Committee did not recommend any changes to the proposed rules. The Advisory Committee voted and recommended that the proposed rules be published in the *Texas Register* for public comment.

SECTION-BY-SECTION SUMMARY

The proposed rules amend §120.21, Dyslexia Therapist Licensing Requirements, by allowing a person who holds current certification as an academic language therapist issued by ALTA to apply for a dyslexia therapist license without being required to provide documentation that the person has earned a master's degree from an accredited institution of higher education.

The proposed rules amend §120.22, Dyslexia Practitioner Licensing Requirements, by allowing a person who holds current certification as an academic language practitioner issued by ALTA to apply for a dyslexia practitioner license without being required to provide documentation that the person has earned

a bachelor's degree from an accredited institution of higher education.

The proposed rules amend §120.23(a) by updating the name of the ALTA examination required for licensure as a dyslexia therapist.

The proposed rules amend §120.23(b) by updating the name of the ALTA examination required for licensure as a dyslexia practitioner.

The proposed rules amend §120.25, Continuing Education, by clarifying that courses and programs provided by education service centers are included in the acceptable categories for continuing education credit; correcting erroneous cross-references; and allowing the human trafficking prevention training course required for license renewal to be accepted for up to one hour of continuing education credit.

The proposed rules amend §120.90, Professional Standards and Basis for Disciplinary Action, by removing the prohibition against providing services solely by written, telephone, or electronic/video correspondence or communication; and renumbering the remaining provisions accordingly. This change will allow a license holder to provide telehealth services without the requirement for an initial in-person meeting with a client.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, enforcing or administering the proposed rules does not have foreseeable implications relating to costs or revenues of state or local governments.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

PUBLIC BENEFITS

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be more effective and efficient regulation of the Dyslexia Therapy Program and expansion of the availability of telehealth services.

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there will be a reduction in costs to some persons who are required to comply with the proposed rules. Licensees who take a free human trafficking prevention training course and submit the course for continuing education credit will see a minimal cost savings of an undeterminable amount in obtaining the required continuing education hours for license renewal.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

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

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

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. Since the agency has determined that the proposed

rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

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

The proposed rules do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

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

1. The proposed rules do not create or eliminate a government program.
2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.
3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.
4. The proposed rules do not require an increase or decrease in fees paid to the agency.
5. The proposed rules do not create a new regulation.
6. The proposed rules do expand, limit, or repeal an existing regulation. The proposed rules repeal the prohibition against providing dyslexia therapy services solely through telehealth services.
7. The proposed rules do not increase or decrease the number of individuals subject to the rules' applicability.
8. The proposed rules do not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENTS

Comments on the proposed rules may be submitted electronically on the Department's website at <https://ga.tdlr.texas.gov:1443/form/gcerules>; by facsimile to (512) 475-3032; or by mail to Monica Nuñez, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711. The deadline for comments is 30 days after publication in the *Texas Register*.

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 403, which authorize the Texas Commission of Licensing and Regulation, the Department's governing

body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 403. No other statutes, articles, or codes are affected by the proposed rules.

§120.21. *Dyslexia Therapist Licensing Requirements.*

(a) A person who holds current certification as an academic language therapist issued by the Academic Language Therapy Association or its equivalent as approved by the department, may be licensed as a dyslexia therapist if the person has earned at least a master's degree from an accredited public or private institution of higher education.

(b) A person who qualifies for licensure under subsection (a)[~~7~~] is not required to provide documentation to the department that the person meets the requirements of Occupations Code §403.105 [~~§403.105(a)(2) - (5)~~], Eligibility for Licensed Dyslexia Therapist License.

(c) A licensed dyslexia therapist may practice in a school, learning center, clinic, or private practice setting.

§120.22. *Dyslexia Practitioner Licensing Requirements.*

(a) A person who holds current certification as an academic language practitioner issued by the Academic Language Therapy Association or its equivalent, as approved by the department, may be licensed as a dyslexia practitioner if the person has earned a bachelor's degree from an accredited public or private institution of higher education.

(b) A person who qualifies for licensure under subsection (a)[~~7~~] is not required to provide documentation to the department that the person meets the requirements of Occupations Code §403.104 [~~§403.104(a)(2) - (5)~~], Eligibility for Licensed Dyslexia Practitioner License.

(c) A licensed dyslexia practitioner may practice only in an educational setting, including a school, learning center, or clinic.

§120.23. *Examination.*

(a) The examination designated and approved by the department for licensure as a dyslexia therapist is the Academic Language Therapy Association Competency Examination for Multisensory Structured Language Education, Therapist Level. [~~Alliance National Registration Examination, Therapist Level, administered by the Academic Language Therapy Association.~~]

(b) The examination designated and approved by the department for licensure as a dyslexia practitioner is the Academic Language Therapy Association Competency Examination for Multisensory Structured Language Education, Practitioner Level. [~~Alliance National Registration Examination, Practitioner Level, administered by the Academic Language Therapy Association.~~]

(c) The applicable licensure examination requirement is waived for a person who holds current certification as an academic language therapist or academic language practitioner issued by the Academic Language Therapy Association, or its equivalent, as approved by the department.

§120.25. *Continuing Education.*

(a) A license holder must complete 20 clock-hours of continuing education during each two-year licensure period.

(b) Continuing education credit taken by a license holder for renewal shall be acceptable if the experience falls in one or more of the following categories and meets the requirements of subsection (c):

(1) academic courses at a regionally accredited college or university;

(2) in-service educational programs, training programs, institutes, seminars, workshops and conferences, including courses and programs provided by education service centers;

(3) instructing or presenting education programs or activities at an academic course, in-service educational programs, training programs, institutes, seminars, workshops and conferences not to exceed five clock-hours each continuing education period;

(4) publishing a book or an article in a peer review journal not to exceed five clock-hours each continuing education period; or

(5) successful completion of a self-study program, not to exceed ten clock-hours each continuing education period.

(c) Continuing education credit taken by a license holder, shall be in one or more of the following content areas:

(1) basic language and/or learning disorders;

(2) applied multisensory practice and methodology;

(3) curricula in academic language therapy;

(4) related research in medicine, psychology, education, or linguistics; or

(5) professional practice, including relevant laws, rules, and ethics of practice.

(d) Continuing education experience shall be credited as follows:

(1) Completion of course work at or through an accredited college or university, shall be credited for each semester hour on the basis of ten clock-hours of credit for each semester hour successfully completed for credit or audit as evidenced by a certificate of successful completion or official transcript.

(2) Parts of programs that meet the criteria of subsection (b)(2) [(e)(2)] or (3)[.] shall be credited on a one-for-one basis with one clock-hour of credit for each clock-hour spent in the continuing education experience.

(3) A clock-hour shall be 50 minutes of attendance and participation in an acceptable continuing education experience.

(4) Continuing education programs, as described in subsection (b)(2) [(e)(2)] and (3), must be offered or approved by the Academic Language Therapy Association or its equivalent, as approved by the department.

(5) Successful completion of continuing education experience, as described in subsection (b)(2) [(e)(2)] and (3), is evidenced by a certificate of completion or attendance issued by the approved sponsoring organization of the course.

(6) Successful completion of continuing education experience, as described in subsection (b)(4), is evidenced by submission of a copy of the publication.

(7) Successful completion of continuing education experience, described in subsection (b)(5), is evidenced by a certificate of completion presented by the sponsoring organization of the self-study program.

(e) The department shall employ an audit system for continuing education reporting. The license holder shall be responsible for maintaining a record of his or her continuing education experiences. The certificates, diplomas, or other documentation verifying earning of continuing education hours, are not to be forwarded to the department

at the time of renewal unless the license holder has been selected for audit.

(f) The audit process shall be as follows.

(1) The department shall select for audit, a random sample of license holders for each renewal month. License holders will be notified of the continuing education audit when they receive their renewal documentation.

(2) All license holders selected for audit shall submit copies of certificates, transcripts or other documentation satisfactory to the department, verifying the license holder's attendance, participation and completion of the continuing education. All documentation must be provided at the time of renewal.

(3) Failure to timely furnish this information or providing false information during the audit process or the renewal process are grounds for disciplinary action against the license holder.

(4) A license holder who is selected for continuing education audit may renew through the online renewal process. However, the license will not be considered renewed until the required continuing education documents are received, accepted and approved by the department.

(g) Licenses will not be renewed until continuing education requirements have been met.

(h) A person who fails to complete continuing education requirements for renewal may not renew the license. The person may obtain a new license by complying with the current requirements and procedures for obtaining a license.

(i) The department may not grant continuing education credit to any license holder for:

(1) education incidental to the regular professional activities of a license holder, such as learning occurring from experience or research;

(2) professional organization activity, such as serving on committees or councils or as an officer;

(3) any continuing education activity completed before or after the period of time described in subsection (a); or

(4) performance of duties that are routine job duties or requirements.

(j) The human trafficking prevention training course required for license renewal under §120.26(b) may be accepted for up to one hour of continuing education credit.

§120.90. Professional Standards and Basis for Disciplinary Action.

(a) This section is authorized under Texas Occupations Code, Chapters 51 and 403.

(1) If a person violates any provision of Texas Occupations Code, Chapters 51, 403, or any other applicable provision, this chapter, or a rule or order of the executive director or commission, proceedings may be instituted to impose administrative penalties, administrative sanctions, or both in accordance with the provisions of the Texas Occupations Code and the associated rules.

(2) The enforcement authority granted under Texas Occupations Code, Chapters 51 and 403, and any associated rules may be used to enforce the Texas Occupations Code and this chapter.

(b) A license holder shall comply with the following requirements in the provision of professional services. All license holders shall:

(1) only provide professional services that are within the scope of the license holder's competence, considering level of education, training, and experience.

(2) ensure a safe therapy or teaching environment for clients.

(3) not jeopardize a client's safety or well-being by abusive or inattentive behavior.

(4) maintain objectivity in all matters concerning the welfare of the client.

(5) terminate a professional relationship when it is reasonably clear that the client is not benefitting from the services being provided or when it is reasonably clear that the client no longer needs the services.

(6) seek to identify competent, dependable referral sources for clients and shall refer when requested or appropriate.

(7) provide accurate information to clients and the public about the nature and management of dyslexia and about the services rendered.

(8) be knowledgeable of all available diagnostic data and other relevant information regarding each client.

(9) not guarantee, directly or by implication, the results of any therapeutic or teaching services, except that a reasonable statement of prognosis may be made. A license holder shall not mislead clients to expect results that cannot be predicted from reliable evidence.

(10) accurately represent and describe any product created or recommended by the license holder.

(11) not require the exclusive use or purchase by a client of any product created or produced by the license holder.

(12) not use his or her professional relationship with a client to promote any product for personal gain or profit, unless the license holder has disclosed to the client the nature of the license holder's personal gain or profit.

(13) not misrepresent his or her education, training, credentials, or competence.

(14) fully inform clients of the nature and possible outcomes of services rendered.

(15) obtain written consent from a client or a minor client's parent or legal guardian in order to use the client's data or information for research or teaching activities.

(16) not falsify records.

(17) bill a client or third party only for the services actually rendered in the manner agreed to by the license holder and the client or the minor client's parent or legal guardian.

~~[(18) not provide professional services solely by written, telephone, or electronic/video correspondence or communication.]~~

(18) [(19)] not provide professional services to a client who is receiving dyslexia services from another license holder, except with the prior knowledge and consent of the other license holder.

(19) [(20)] not reveal, without authorization, any professional or personal information about a client unless required by law or compelled by a court to do so, or unless doing so is necessary to protect the welfare of the client or of the community. If a license holder reveals professional or personal information about a client without authorization, the information disclosed, the person or entity to whom it

was disclosed, and the justification for disclosure shall be documented by the license holder in the client's record.

(20) [(21)] provide, in plain language, a written explanation of the charges for professional services previously made on a bill or statement, upon the written request of a client or the minor client's parent or legal guardian.

(21) [(22)] not engage in the medical diagnosis or treatment of clients.

(22) [(23)] not engage in sexual contact, including intercourse or kissing, sexual exploitation, or therapeutic deception, with a client. Sexual contact and sexual intercourse mean the activities and behaviors described in Penal Code, §21.01. Sexual exploitation means a pattern, practice, or scheme of conduct, which may include sexual contact, that can reasonably be construed as being for the purposes of sexual arousal or gratification or sexual abuse of any person. Therapeutic deception means a representation by a license holder that sexual contact with, or sexual exploitation by, the license holder is consistent with, or part of, the professional services being provided to the client.

(23) [(24)] not use alcohol or drugs, not legally prescribed for the license holder, when the use adversely affects or could adversely affect the provision of professional services.

(24) [(25)] not offer to pay or agree to accept any remuneration directly or indirectly, overtly or covertly, in cash or in kind, to or from any person, firm, association of persons, partnership, or corporation for securing or soliciting clients or patronage.

(25) [(26)] comply with all provisions of the Act and this chapter, as well as any other state or federal law or rule that relates to the provision of professional services by, or the regulation of the license holder.

(26) [(27)] not obtain a license by means of fraud, misrepresentation, or concealment of a material fact.

(27) [(28)] not sell, barter, or offer to sell or barter a license.

(28) [(29)] inform the department of any violations of this chapter or the Act.

(29) [(30)] comply with any order issued by the department that relates to the license holder.

(30) [(31)] not interfere with a department investigation or disciplinary proceeding by misrepresentation or omission of facts to the department or by the use of threats or harassment against any person.

(31) [(32)] cooperate with the department by promptly furnishing required documents and by promptly responding to a request for information from the department.

(32) [(33)] provide professional services without discrimination based on race, color, national origin, religion, gender, age, or disability.

(c) A license holder in private practice shall:

(1) provide a client or a minor client's parent or legal guardian with a written agreement for services prior to the commencement of professional services.

(A) The agreement shall contain, at a minimum, a description of the services to be provided, goals, techniques, materials, the cost for services, payment arrangements and policies, hours, cancellation and refund policies, contact information for both parties, and the dated signatures of both parties.

(B) Any subsequent modifications to the agreement shall be signed and dated by both parties.

(2) maintain legible and accurate records of professional services rendered. A license holder practicing in an educational setting, including a school, learning center, or clinic, shall comply with the recordkeeping requirements of the educational setting.

(3) maintain records for a minimum of five years following the termination of services. A license holder practicing in an educational setting, including a school, learning center, or clinic, shall comply with the records retention requirements of the educational setting.

(4) not delegate any service requiring professional competence to a person not competent to provide the service. A license holder in private practice is responsible for the services provided by unlicensed persons employed or contracted by the license holder.

(5) notify each client or the minor client's parent or legal guardian of the department's name, website, email address, mailing address, and telephone number for the purpose of directing complaints to the department by providing notification on a sign prominently placed in the primary place of business or on a written document, such as an agreement or contract for services or an informational brochure provided by a license holder to a client or the minor client's parent or legal guardian.

(6) display the license in the primary location of practice, but shall not display a license that has been photographically or otherwise reproduced.

(d) Information used by a license holder in any advertisement or announcement shall not contain information that is false, inaccurate, misleading, incomplete, out of context, deceptive or not readily verifiable. Advertising includes, but is not limited to, any announcement of services, letterhead, business cards, commercial products, and billing statements. False, misleading, or deceptive advertising or advertising not readily subject to verification includes advertising that:

(1) makes a material misrepresentation of fact or omits a fact necessary to make the statement as a whole not materially misleading;

(2) makes a representation likely to create an unjustified expectation about the results of a professional service;

(3) compares a professional's services with another professional's services unless the comparison can be factually substantiated;

(4) causes confusion or misunderstanding as to the credentials, education, or licensing of a professional;

(5) makes a representation that is designed to take advantage of the fears or emotions of a particularly susceptible type of client; or

(6) represents in the use of a professional name, a title or professional identification that is expressly or commonly reserved to or used by another profession or professional, unless the license holder is licensed or otherwise authorized to use the title or professional identification.

(e) Records are the responsibility and property of the entity or individual who owns the practice or the practice setting.

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 20, 2020.

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Brad Bowman

General Counsel

Texas Department of Licensing and Regulation

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 475-4879



CHAPTER 121. BEHAVIOR ANALYST

16 TAC §§121.10, 121.21, 121.22, 121.70, 121.75

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules and a new rule section at 16 Texas Administrative Code (TAC), Chapter 121, §§121.10, 121.21, 121.22, 121.70, 121.75, and new 121.71, regarding the Behavior Analysts Program. These proposed changes are referred to as "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC Chapter 121 implement Texas Occupations Code, Chapter 506, Behavior Analysts, and Chapter 111, Telemedicine and Telehealth.

The proposed rules establish standards and responsibilities for delivering behavior analysis services by license holders who choose to provide their services using telehealth. The proposed rules also add relevant definitions, update cross references, and make minor editorial changes in the chapter. The proposed rules are necessary to provide uniform standards and guidelines for the way license holders may practice behavior analysis using telehealth services.

The behavior analyst professional community is regulated by its national certifying entity but desired to create state telehealth standards for Texas. Telehealth as a method of providing behavior analysis services has long been practiced in the state and the rule amendments compile and organize minimum requirements in a framework that will promote consistency and uniform quality of care. The Standard of Care Workgroup of the Advisory Board met on July 20 and September 14 of 2020, to discuss and draft rule language.

The proposed rules were presented to and discussed by the Behavior Analyst Advisory Board at its meeting on November 4, 2020. The Advisory Board made the following changes to the proposed rules: changed "behavior analyst" to "license holder" in new §121.71(a)(1)(C); added "A provider shall consider relevant factors including the client's behavioral, physical, and cognitive abilities in determining the appropriateness of providing services via telehealth" in new §121.71(d)(4); added "to a client" to the second half of the sentence in §121.71(d)(14); and made additional minor editorial changes in §121.75. The Advisory Board voted and recommended that the proposed rules with these changes be published in the *Texas Register* for public comment.

SECTION-BY-SECTION SUMMARY

The proposed rules amend §121.10 by adding thirteen definitions relevant to the practice of telehealth, make minor edits in three existing definitions, and renumber the section accordingly.

The proposed rules amend §121.21, Behavior Analyst Licensing Requirements, by adding a provision that clarifies that a behavior analyst must be licensed in Texas to serve clients in Texas unless exempt.

The proposed rules amend §121.22, Assistant Behavior Analyst Licensing Requirements, by adding a provision that clarifies that an assistant behavior analyst must be licensed in Texas to serve clients in Texas unless exempt.

The proposed rules amend §121.70, Responsibilities of License Holders, by changing the section title to Administrative Practice Responsibilities of License Holders. Professional practice responsibilities are moved from this section to a newly created section, and a set of administrative practice responsibilities for telehealth service is added to §121.70, including minimum requirements for data transmission and technology, and specifying methods of practice and activities that may be conducted using telehealth. Minor editorial changes are also made in the section.

The proposed rules add new §121.71, Professional Services Practice Responsibilities of License Holders. Existing professional responsibilities are moved from §121.70 into the new section, and new requirements are added in the section for professional responsibilities for practicing telehealth. Requirements for disclosure and client consent are updated to include consent for treatment delivery using telehealth, and minimum standards for quality of services, including legal requirements, use of facilitators, supervision, complaints, and records are provided. Cross reference corrections and minor editorial changes are also made in the section.

The proposed rules amend §121.75, Code of Ethics, to update cross references in accordance with renumbered provisions elsewhere in the chapter, and to make minor editorial changes.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to state or local government as a result of enforcing or administering the proposed rules. Mr. Couvillon has also determined that for each year of the first five years the proposed rules are in effect, there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be increased consistency in the quality and provision of behavior analysis services conducted using telehealth, and the corresponding cost savings to participants who continue to use or begin using telehealth.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules. License holders are not required to use telehealth. The proposed rules add definitions and clarifying language on the provision of telehealth, putting into rule more specifics for practices behavior analysts are already authorized to perform and routinely do perform. In most cases any minor

costs to upgrade telecommunications technology are expected to be borne by the entities by which the license holders are employed and would be motivated by the continuing choice to use telehealth services. The use of telehealth services generally is considered a cost saving alternative that has no associated increases in economic costs to participants over the cost of in-person services.

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

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. Since the agency has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

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

The proposed rules do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

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

1. The proposed rules do not create or eliminate a government program.
2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.
3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.
4. The proposed rules do not require an increase or decrease in fees paid to the agency.
5. The proposed rules do not create a new regulation.
6. The proposed rules expand an existing regulation.
7. The proposed rules do not increase or decrease the number of individuals subject to the rules' applicability.
8. The proposed rules do not positively or adversely affect this state's economy.

The proposed rules add definitions and specific minimum requirements and clarify the permissible ways in which license holders may provide telehealth services. For example, the rules specifically allow the use of telecommunications to observe and supervise persons physically present with a client. Existing rules require the consent of the client for services; the proposed rule specifies that the consent must include the provision of services using telehealth. The requirements and parameters given expand the rule by providing specificity for the practice of telehealth, but do not exceed existing responsibilities for providing behavior analysis services. Telehealth is simply another method by which behavior analysis services can be provided. The prac-

tice of telehealth is not prohibited and has been commonly used in the behavior analysis field. The addition of detail in the rule to address this method of providing services does not impact license holders in a way that will require significant changes in the way they provide behavior analysis services if they choose to use this method.

The proposed rules add a requirement for a service agreement to include a client's consent for transitional, experimental, provisional or unestablished-effectiveness treatments. A provider may categorize telehealth delivery in one of these ways if there is not yet sufficient data to conclusively support the use of the method for a particular purpose.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENTS

Comments on the proposed rules may be submitted electronically on the Department's website at <https://ga.tdlr.texas.gov:1443/form/gcerules>; by facsimile to (512) 475-3032; or by mail to Monica Nuñez, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711. The deadline for comments is 30 days after publication in the *Texas Register*.

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51, 111, and 506, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51, 111, and 506. No other statutes, articles, or codes are affected by the proposed rules.

§121.10. Definitions.

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

- (1) Act--Texas Occupations Code, Chapter 506.
- (2) Advertising--The solicitation for business utilizing the titles "licensed behavior analyst" or "licensed assistant behavior analyst."
- (3) Advisory Board--The Behavior Analyst Advisory Board.
- (4) Applicant--A person who applies for a license to use the title "licensed behavior analyst" or "licensed assistant behavior analyst" or to practice behavior analysis.
- (5) Asynchronous telehealth - Store-and-forward telehealth practice including the transmission of images or data when the data transfer does not occur in real-time.
- (6) [(5)] Authorized representative -- A person or entity that is authorized to represent the interests of a [the] client and to per-

form functions including making decisions about behavior analysis services.

(7) [(6)] Behavior Analyst Certification Board (BACB)--a certifying entity for persons practicing behavior analysis.

(8) [(7)] Client--A person who is receiving behavior analysis services from a license holder for the person's own treatment purposes, or a person or entity who is not receiving behavior analysis services from a license holder for their own treatment purposes including:

(A) an authorized representative of the person receiving behavior analysis services for the person's own treatment purposes; or

(B) an individual, institution, school, school district, educational institution, agency, firm, corporation, organization, government or governmental subdivision, business trust, estate, trust, partnership, association, or any other legal entity.

(9) Client site - The physical location of a client at the time behavior analysis services are practiced through synchronous or asynchronous telehealth. Also termed the origination site.

(10) [(8)] Commission--The Texas Commission of Licensing and Regulation.

(11) [(9)] Department--The Texas Department of Licensing and Regulation.

(12) Direct observation--A method of data collection that consists of observing the object of study in a particular situation or environment.

(13) Direct supervision--Supervision of a person who is performing behavior analysis services with a client.

(14) [(10)] Executive director--The executive director of the department.

(15) Facilitator--An individual physically present with a client who assists with the delivery of behavior analysis services at the direction of a behavior analyst or assistant behavior analyst.

(16) Indirect supervision--Supervision of a person who performs behavior analysis services but which does not occur when services are being provided to a client. This may include behavioral skills training and delivery of performance feedback; modeling technical, professional, and ethical behavior; guiding behavioral case conceptualization, problem-solving, and decision-making repertoires; review of written materials such as behavior programs, data sheets, or reports; oversight and evaluation of the effects of behavioral service delivery; and ongoing evaluation of the effects of supervision.

(17) [(11)] License--A license issued under the Act authorizing a person to use the title "licensed behavior analyst" or "licensed assistant behavior analyst" or to practice behavior analysis.

(18) [(12)] License holder--A person who has been issued a license in accordance with the Act to use the title "licensed behavior analyst" or "licensed assistant behavior analyst" or to practice behavior analysis.

(19) [(13)] Multiple relationship--A personal, professional, business, or other type of interaction by a license holder with a client or with a person or entity involved with the provision of behavior analysis services to a client that is not related to, or part of, the behavior analysis services.

(20) Provider--An individual who holds a current, renewable, behavior analyst or assistant behavior analyst license under this chapter, or who is authorized to provide behavior analysis services.

(21) Provider site--The physical location of a provider at the time behavior analysis services are furnished through synchronous or asynchronous telehealth. Also termed the distance site.

(22) [(14)] Service agreement--A [The] signed written contract for behavior analysis services. A [the] service agreement includes responsibilities and obligations of all parties and the scope of behavior analysis services to be provided. A [The] service agreement may be identified by other terms including treatment agreement, Memorandum of Understanding (MOU), or Individualized Education Program (IEP).

(23) Supervision--Supervision of a person who performs behavior analysis services, and may include both direct and indirect supervision.

(24) Synchronous telehealth--telehealth services that require transmission of images, video, or data through a communication link for real-time interaction to take place.

(25) Telecommunications--Interactive communication by two-way transmission using telecommunications technology, including, but not limited to sound, visual images, or computer data.

(26) Telecommunications technology--Computers and equipment used or capable of use for purposes of telecommunications, other than analog telephone, email, or facsimile technology and equipment. Telecommunications technology includes, but is not limited to:

(A) compressed digital interactive video, audio, or data transmission;

(B) clinical data transmission using computer imaging by way of still-image capture, storage and forward; and

(C) other technology that facilitates the delivery of telehealth services.

(27) Telehealth service--The meaning of "telehealth service" is the same as defined in Occupations Code Chapter 111.

(28) [(15)] Treatment plan--A [The] written behavior change program for an individual client. A [The] treatment plan includes consent, objectives, procedures, documentation, regular review, and exit criteria. A [The] treatment plan may be identified by other terms including Behavior Intervention Plan, Behavior Support Plan, Positive Behavior Support Plan, or Protocol.

§121.21. Behavior Analyst Licensing Requirements.

(a) To qualify for licensure as a behavior analyst, a person must:

(1) hold current certification as a Board Certified Behavior Analyst or a Board Certified Behavior Analyst-Doctoral or equivalent, issued by the Behavior Analyst Certification Board or its equivalent as approved by the department; and

(2) be in compliance with all professional, ethical, and disciplinary standards established by the certifying entity.

(b) Persons who are subject to or have received a disciplinary action by the certifying entity may be ineligible for a license.

(c) Persons who hold current certification by the certifying entity but who do not hold a current license may not:

(1) practice behavior analysis; or

(2) use the title "licensed behavior analyst."

(d) Persons who hold a current Texas license may use the title "licensed behavior analyst" or a reasonable abbreviation of the title that

is accurate and not misleading, including "LBA," "L.B.A.," "TXLBA," or "TX. L.B.A."

(e) Except as provided in Subchapter B, Texas Occupations Code Chapter 506, a person must be licensed under this chapter to provide behavior analysis services to a client in Texas.

§121.22. Assistant Behavior Analyst Licensing Requirements.

(a) To qualify for licensure as an assistant behavior analyst, a person must:

(1) hold current certification as a Board Certified Assistant Behavior Analyst or equivalent, issued by the Behavior Analyst Certification Board or its equivalent as approved by the department;

(2) be in compliance with all professional, ethical, and disciplinary standards established by the certifying entity; and

(3) be in compliance with the applicable supervision requirements of the certifying entity at all times when practicing behavior analysis.

(b) Persons who are subject to or have received a disciplinary action by the certifying entity may be ineligible for a license.

(c) Persons who hold current certification by the certifying entity but who do not hold a current license may not:

(1) practice behavior analysis; or

(2) use the title "licensed assistant behavior analyst."

(d) Persons who hold a current Texas license may use the title "licensed assistant behavior analyst" or a reasonable abbreviation of the title that is accurate and not misleading, including "LaBA," "L.a.B.A.," "TXLaBA," or "TX. L.a.B.A." The letter "a" representing the word "assistant" may not be capitalized unless the abbreviation clearly represents the word "assistant," including "Lic. Asst. BA," "TX L. Assist. B.A." or similar.

(e) Except as provided in Subchapter B, Texas Occupations Code Chapter 506, a person must be licensed under this chapter to provide behavior analysis services to a client in Texas.

§121.70. Administrative Practice Responsibilities of License Holders.

(a) Licenses issued by the department remain the property of the department and shall be surrendered to the department on demand.

(b) ~~[Administrative Practice Responsibilities.]~~ A license holder shall:

(1) inform the department of any violations of this chapter or the Act.

(2) promptly provide upon request any documents or information satisfactory to the department to demonstrate the license holder's qualifications for certification by the certifying entity or for licensure by the department.

(3) report to the department any fact that may affect a [the] license holder's qualifications to hold a certification or license in accordance with §121.50.

(4) notify each client or a [the] minor client's parent or authorized representative of the department's name, website, email address, mailing address, and telephone number for the purpose of directing complaints to the department.

(5) truthfully respond in a manner that fully discloses all information in an honest, materially responsive and timely manner to a complaint filed with or by the department.

(6) not interfere with a department investigation or disciplinary proceeding in any way, including by misrepresentation or omission of facts to the department or using threats or harassment against any person.

(7) comply with any order issued by the commission or the executive director that relates to the license holder.

(8) when creating a written agreement for services, comply with applicable professional and ethical standards and requirements including those of the license holder's certifying entity.

(9) upon revision or amendment of a written agreement for services, obtain the signatures of all parties.

(10) maintain legible and accurate records of behavior analysis services rendered. A license holder practicing in an educational setting, school, learning center, or clinic shall comply with the recordkeeping requirements of the service setting or with the retention requirements of the certifying entity, if the latter are more stringent.

(11) maintain records for a minimum of the longer of:

(A) seven years following the termination of behavior analysis services;

(B) seven years following the date on which a minor client reaches the age of 22; or

(C) the retention period required by the certifying entity.

(12) not delegate any services, functions, or responsibilities requiring professional competence to a person not competent or not properly credentialed. A license holder in private practice is responsible for the services provided by unlicensed persons employed or contracted by the license holder.

(13) display the current original license certificate as issued by the department in the primary location of practice, if any, or in the license holder's business office, but shall not display a license that has been photographically or otherwise reproduced.

(14) carry and display a department-issued duplicate of the current license certificate or license card or an unmodified image of the department-issued license certificate or license card, as appropriate and necessary, at locations other than the primary location of practice. A [The] license holder shall produce the current original department-issued license certificate or license card upon request.

(15) use electronic methods to create, amend, or sign documents, and accept signatures of clients on documents related to the provision of behavior analysis services, only in accordance with applicable law.

(c) Administrative Practice Responsibilities: Telehealth.

(1) Licensed behavior analysts and licensed assistant behavior analysts may provide telehealth services in accordance with the Act and Occupations Code, Chapter 111, and any requirements imposed by laws and rules governing health professional programs administered by the department. Unless the context requires otherwise, a reference to "direct" care, treatment, or other actions or observations by a behavior analyst or a person supervising a licensed behavior analyst or a licensed assistant behavior analyst in the course of client care include the provision of telehealth services.

(2) Except to the extent it imposes additional or more stringent requirements, this subsection does not affect the applicability of any other requirement or provision of law to which a person is subject under the Act, this chapter, or other law, or by the person's certifying

entity, when the person is functioning as a provider of telehealth services.

(3) Telehealth services may be delivered in a variety of ways, including, but not limited to, the following:

(A) the store-and-forward service delivery model/electronic transmission is an asynchronous electronic transmission of stored clinical data from one location to another; and

(B) the clinician interactive service delivery model is a synchronous, real time interaction between a provider and a client that may occur via telecommunication links.

(4) Live as compared to stored data refers to the actual data transmitted during the telehealth session. Live, real-time and stored clinical data may be included during the telehealth session.

(5) A license holder may engage in direct observation, direct supervision, or indirect supervision in-person and on-site, through telehealth, or in another manner approved by the license holder's certifying entity.

(6) The quality of electronic transmissions shall be adequate for the provision of an individualized client's telehealth service.

(7) A telehealth provider shall only utilize technology that the provider is competent to use as part of the provider's telehealth services.

(8) A telehealth provider shall maintain equipment used for telehealth services at the provider site and, as applicable, at a client site at which a client is present, in adequate operational status to provide appropriate quality of service.

(9) Telehealth providers shall ensure that communications occur without a change in the form or content of the information, as sent and received, other than through encoding or encryption of a transmission itself for purposes of and to protect the transmission.

§121.71. Professional Services Practice Responsibilities of License Holders.

(a) A license holder shall:

(1) enter into a service agreement with a client, as defined in §121.10, when behavior analysis services are to be provided;

(A) A behavior analyst shall describe the services to be delivered in a service agreement that may include the following activities: consultation, assessment, training, treatment design, treatment implementation, and treatment evaluation.

(B) A behavior analyst shall create a treatment plan when the service agreement provides for delivering treatment to an individual.

(C) A treatment plan is not required if a license holder will not deliver treatment to an individual.

(2) include in the service agreement or otherwise document and disclose to a client, as appropriate:

(A) the client's consent to treatment that is transitional, experimental, or provisional or for which its effectiveness has not been established, or effectiveness has not been established for the method, manner, or mode of treatment for which consent is obtained;

(B) conflicts of interest or multiple relationships that a license holder is aware of or becomes aware of, as defined in §121.10;

(C) a description of how a conflict of interest or multiple relationship will be addressed if one is discovered or disclosed;

(D) the acknowledgment of known conflicts of interest or multiple relationships and agreement to begin or to continue behavior analysis services despite them; and

(E) a reasoned justification for beginning or continuing to provide behavior analysis services if conflicts of interest or multiple relationships are acknowledged;

(3) re-evaluate treatment progress as needed and at least annually, and document the evaluation; and

(4) comply with all applicable requirements of the license holder's certifying entity, including the BACB Professional and Ethical Compliance Code for Behavior Analysts, when entering into service agreements and providing behavior analysis services.

(b) If any requirement of a license holder's certifying entity differs in stringency from a requirement of the Act or the commission rules, the more stringent provision shall apply.

(c) If any requirement of a license holder's certifying entity conflicts with a requirement of the commission rules such that the license holder cannot reasonably comply with both requirements, the license holder shall comply with the requirement of the certifying entity.

(d) Professional Services Practice Responsibilities: Telehealth.

(1) Except to the extent it imposes additional or more stringent requirements, this subsection does not affect the applicability of any other requirement or provision of law to which a person is subject under the Act, this chapter, or other law, or by the person's certifying entity, when the person is functioning as a provider of telehealth services.

(2) The requirements of this section apply to the use of telehealth by behavior analysts and assistant behavior analysts licensed under this chapter.

(3) A license holder shall provide the same quality of services via telehealth as is provided during in-person sessions. A telehealth provider shall maintain a focus on evidence-based practice and identify appropriate meaningful outcomes for a client. When an established telehealth procedure is not available, a license holder shall notify a client or multi-disciplinary team, as appropriate, that the procedure is experimental.

(4) A telehealth provider shall notify a client or multi-disciplinary team, as appropriate, of the conditions of telehealth services, including, but not limited to, the right to refuse telehealth services, options for service delivery, differences between in-person and remote service delivery methods, and instructions for filing and resolving complaints.

(A) A telehealth provider shall obtain client consent before services may be provided through telehealth.

(B) A provider shall consider relevant factors including the client's behavioral, physical, and cognitive abilities in determining the appropriateness of providing services via telehealth.

(C) If a client previously consented to in-person services, a telehealth provider shall obtain updated consent to include telehealth services.

(5) Telehealth providers shall not provide services by correspondence only, e.g., mail, email, or faxes, although these may be used as adjuncts to telehealth.

(6) The initial contact between a license holder and a client may be at the same physical location or through telehealth, as deemed appropriate by the license holder.

(7) Telehealth providers shall comply with all laws, rules, and certifying entity requirements governing the maintenance of client records, including client confidentiality requirements, regardless of the state where the records of any client within this state are maintained.

(8) A telehealth provider shall be sensitive to cultural and linguistic variables that affect the identification, assessment, treatment, and management of a client when providing services through telehealth.

(9) Supervision undertaken through telehealth must meet the standards of the certifying entity.

(10) Subject to the requirements and limitations of this section, a telehealth provider may utilize a facilitator at a client site to assist the provider in rendering telehealth services.

(11) A telehealth provider, before allowing a facilitator to assist a provider in rendering telehealth services, shall ascertain a facilitator's qualifications, training, and competence, as appropriate and reasonable, for each task a provider directs a facilitator to perform, and in the methodology and equipment a facilitator is to use.

(12) A facilitator may perform at a client site only the following tasks:

(A) a task for which a facilitator holds and acts in accordance with any relevant license, permit, or authorization required or exemption available under the Texas Occupations Code to perform the task; and

(B) those physical, administrative, and other tasks for which a telehealth provider determines a facilitator is competent to perform in connection with the rendering of behavior analysis services for which no license, permit, or authorization under the Texas Occupations Code is required or to which an exemption applies.

(13) A telehealth provider shall be able to see and hear a client and a facilitator, if used, via telecommunications technology in synchronous, real-time interactions, even when receiving or sending data and other telecommunication transmissions, when providing telehealth services.

(14) A telehealth provider shall not render telehealth services to a client if the presence of a facilitator is required for safe and effective service to a client and no qualified facilitator is available.

(15) A telehealth provider shall document the provider's telehealth services to the same standard as in-person services.

§121.75. Code of Ethics.

(a) Individuals certified by the BACB are required to comply with the BACB Professional and Ethical Compliance Code for Behavior Analysts.

(1) The department may consult the requirements of the certifying entity or the BACB Professional and Ethical Compliance Code for Behavior Analysts in the application and enforcement of the ethical standards included in this section.

(2) The department will apply the requirements of this section consistent with the requirements, guidance, and interpretations of the certifying entity unless an alternate interpretation is reasonably necessary or required.

(b) License holders shall comply with the following ethical standards when providing behavior analysis services. All license holders shall:

(1) comply with all provisions of the Act and this chapter, as well as any other state or federal law or rule that applies to the pro-

vision of behavior analysis services by, or the regulation of, a [the] license holder.

(2) provide behavior analysis services without discrimination based on race, color, national origin, religion, gender, age, or disability.

(3) offer to perform or perform only behavior analysis services for which a [the] license holder is qualified and that are within the scope of a [the] license holder's certification, license, or competence, considering level of education, training, and experience.

(4) accurately and truthfully represent the license holder's education, training, credentials, and competence.

(5) fully and accurately inform clients of the nature and possible outcomes of services rendered.

(6) be knowledgeable of all available information relevant to the behavior analysis services being provided to a [the] client.

(7) take reasonable measures to ensure a safe environment for clients.

(8) maintain objectivity in all matters concerning the welfare of a [the] client.

(9) not guarantee, directly or by implication, the results of any behavior analysis services, except that a reasonable statement of prognosis may be made. A license holder shall not mislead clients to expect results that cannot be predicted from reliable evidence.

(10) obtain written consent from a client in order to use a [the] client's data or information for research or teaching activities.

(11) reveal confidential or personal information about a client only with authorization unless:

(A) required by law or compelled by a court to reveal the information;

(B) required by the certifying entity to reveal the information; or

(C) revealing the information is necessary to protect the welfare of a [the] client or of the community.

(12) document any confidential or personal information disclosed, the person or entity to whom it was disclosed, and the justification for disclosure in a [the] client's record if a license holder reveals such information about a client without authorization.

(13) if requested, provide an explanation of the charges for behavior analysis services previously made on a bill or statement in writing and in plain language.

(14) if requested, accurately represent and describe any product created or recommended by a [the] license holder that is used or will be used in providing behavior analysis services to a [the] client.

(15) not offer to pay or agree to accept any remuneration directly or indirectly, overtly or covertly, in cash or in kind, to or from any person, firm, association of persons, partnership, or corporation for securing or soliciting clients or patronage.

(16) not overcharge a client or third party.

(17) not over treat a client.

(18) terminate a professional relationship when it is reasonably clear that a [the] client is not benefitting from the services being provided or when it is reasonably clear that a [the] client no longer needs the services.

(19) seek to identify competent, dependable referral sources for clients and shall refer when requested or appropriate.

(20) not sell, barter, or offer to sell or barter a license.

(21) refrain from practicing behavior analysis if, due to illness or use of alcohol, drugs or medications, narcotics, chemicals or other substances, or from mental or physical conditions, a [the] license holder is incapable of practicing with reasonable skill and safety to clients in the provision of behavior analysis services.

(22) refrain from engaging in sexual contact, including intercourse or kissing, sexual exploitation, or therapeutic deception, with a client. Sexual contact and sexual intercourse mean the activities and behaviors described in Penal Code, §21.01. Sexual exploitation means a pattern, practice, or scheme of conduct, which may include sexual contact, that can reasonably be construed as being for the purposes of sexual arousal or gratification or sexual abuse of any person. Therapeutic deception means a representation by a license holder that sexual contact with, or sexual exploitation by, the license holder is consistent with, or part of, the behavior analysis services being provided to a [the] client.

(23) refrain from participating in inappropriate or exploitative multiple relationships. Inappropriate or exploitative multiple relationships are prohibited.

(A) Inappropriate or exploitative relationships include, but are not limited to, relationships in which:

(i) a [the] license holder's objectivity is impaired or likely to be impaired;

(ii) a [the] license holder's ability to provide competent services is impaired or prevented;

(iii) the relationship is or reasonably could be harmful to the well-being of a client, supervisee, employee, student, or other person involved in the provision of behavior analysis services with a [the] license holder, including the person's emotional, psychological, physical, social, or financial well-being;

(iv) the relationship creates or could create a conflict of interest among a [the] license holder and a client or any person or entity involved in or connected with the provision of behavior analysis services to a client, unless the conflict of interest has been addressed in accordance with §121.71(a)(2) [§121.70(e)(2)]; or

(v) a [the] license holder receives an advantage, benefit, or thing of value other than regular compensation for behavior analysis services provided.

(B) Inappropriate or exploitative relationships may include unprofessional behavior such as: deception; trickery; undue pressure or influence, including giving or acceptance of gifts; intimidation; or threats; but need not be accompanied by such behaviors to be inappropriate or exploitative.

(C) Multiple relationships, other than those related to the provision of behavior analysis services or that have been addressed in accordance with §121.71(a)(2) [§121.70(e)(2)], between a [the] license holder and the following may be considered inappropriate or exploitative unless evidence demonstrates otherwise:

(i) client;

(ii) authorized representative of a [the] client;

(iii) spouse or significant other of a [the] client;

(iv) cohabitants of a [the] client;

(v) first-degree and second-degree relatives of a [the] client; and

(vi) persons with whom a [the] client shares a close personal, business, or financial relationship.

(D) Except as provided in §121.71(a)(2) [§121.70(e)(2)], multiple relationships are prohibited:

(i) during the provision of behavior analysis services to a [the] client;

(ii) for a minimum of two years after behavior analysis services have ended;

(iii) at all times after behavior analysis services have ended if behavior analysis services for the same client are reasonably expected to be requested from a [the] license holder again; and

(iv) indefinitely until there is reasonable certainty that the potential for harm to a [the] client is unlikely.

(c) Information used by a license holder in any advertisement or announcement shall not contain information that is false, inaccurate, misleading, incomplete, out of context, deceptive or not readily verifiable. Advertising includes, but is not limited to, any announcement of services, letterhead, business cards, commercial products, and billing statements. False, misleading, or deceptive advertising or advertising not readily subject to verification includes advertising that:

(1) makes a material misrepresentation of fact or omits a fact necessary to make the statement as a whole not materially misleading;

(2) makes a representation likely to create an unjustified expectation about the results of a professional service;

(3) compares a professional's services with another professional's services unless the comparison can be factually substantiated;

(4) causes confusion or misunderstanding as to the credentials, education, or licensing of a professional;

(5) makes a representation that is designed to take advantage of the fears or emotions of a client; or

(6) represents in the use of a professional name, a title or professional identification that is expressly or commonly reserved to or used by another profession or professional, unless a [the] license holder is licensed or otherwise authorized to use the title or professional identification.

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

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Brad Bowman

General Counsel

Texas Department of Licensing and Regulation

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For further information, please call: (512) 475-4879



TITLE 22. EXAMINING BOARDS

PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CHAPTER 75. BUSINESS PRACTICES

22 TAC §75.9

The Texas Board of Chiropractic Examiners (Board) proposes new 22 TAC §75.9 (Closing a Practice). The purpose of the proposed rule is to provide a licensee with the minimum steps the licensee should take to avoid patient abandonment and to protect patient records when closing down a chiropractic practice.

The Board's Executive Director, Patrick Fortner, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local government. There will be no adverse effect on small businesses or rural communities, micro-businesses, or local or state employment. There will be no additional economic costs to persons required to comply with the rule as proposed. An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed rule will not have an adverse economic effect on small businesses or rural communities as defined in Texas Government Code §2006.001(1-a) and (2).

Mr. Fortner has determined that for each year of the first five years the proposed rule will be in effect the public benefit is to provide a licensee with the minimum steps the licensee should take to avoid patient abandonment and to protect patient records when closing down a chiropractic practice.

The Board provides this Government Growth Impact Statement, pursuant to Texas Government Code §2001.0221, for the proposed new of 22 TAC §75.9. For each year of the first five years the proposed rule is in effect, Mr. Fortner has determined:

(1) The proposed rule does not create or eliminate a government program.

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

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

(4) The proposed rule does not require a decrease or increase in fees paid to the Board.

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

(6) The proposal does not repeal existing Board rules for an administrative process.

(7) The proposed rule does not decrease the number of individuals subject to the rule's applicability.

(8) The proposed rule does not positively or adversely affect the state economy.

Comments on the proposed rule or a request for a public hearing may be submitted to Christopher Burnett, General Counsel, Texas Board of Chiropractic Examiners, 333 Guadalupe, Suite 3-825, Austin, Texas 78701, via email: rules@tbce.state.tx.us; or fax: (512) 305-6705, no later than 30 days from the date that this proposed rule is published in the *Texas Register*. Please include the rule name and number in the subject line of any comments submitted by email.

The rule is proposed under Texas Occupations Code §201.152, which authorizes the Board to adopt rules necessary to perform the Board's duties and to regulate the practice of chiropractic.

No other statutes or rules are affected by this proposed rule.

§75.9. Financial Misconduct.

(a) A licensee permanently closing down a chiropractic practice should take the following steps to avoid patient abandonment:

(1) arrange with another licensee or other person to take over the licensee's duty to maintain patient records;

(2) communicate within a reasonable time to all active patients informing them of the closure and whom to contact for patient records or continuation of chiropractic care;

(3) place a clearly visible sign containing information of whom to contact for patient records or continuation of chiropractic care at all business locations;

(4) update all public listings for the chiropractic practice, including social media accounts, to state when the practice will close, whom to contact for patient records, and who will take over the duty to maintain patient records;

(5) refund any unused portion of any patient's prepaid treatment plan; and

(6) notify the Board in writing of the closure of the chiropractic practice.

(b) A licensee should document the steps taken under subsection (a) of this section.

(c) A licensee may modify or eliminate the steps in subsection (a)(1) - (5) of this section if they are inapplicable.

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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Christopher Burnett

General Counsel

Texas Board of Chiropractic Examiners

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CHAPTER 78. SCOPE OF PRACTICE

22 TAC §78.10

The Texas Board of Chiropractic Examiners (Board) proposes new 22 TAC §78.10 (Prohibitions on Animal Chiropractic). Under Texas Occupations Code §201.1525, the Board is required, when necessary, to adopt rules to clarify what activities are outside the scope of chiropractic practice if the statutory limits in Chapter 201 prove insufficient. The Board has generally declined to propose rules to declare specific activities as outside the scope of practice because the statutory limits are sufficiently precise. However, the Board has found animal chiropractic to be an activity that does require clarification by rule under §201.1525.

Texas Occupations Code Chapter 201 limits the practice of chiropractic to human beings. But many licensees (as well as other individuals) currently provide chiropractic services to animals, a practice growing in popularity in the state. Under Occupations Code Chapter 801, any medical procedure or technique performed on an animal falls under the jurisdiction of the Texas Board of Veterinary Medical Examiners (TBVME). TBVME has recognized animal chiropractic and has promulgated rules to govern its use (see 22 TAC §573.14). This gap between Occupations Code Chapters 201 and 801 has created uncertainty for the Board's licensees who routinely perform animal chiropractic services under the supervision of a licensed veterinarian.

The proposed rule removes that uncertainty. Under the proposed rule, the Board states that while animal chiropractic is outside the scope of chiropractic, the Board will not sanction a licensee for performing animal chiropractic under the supervision of a licensed veterinarian as long as the licensee does so in accordance with any rules on the practice adopted by TBVME. This makes it clear to all that the regulation of animal chiropractic falls under the jurisdiction of TBVME, not the Board. The proposed rule further states the Board will not sanction a licensee for advertising animal chiropractic services as long as the advertising is again in accordance with TBVME rules. The Board has provided TBVME with the text of this rule and they have voiced no objections.

The Board's Executive Director, Patrick Fortner, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local government. There will be no adverse effect on small businesses or rural communities, micro-businesses, or local or state employment. There will be no additional economic costs to persons required to comply with the rule as proposed. An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed rule will not have an adverse economic effect on small businesses or rural communities as defined in Texas Government Code §2006.001(1-a) and (2).

Mr. Fortner has determined that for each year of the first five years the proposed rule will be in effect the public benefit is to clarify the circumstances under which a licensee may perform animal chiropractic or advertise animal chiropractic services.

The Board provides this Government Growth Impact Statement, pursuant to Texas Government Code §2001.0221, for the proposed new of 22 TAC §78.10. For each year of the first five years the proposed rule is in effect, Mr. Fortner has determined:

(1) The proposed rule does not create or eliminate a government program.

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

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

(4) The proposed rule does not require a decrease or increase in fees paid to the Board.

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

(6) The proposal does not repeal existing Board rules for an administrative process.

(7) The proposed rule does not decrease the number of individuals subject to the rule's applicability.

(8) The proposed rule does not positively or adversely affect the state economy.

Comments on the proposed rule or a request for a public hearing may be submitted to Christopher Burnett, General Counsel, Texas Board of Chiropractic Examiners, 333 Guadalupe, Suite 3-825, Austin, Texas 78701, via email: rules@tbce.state.tx.us; or fax: (512) 305-6705, no later than 30 days from the date that this proposed rule is published in the *Texas Register*. Please include the rule name and number in the subject line of any comments submitted by email.

The rule is proposed under Texas Occupations Code §201.152, which authorizes the Board to adopt rules necessary to perform the Board's duties and to regulate the practice of chiropractic.

No other statutes or rules are affected by this proposed rule.

§78.10. Prohibitions on Animal Chiropractic.

(a) The definition of "animal chiropractic" is under the jurisdiction of the Texas Board of Veterinary Medical Examiners (TBVME).

(b) Animal chiropractic is outside the chiropractic scope of practice in Texas.

(c) A licensee may practice animal chiropractic only if done in compliance with the rules on animal chiropractic adopted by TBVME.

(d) A licensee advertising animal chiropractic services is exempt from the Board's rules that prohibit advertising services outside the scope of practice if the services are provided in compliance with subsection (c) of this section.

(e) A licensee practicing animal chiropractic not in compliance with subsection (c) of this section is subject to disciplinary action for practicing outside the scope of practice.

(f) A licensee advertising animal chiropractic services not in compliance with subsection (d) of this section is subject to disciplinary action for advertising services outside the scope of practice.

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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Christopher Burnett
General Counsel

Texas Board of Chiropractic Examiners

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For further information, please call: (512) 305-6700



CHAPTER 80. COMPLAINTS

22 TAC §80.4

The Texas Board of Chiropractic Examiners (Board) proposes repealing 22 TAC §80.4 (Schedule of Penalties). The Board will propose a new §80.4 in a separate rulemaking. Because of the Board's comprehensive rule revisions over the last two years, the cites to other rules contained in §80.4 are now out of date.

The Board's Executive Director, Patrick Fortner, has determined that for the first five-year period the proposed repeal is in effect

there will be no fiscal implications for state or local government. There will be no adverse effect on small businesses or rural communities, micro-businesses, or local or state employment. There will be no additional economic costs to persons required to comply with the repeal as proposed. An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed repeal will not have an adverse economic effect on small businesses or rural communities as defined in Texas Government Code §2006.001(1-a) and (2).

Mr. Fortner has determined that for each year of the first five years the proposed repeal will be in effect the public benefit is to update incorrect cites to Board rules.

The Board provides this Government Growth Impact Statement, pursuant to Texas Government Code §2001.0221, for the proposed repeal of 22 TAC §80.4. For each year of the first five years the proposed repeal is in effect, Mr. Fortner has determined:

(1) The proposed repeal does not create or eliminate a government program.

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

(3) Implementation of the proposed repeal does not require an increase or decrease in future legislative appropriations to the Board.

(4) The proposed repeal does not require a decrease or increase in fees paid to the Board.

(5) The proposed repeal does not create a new regulation.

(6) The proposal repeals existing Board rules for an administrative process.

(7) The proposed repeal does not decrease the number of individuals subject to the rule's applicability.

(8) The proposed repeal does not positively or adversely affect the state economy.

Comments on the proposed repeal or a request for a public hearing may be submitted to Christopher Burnett, General Counsel, Texas Board of Chiropractic Examiners, 333 Guadalupe, Suite 3-825, Austin, Texas 78701, via email: rules@tbce.state.tx.us; or fax: (512) 305-6705, no later than 30 days from the date that this proposed repeal is published in the *Texas Register*. Please include the rule name and number in the subject line of any comments submitted by email.

The repeal is proposed under Texas Occupations Code §201.152, which authorizes the Board to adopt rules necessary to perform the Board's duties and to regulate the practice of chiropractic, and Texas Occupations Code §201.503, which requires the Board to adopt a schedule of sanctions by rule.

No other statutes or rules are affected by this proposed repeal.

§80.4. Schedule of Penalties.

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

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22 TAC §80.4

The Texas Board of Chiropractic Examiners (Board) proposes new 22 TAC §80.4 (Schedule of Penalties); the current rule is being repealed in a separate rulemaking action. The purpose is to update the penalty schedule to show the current rule cites after the Board's recently completed major revision of its rules. The new penalty schedule also organizes rule violations into functional areas for better readability. The text of the rule further clarifies the circumstances when the Board will not report certain administrative violations to national practitioner databases.

The Board's Executive Director, Patrick Fortner, has determined that for the first five-year period the proposed new rule is in effect there will be no fiscal implications for state or local government. There will be no adverse effect on small businesses or rural communities, micro-businesses, or local or state employment. There will be no additional economic costs to persons required to comply with the new rule as proposed. An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed new rule will not have an adverse economic effect on small businesses or rural communities as defined in Texas Government Code §2006.001(1-a) and (2).

Mr. Fortner has determined that for each year of the first five years the proposed new rule will be in effect the public benefit is to update the penalty schedule to show the current rule cites after the Board's recently completed major revision of its rules to organize rule violations into functional areas for better readability, and to clarify the circumstances when the Board will not report certain administrative violations to national practitioner databases.

The Board provides this Government Growth Impact Statement, pursuant to Texas Government Code §2001.0221, for the new 22 TAC §80.4. For each year of the first five years the proposed new rule is in effect, Mr. Fortner has determined:

- (1) The proposed new rule does not create or eliminate a government program.
- (2) Implementation of the proposed new rule does not require the creation of new employee positions or the elimination of existing employee positions.
- (3) Implementation of the proposed new rule does not require an increase or decrease in future legislative appropriations to the Board.
- (4) The proposed new rule does not require a decrease in fees paid to the Board.
- (5) The proposed new rule does not create a new regulation.
- (6) The proposal new rule amends an existing Board rules for an administrative process.
- (7) The proposed new rule does not decrease the number of individuals subject to the rule's applicability.
- (8) The proposed new rule does not positively or adversely affect the state economy.

Comments on the proposed new rule or a request for a public hearing may be submitted to Christopher Burnett, General Counsel, Texas Board of Chiropractic Examiners, 333 Guadalupe, Suite 3-825, Austin, Texas 78701, via email: rules@tbce.state.tx.us; or fax: (512) 305-6705, no later than 30 days from the date that this proposed new rule is published in the *Texas Register*. Please include the rule name and number in the subject line of any comments submitted by email.

The new rule is proposed under Texas Occupations Code §201.152, which authorizes the Board to adopt rules necessary to perform the Board's duties and to regulate the practice of chiropractic, and Occupations Code §201.502, which requires the Board to adopt a schedule of penalties.

No other statutes or rules are affected by this proposed new rule.

§80.4. Schedule of Penalties.

(a) The following table contains the categories of penalties for violations of statutes and laws under the Board's jurisdiction. Figure: 22 TAC §80.4(a)

(b) All violations of statutes and rules under the Board's jurisdiction are subject to a maximum penalty of up to \$1000 per violation per day and license revocation.

(c) "Category I" means violations the Board shall report to national practitioner databases as required by law.

(d) "Category II" means violations the Board shall report to national practitioner databases only if the violation is egregious or the licensee has a significant history of similar administrative violations.

(e) Any violation of statute or rule not listed in the attached graphic under subsection (a) of this section is subject to the penalties 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.

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Christopher Burnett
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PART 11. TEXAS BOARD OF NURSING

CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.7

The Texas Board of Nursing (Board) proposes amendments to §217.7, relating to Change of Name and/or Address. The amendments are being proposed under the authority of the Occupations Code §301.151.

Background: On June 15, 2020, the Board launched the Texas Nurse Portal. The Texas Nurse Portal is a paperless, online system that allows individuals to apply for nurse licensure by examination, endorsement, or renewal. In an effort to continue mov-

ing the Board's work flow to a paperless system, the proposed amendments require all name and address changes to be made online through the Texas Nurse Portal.

Section by Section Overview. Proposed amended §217.7(a) requires a nurse or applicant to notify the Board within ten days of a change of name by submitting a legal document reflecting the name change in the Texas Nurse Portal accessible through the Board's website.

Proposed amended §217.7(b) requires a nurse or applicant to notify the Board within ten days of a change of address by submitting the new address in the Texas Nurse Portal accessible through the Board's website.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no change in the revenue to state government as a result of the enforcement or administration of the proposal.

Public Benefit/Cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be the adoption of a more efficient process for licensee name and address changes. There are no anticipated costs of compliance. On the contrary, the proposed amendments may reduce the existing nominal costs borne by individuals having to mail or fax paper copies of documents to the Board's offices.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. The Board has determined that there will be no economic impact on small businesses, micro businesses, or rural communities because there are no anticipated costs of compliance associated with the proposal. As such, an economic impact statement and regulatory flexibility analysis is not required.

Government Growth Impact Statement. The Board is required, pursuant to Tex. Gov't Code §2001.0221 and 34 Texas Administrative Code §11.1, to prepare a government growth impact statement. The Board has determined for each year of the first five years the proposed amendments will be in effect: (i) the proposal does not create or eliminate a government program; (ii) the proposal is not expected to have an effect on existing agency positions; (iii) implementation of the proposal does not require an increase or decrease in future legislative appropriations to the Board; (iv) the proposal does not require an increase or decrease in fees paid to the Board; (v) the proposal does not implement new legislation; (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 this proposal should be submitted to both Mark Majek, Director of Operations, and James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to mark.majek@bon.texas.gov and dusty.johnston@bon.texas.gov, or faxed to (512) 305-8101.

If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The amendments are proposed under the authority of the Occupations Code §301.151.

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

Cross Reference To Statute. The following statutes are affected by this proposal: the Occupations Code §301.151.

§217.7. Change of Name and/or Address.

(a) A nurse/applicant for licensure shall notify the Board [board in writing] within ten days of a change of name by submitting a legal document reflecting the [this] name change in the Texas Nurse Portal accessible through the Board's website.

(b) A nurse/applicant for licensure shall notify the Board [board in writing] within ten [10] days of a change of address by submitting [; providing] the new address [and his or her license number] in the Texas Nurse Portal accessible through the Board's website.

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 19, 2020.

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Jena Abel

Deputy General Counsel

Texas Board of Nursing

Earliest possible date of adoption: January 3, 2021

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



PART 30. TEXAS STATE BOARD OF EXAMINERS OF PROFESSIONAL COUNSELORS

CHAPTER 681. PROFESSIONAL COUNSELORS

SUBCHAPTER C. APPLICATION AND LICENSING

22 TAC §681.92

The Texas Behavioral Health Executive Council proposes the repeal of §681.92, relating to experience requirements (internship). The proposed repeal corresponds with the proposal of a new rule elsewhere in this edition of the *Texas Register*.

Overview and Explanation of the Proposed Rule. The proposed repeal of the rule is needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Coun-

cil to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507.

The Executive Council has proposed new rules, in this and a prior edition of the *Texas Register*, which concern the same subject matter and many of the same details and requirements found in these rules, therefore the repeal of this rule is necessary to implement H.B. 1501.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed repeal is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the repeal. Additionally, Mr. Spinks has determined that enforcing or administering the repeal does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed repeal is in effect there will be a benefit to licensees, applicants, and the general public because the corresponding proposed new rule will provide greater efficiencies and consistency by consolidating all the same or similar requirements from the boards for marriage and family therapists, professional counselors, psychologists, and social workers and implementing the same under one agency, the Executive Council. Mr. Spinks has also determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed repeal is in effect, there will be no additional economic costs to persons required to comply with this repeal.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed repeal is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed repeal will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed repeal will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed repeal does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed repeal is

necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed repeal is in effect, the Executive Council estimates that the proposed repeal will have no effect on government growth. The proposed repeal does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to the agency; it does not require an increase or decrease in fees paid to this agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed repeal. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed repeal may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

Statutory Authority. The repeal is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this repeal pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §503.2015 of the Tex. Occ. Code the Texas State Board of Examiners of Professional Counselors previously voted and, by a majority, approved to propose this repeal to the Executive Council. The repeal is specifically authorized by §503.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this repeal in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this repeal to the Executive Council. Therefore, the Executive Council has complied with Chapters 503 and 507 of the Texas Occupations Code and may propose this repeal.

Lastly, the Executive Council proposes this repeal under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§681.92. Experience Requirements (Internship).

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 20, 2020.

TRD-202004910

Darrel D. Spinks

Executive Director

Texas State Board of Examiners of Professional Counselors

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 305-7706



22 TAC §681.92

The Texas Behavioral Health Executive Council proposes new §681.92, relating to experience requirements (internship).

Overview and Explanation of the Proposed Rule. The proposed rule is needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507.

If a rule will pertain to the qualifications necessary to obtain a license; the scope of practice, standards of care, or ethical practice for a profession; continuing education requirements; or a schedule of sanctions then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code.

The proposed rule pertains to the qualifications necessary to obtain a license and continuing education requirements for professional counselors; and incorporate changes necessary to implement H.B. 1501. Therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Examiners of Professional Counselors, in accordance with §503.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose these rules to the Executive Council. Therefore, the Executive Council has complied with Chapters 503 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering this rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater efficiencies and consistency by consolidating all the same or similar requirements from the boards for marriage and family therapists, professional counselors, psychologists, and social workers and implementing the same under one agency, the Executive Council. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation, although it is a new rule it consolidates the current rule from the applicable board for the profession to conform with the Executive Council's rules, thereby reducing the amount of regulations in Texas; it does not expand an existing regulation, it provides clarification regarding existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §503.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §503.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 503 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§681.92. Experience Requirements (Internship).

(a) All applicants for LPC licensure must complete supervised experience acceptable to the Council of 3,000 clock-hours under a Council-approved supervisor.

(1) All internships physically occurring in Texas must be completed under the supervision of a Council-approved supervisor.

(2) For all internships physically completed in a jurisdiction other than Texas, the supervisor must be a person licensed or certified by that jurisdiction in a profession that provides counseling and who has the academic training and experience to supervise the counseling services offered by the Associate. The applicant must provide documentation acceptable to the Council regarding the supervisor's qualifications.

(b) The supervised experience must include at least 1,500 clock-hours of direct client counseling contact. Only actual time spent counseling may be counted.

(c) An LPC Associate may not complete the required 3,000 clock-hours of supervised experience in less than 18 months.

(d) The experience must consist primarily of the provision of direct counseling services within a professional relationship to clients by using a combination of mental health and human development principles, methods, and techniques to achieve the mental, emotional, physical, social, moral, educational, spiritual, or career-related development and adjustment of the client throughout the client's life.

(e) The LPC Associate must receive direct supervision consisting of a minimum of four (4) hours per month of supervision in individual (up to two Associates or group (three or more) settings while the Associate is engaged in counseling unless an extended leave of one month or more is approved in writing by the Council approved supervisor. No more than 50% of the total hours of supervision may be received in group supervision.

(f) An LPC Associate may have up to two (2) supervisors at one time.

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 20, 2020.

TRD-202004911

Darrel D. Spinks

Executive Director

Texas State Board of Examiners of Professional Counselors

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 305-7706



22 TAC §681.164

The Texas Behavioral Health Executive Council proposes new §681.164, relating to licensing persons with criminal convictions.

Overview and Explanation of the Proposed Rule. The proposed rule is needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of

the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507.

If a rule will pertain to the qualifications necessary to obtain a license then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed rule pertains to licensing persons with criminal convictions as professional counselors; therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Examiners of Professional Counselors, in accordance with §503.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 503 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity and consistency in the Executive Council's rules by aligning with current legal standards. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the

residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation, it clarifies a rule that was repealed so it may better align with current legal standards; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §503.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §503.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 503 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§681.164. Licensing of Persons with Criminal Convictions.

The following felonies and misdemeanors directly relate to the duties and responsibilities of a licensee:

- (1) offenses listed in Article 42A.054 of the Code of Criminal Procedure;
- (2) a sexually violent offense, as defined by Article 62.001 of the Code of Criminal Procedure;
- (3) any felony offense wherein the judgment reflects an affirmative finding regarding the use or exhibition of a deadly weapon;
- (4) any criminal violation of Chapter 503 (Licensed Professional Counselor Act) of the Occupations Code;
- (5) any criminal violation of Chapter 35 (Insurance Fraud) or Chapter 35A (Medicaid Fraud) of the Penal Code;
- (6) any criminal violation involving a federal health care program, including 42 USC §1320a-7b (Criminal penalties for acts involving Federal health care programs);
- (7) any offense involving the failure to report abuse or neglect;
- (8) any state or federal offense not otherwise listed herein, committed by a licensee while engaged in the practice of professional counseling;
- (9) any criminal violation of §22.041 (abandoning or endangering a child) of the Penal Code;
- (10) any criminal violation of §21.15 (invasive visual recording) of the Penal Code;
- (11) any criminal violation of §43.26 (possession of child pornography) of the Penal Code;
- (12) any criminal violation of §22.04 (injury to a child, elderly individual, or disabled individual) of the Penal Code;
- (13) three or more drug or alcohol related convictions within the last 10 years, evidencing possible addiction that will have an effect on the licensee's ability to provide competent services; and
- (14) any attempt, solicitation, or conspiracy to commit an offense listed herein.

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 20, 2020.

TRD-202004912

Darrel D. Spinks

Executive Director

Texas State Board of Examiners of Professional Counselors

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 305-7706



CHAPTER 781. SOCIAL WORKER LICENSURE

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §781.102

The Texas Behavioral Health Executive Council proposes amended 22 TAC §781.102, relating to definitions.

Overview and Explanation of the Proposed Rule. The proposed amended rule, in conjunction with other rule amendments published in this edition of the *Texas Register*, will no longer require the preapproval of a supervision plan in order to accrue supervised experience required for the issuance of a license as a clinical social worker (LCSW) or for independent practice recognition for a baccalaureate social worker (BSW) or a master social worker (MSW). Supervised experience will still be required, at the same requisite level that is currently in place, but documentation of the required supervised experience will now only be submitted to the Executive Council when the applicant is applying for either the LCSW or independent practice recognition. The Executive Council anticipates the proposed amendment will address the backlog of applications and expedite future applications received.

If a rule will pertain to the qualifications necessary to obtain a license then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed amendment pertains to supervised experience requirements for licensure as an LCSW or for independent practice recognition for an BSW or MSW; therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Social Worker Examiners, in accordance with §505.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater efficiencies in the application and

licensing process while still maintaining the same requirements and standards for obtaining a license. Therefore, it is anticipated that applications will be processed faster, increasing the amount of licensed and qualified professionals in Texas, while still maintaining the same minimum requirements for competency. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register*. Comments may

also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §505.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Sections 781.302, 781.401, 781.402, 781.403, 781.404, and 781.406 are affected by this proposed rule; no other code, articles or statutes are affected by this section.

§781.102. Definitions.

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

(1) Accredited colleges or universities--An educational institution that is accredited by an accrediting agency recognized by the Council for Higher Education Accreditation, the Texas Higher Educa-

tion Coordinating Board, or the United States Department of Education.

(2) Act--The Social Work Practice Act, Texas Occupations Code, Chapter 505, concerning the licensure and regulation of social workers.

(3) Agency--A public or private employer, contractor or business entity providing social work services.

(4) Assessment--An ongoing process of gathering information about and reaching an understanding of the client or client group's characteristics, perceived concerns and real problems, strengths and weaknesses, and opportunities and constraints; assessment may involve administering, scoring and interpreting instruments designed to measure factors about the client or client group.

(5) Association of Social Work Boards (ASWB)--The international organization which represents regulatory boards of social work and administers the national examinations utilized in the assessment for licensure.

(6) Board--Texas State Board of Social Worker Examiners.

(7) Case record--Any information related to a client and the services provided to that client, however recorded and stored.

(8) Client--An individual, family, couple, group or organization that receives social work services from a person identified as a social worker who is licensed by the Council.

(9) Clinical social work--A specialty within the practice of master social work that requires applying social work theory, knowledge, methods, ethics, and the professional use of self to restore or enhance social, psychosocial, or bio-psychosocial functioning of individuals, couples, families, groups, and/or persons who are adversely affected by social or psychosocial stress or health impairment. Clinical social work practice involves using specialized clinical knowledge and advanced clinical skills to assess, diagnose, and treat mental, emotional, and behavioral disorders, conditions and addictions, including severe mental illness and serious emotional disturbances in adults, adolescents and children. Treatment methods may include, but are not limited to, providing individual, marital, couple, family, and group psychotherapy. Clinical social workers are qualified and authorized to use the Diagnostic and Statistical Manual of Mental Disorders (DSM), the International Classification of Diseases (ICD), Current Procedural Terminology (CPT) codes, and other diagnostic classification systems in assessment, diagnosis, and other practice activities. The practice of clinical social work is restricted to either a Licensed Clinical Social Worker, or a Licensed Master Social Worker under clinical supervision in employment or under a clinical supervision plan.

(10) Confidential information--Individually identifiable information relating to a client, including the client's identity, demographic information, physical or mental health condition, the services the client received, and payment for past, present, or future services the client received or will receive. Confidentiality is limited in cases where the law requires mandated reporting, where third persons have legal rights to the information, and where clients grant permission to share confidential information.

(11) Conditions of exchange--Setting reimbursement rates or fee structures, as well as business rules or policies involving issues such as setting and cancelling appointments, maintaining office hours, and managing insurance claims.

(12) Counseling, clinical--The use of clinical social work to assist individuals, couples, families or groups in learning to solve problems and make decisions about personal, health, social, educational, vocational, financial, and other interpersonal concerns.

(13) Counseling, supportive--The methods used to help individuals create and maintain adaptive patterns. Such methods may include, but are not limited to, building community resources and networks, linking clients with services and resources, educating clients and informing the public, helping clients identify and build strengths, leading community groups, and providing reassurance and support.

(14) Council--the Texas Behavioral Health Executive Council.

(15) Consultation--Providing advice, opinions and conferring with other professionals regarding social work practice.

(16) Continuing education--Education or training aimed at maintaining, improving, or enhancing social work practice.

(17) Council on Social Work Education (CSWE)--The national organization that accredits social work education schools and programs.

(18) Direct practice--Providing social work services through personal contact and immediate influence to help clients achieve goals.

(19) Dual or multiple relationship--A relationship that occurs when social workers interact with clients in more than one capacity, whether it be before, during, or after the professional, social, or business relationship. Dual or multiple relationships can occur simultaneously or consecutively.

(20) Electronic practice--Interactive social work practice that is aided by or achieved through technological methods, such as the web, the Internet, social media, electronic chat groups, interactive TV, list serves, cell phones, telephones, faxes, and other emerging technology.

(21) Examination--A standardized test or examination, approved by the Council, which measures an individual's social work knowledge, skills and abilities.

(22) Equivalent or substantially equivalent - a licensing standard or requirement for an out-of-state license that is equal to or greater than a Texas licensure requirement shall be deemed equivalent or substantially equivalent.

(23) Executive Director - the executive director for the Texas Behavioral Health Executive Council. The executive director may delegate responsibilities to other staff members.

(24) Exploitation--Using a pattern, practice or scheme of conduct that can reasonably be construed as primarily meeting the licensee's needs or benefitting the licensee rather than being in the best interest of the client. Exploitation involves the professional taking advantage of the inherently unequal power differential between client and professional. Exploitation also includes behavior at the expense of another practitioner. Exploitation may involve financial, business, emotional, sexual, verbal, religious and/or relational forms.

(25) Field placement--A formal, supervised, planned, and evaluated experience in a professional setting under the auspices of a CSWE-accredited social work program and meeting CSWE standards.

(26) Fraud--A social worker's misrepresentation or omission about qualifications, services, finances, or related activities or information, or as defined by the Texas Penal Code or by other state or federal law.

(27) Full-time experience--Providing social work services thirty or more hours per week.

(28) Group supervision for licensure or for specialty recognition--Providing supervision to a minimum of two and a maximum of six supervisees in a designated supervision session.

(29) Health care professional--A licensee or any other person licensed, certified, or registered by the State of Texas in a health related profession.

(30) Impaired professional--A licensee whose ability to perform social work services is impaired by the licensee's physical health, mental health, or by medication, drugs or alcohol.

(31) Independent clinical practice--The practice of clinical social work in which the social worker, after having completed all requirements for clinical licensure, assumes responsibility and accountability for the nature and quality of client services, pro bono or in exchange for direct payment or third party reimbursement. Independent clinical social work occurs in independent settings.

(32) Independent non-clinical practice--The unsupervised practice of non-clinical social work outside of an organizational setting, in which the social worker, after having completed all requirements for independent non-clinical practice recognition, assumes responsibility and accountability for the nature and quality of client services, pro bono or in exchange for direct payment or third party reimbursement.

(33) Independent Practice Recognition--A specialty recognition related to unsupervised non-clinical social work at the LBSW or LMSW category of licensure, which denotes that the licensee has earned the specialty recognition, commonly called IPR, by successfully completing additional supervision which enhances skills in providing independent non-clinical social work.

(34) Individual supervision for licensure or specialty recognition--Supervision for professional development provided to one supervisee during the designated supervision session.

(35) LBSW--Licensed Baccalaureate Social Worker.

(36) LCSW--Licensed Clinical Social Worker.

(37) License--A regular or temporary Council-issued license, including LBSW, LMSW, and LCSW. Some licenses may carry an additional specialty recognition, such as LMSW-AP, LBSW-IPR, or LMSW-IPR.

(38) Licensee--A person licensed by the Council to practice social work.

(39) LMSW--Licensed Master Social Worker.

(40) LMSW-AP--Licensed Master Social Worker with the Advanced Practitioner specialty recognition for non-clinical practice. This specialty recognition will no longer be conferred after September 1, 2017. Licensees under a [Council-approved] supervision plan for this specialty recognition before September 1, 2017 will be permitted to complete supervision and examination for this specialty recognition.

(41) Non-clinical social work--Professional social work which incorporates non-clinical work with individuals, families, groups, communities, and social systems which may involve locating resources, negotiating and advocating on behalf of clients or client groups, administering programs and agencies, community organizing, teaching, researching, providing employment or professional development non-clinical supervision, developing and analyzing policy, fund-raising, and other non-clinical activities.

(42) Person--An individual, corporation, partnership, or other legal entity.

(43) Psychotherapy--Treatment in which a qualified social worker uses a specialized, formal interaction with an individual, cou-

ple, family, or group by establishing and maintaining a therapeutic relationship to understand and intervene in intrapersonal, interpersonal and psychosocial dynamics; and to diagnose and treat mental, emotional, and behavioral disorders and addictions.

(44) Recognition--Authorization from the Council to engage in the independent or specialty practice of social work services.

(45) Rules--Provisions of this chapter specifying how the Council implements the Act as well as Title 22, Chapters 881-885 of the Texas Administrative Code.

(46) Social work case management--Using a bio-psychosocial perspective to assess, evaluate, implement, monitor and advocate for services on behalf of and in collaboration with the identified client or client group.

(47) Social worker--A person licensed under the Act.

(48) Social work practice--Services which an employee, independent practitioner, consultant, or volunteer provides for compensation or pro bono to effect changes in human behavior, a person's emotional responses, interpersonal relationships, and the social conditions of individuals, families, groups, organizations, and communities. Social work practice is guided by specialized knowledge, acquired through formal social work education. Social workers specialize in understanding how humans develop and behave within social environments, and in using methods to enhance the functioning of individuals, families, groups, communities, and organizations. Social work practice involves the disciplined application of social work values, principles, and methods including, but not limited to, psychotherapy; marriage, family, and couples intervention; group therapy and group work; mediation; case management; supervision and administration of social work services and programs; counseling; assessment, diagnosis, treatment; policy analysis and development; research; advocacy for vulnerable groups; social work education; and evaluation.

(49) Supervisor, Council-approved--A person meeting the requirements set out in §781.402 of this title (relating to Clinical Supervision for LCSW and Non-Clinical Supervision for Independent Practice Recognition), to supervise a licensee towards the LCSW, Independent Practice Recognition, or as a result of a Council order. A Council-approved supervisor will denote having this specialty recognition by placing a "-S" after their credential initials, e.g., LBSW-S, LMSW-S or LCSW-S.

(50) Supervision--Supervision includes:

(A) administrative or work-related supervision of an employee, contractor or volunteer that is not related to qualification for licensure, practice specialty recognition, a disciplinary order, or a condition of new or continued licensure;

(B) clinical supervision of a Licensed Master Social Worker in a setting in which the LMSW is providing clinical services; the supervision may be provided by a Licensed Professional Counselor, Licensed Psychologist, Licensed Marriage and Family Therapist, Licensed Clinical Social Worker or Psychiatrist. This supervision is not related to qualification for licensure, practice specialty recognition, a disciplinary order, or a condition of new or continued licensure;

(C) clinical supervision of a Licensed Master Social Worker, who is providing clinical services and is under a [Council-approved] supervision plan to fulfill supervision requirements for achieving the LCSW; a Licensed Clinical Social Worker who is a Council-approved supervisor delivers this supervision;

(D) non-clinical supervision of a Licensed Master Social Worker or Licensed Baccalaureate Social Worker who is providing non-clinical social work service toward qualifications for indepen-

dent non-clinical practice recognition; this supervision is delivered by a Council-approved supervisor; and

(E) Council-ordered supervision of a licensee by a Council-approved supervisor pursuant to a disciplinary order or as a condition of new or continued licensure.

(51) Supervision hour--A supervision hour is a minimum of 60 minutes in length.

(52) Termination--Ending social work services with a client.

(53) Waiver--The suspension of educational, professional, and/or examination requirements for applicants who meet the criteria for licensure under special conditions based on appeal to the Council.

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 20, 2020.

TRD-202004913

Darrel D. Spinks

Executive Director

Texas State Board of Social Worker Examiners

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 305-7706



SUBCHAPTER B. RULES OF PRACTICE

22 TAC §781.302

The Texas Behavioral Health Executive Council proposes amended §781.302, relating to the practice of social work.

Overview and Explanation of the Proposed Rule. The proposed amended rule, in conjunction with other rule amendments published in this edition of the *Texas Register*, will no longer require the preapproval of a supervision plan in order to accrue supervised experience required for the issuance of a license as a clinical social worker (LCSW) or for independent practice recognition for a baccalaureate social worker (LBSW) or a master social worker (LMSW). Supervised experience will still be required, at the same requisite level that is currently in place, but documentation of the required supervised experience will now only be submitted to the Executive Council when the applicant is applying for either the LCSW or independent practice recognition. The Executive Council anticipates the proposed amendment will address the backlog of applications and expedite future applications received.

If a rule will pertain to the qualifications necessary to obtain a license, then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed amendment pertains to supervised experience requirements for licensure as an LCSW or for independent practice recognition for an LBSW or LMSW; therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Social Worker Examiners, in accordance with §505.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Execu-

tive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater efficiencies in the application and licensing process while still maintaining the same requirements and standards for obtaining a license. Therefore, it is anticipated that applications will be processed faster, increasing the amount of licensed and qualified professionals in Texas, while still maintaining the same minimum requirements for competency. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does

not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §505.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied

with Chapters 505 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Sections 781.102, 781.401, 781.402, 781.403, 781.404, and 781.406 are affected by this proposed rule; no other code, articles or statutes are affected by this section.

§781.302. The Practice of Social Work.

(a) Practice of Baccalaureate Social Work--Applying social work theory, knowledge, methods, ethics and the professional use of self to restore or enhance social, psychosocial, or bio-psychosocial functioning of individuals, couples, families, groups, organizations and communities. Baccalaureate Social Work is generalist practice and may include interviewing, assessment, planning, intervention, evaluation, case management, mediation, counseling, supportive counseling, direct practice, information and referral, problem solving, supervision, consultation, education, advocacy, community organization, and policy and program development, implementation, and administration.

(b) Practice of Independent Non-Clinical Baccalaureate Social Work--An LBSW recognized for independent practice, known as LBSW-IPR, may provide any non-clinical baccalaureate social work services in either an employment or an independent practice setting. An LBSW-IPR may work under contract, bill directly for services, and bill third parties for reimbursements for services. An LBSW-IPR must restrict his or her independent practice to providing non-clinical social work services.

(c) Practice of Master's Social Work--Applying social work theory, knowledge, methods and ethics and the professional use of self to restore or enhance social, psychosocial, or bio-psychosocial functioning of individuals, couples, families, groups, organizations and communities. An LMSW may practice clinical social work in an agency employment setting under clinical supervision, under a [Council-approved] supervision plan, or under contract with an agency when under a [Council-approved] clinical supervision plan. Master's Social Work practice may include applying specialized knowledge and advanced practice skills in assessment, treatment, planning, implementation and evaluation, case management, mediation, counseling, supportive counseling, direct practice, information and referral, supervision, consultation, education, research, advocacy, community organization and developing, implementing and administering policies, programs and activities. An LMSW may engage in Baccalaureate Social Work practice.

(d) Advanced Non-Clinical Practice of LMSWs--An LMSW recognized as an Advanced Practitioner (LMSW-AP) may provide any non-clinical social work services in either an employment or an independent practice setting. An LMSW-AP may work under contract, bill directly for services, and bill third parties for reimbursements for services. An LMSW-AP must restrict his or her practice to providing non-clinical social work services.

(e) Independent Practice for LMSWs--An LMSW recognized for independent practice may provide any non-clinical social work services in either an employment or an independent practice setting. This licensee is designated as LMSW-IPR. An LMSW-IPR may work under contract, bill directly for services, and bill third parties for reimbursements for services. An LMSW-IPR must restrict his or her independent practice to providing non-clinical social work services.

(f) Practice of Clinical Social Work--The practice of social work that requires applying social work theory, knowledge, methods, ethics, and the professional use of self to restore or enhance social, psychosocial, or bio-psychosocial functioning of individuals, couples, families, groups, and/or persons who are adversely affected by social or psychosocial stress or health impairment. The practice of clinical social work requires applying specialized clinical knowledge and advanced clinical skills in assessment, diagnosis, and treatment of mental, emotional, and behavioral disorders, conditions and addictions, including severe mental illness and serious emotional disturbances in adults, adolescents, and children. The clinical social worker may engage in Baccalaureate Social Work practice and Master's Social Work practice. Clinical treatment methods may include but are not limited to providing individual, marital, couple, family, and group therapy, mediation, counseling, supportive counseling, direct practice, and psychotherapy. Clinical social workers are qualified and authorized to use the Diagnostic and Statistical Manual of Mental Disorders (DSM), the International Classification of Diseases (ICD), Current Procedural Terminology (CPT) Codes, and other diagnostic classification systems in assessment, diagnosis, treatment and other practice activities. An LCSW may provide any clinical or non-clinical social work service or supervision in either an employment or independent practice setting. An LCSW may work under contract, bill directly for services, and bill third parties for service reimbursements.

(g) A licensee who is not recognized for independent practice or who is not under a [Council approved] non-clinical supervision plan must not engage in any independent practice that falls within the definition of social work practice in §781.102 of this title (relating to Definitions) without being licensed and recognized by the Council, unless the person is licensed in another profession and acting solely within the scope of that license. If the person is practicing professionally under another license, the person may not use the titles "licensed clinical social worker," "licensed master social worker," "licensed social worker," or "licensed baccalaureate social worker," or any other title or initials that imply social work licensure unless one holds the appropriate license or independent practice recognition.

(h) An LBSW or LMSW who is not recognized for independent practice may not provide direct social work services to clients from a location that she or he owns or leases and that is not owned or leased by an employer or other legal entity with responsibility for the client. This does not preclude in-home services such as in-home health care or the use of electronic media to provide services in an emergency.

(i) An LBSW or LMSW who is not recognized for independent practice may practice for remuneration in a direct employment or agency setting but may not work independently, bill directly to patients or bill directly to third party payers, unless the LBSW or LMSW is under a formal [Council approved] supervision plan.

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

Filed with the Office of the Secretary of State on November 20, 2020.

TRD-202004914

Darrel D. Spinks

Executive Director

Texas State Board of Social Worker Examiners

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 305-7706

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SUBCHAPTER C. APPLICATION AND LICENSING

22 TAC §781.401

The Texas Behavioral Health Executive Council proposes amended §781.401, relating to qualifications for licensure.

Overview and Explanation of the Proposed Rule. The proposed amended rule, in conjunction with other rule amendments published in this edition of the *Texas Register*, will no longer require the preapproval of a supervision plan in order to accrue supervised experience required for the issuance of a license as a clinical social worker (LCSW) or for independent practice recognition for a baccalaureate social worker (LBSW) or a master social worker (LMSW). Supervised experience will still be required, at the same requisite level that is currently in place, but documentation of the required supervised experience will now only be submitted to the Executive Council when the applicant is applying for either the LCSW or independent practice recognition. The Executive Council anticipates the proposed amendment will address the backlog of applications and expedite future applications received.

If a rule will pertain to the qualifications necessary to obtain a license, then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed amendment pertains to supervised experience requirements for licensure as an LCSW or for independent practice recognition for an LBSW or LMSW; therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Social Worker Examiners, in accordance with §505.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater efficiencies in the application and licensing process while still maintaining the same requirements and standards for obtaining a license. Therefore, it is anticipated that applications will be processed faster, increasing the amount of licensed and qualified professionals in Texas, while still maintaining the same minimum requirements for competency. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of

the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §505.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Sections 781.102, 781.302, 781.402, 781.403, 781.404, and 781.406 are affected by this proposed rule; no other code, articles or statutes are affected by this section.

§781.401. Qualifications for Licensure.

(a) Licensure. The following education and experience is required for licensure as designated. If an applicant for a license has held a substantially equivalent license in good standing in another jurisdiction for one year immediately preceding the date of application, the applicant will be deemed to have met the experience requirement under this chapter.

(1) Licensed Clinical Social Worker (LCSW).

(A) Has been conferred a master's degree in social work from a CSWE-accredited social work program, or a doctoral degree in social work from an accredited institution of higher learning acceptable to the Council, and has documentation in the form of a university transcript of successfully completing a field placement in social work.

(B) Has had 3000 hours of [Council-approved] supervised professional clinical experience over a period of 24 to 48 months, or its equivalent if the experience was completed in another jurisdiction. Supervised [Council-approved supervised] professional experience must comply with §781.404 of this title (relating to Recognition

as a Council-approved Supervisor and the Supervision Process) and all other applicable laws and rules.

(C) Has had a minimum of 100 hours of [Council-approved] supervision, over the course of the 3000 hours of experience, with a Council-approved supervisor. Supervised experience must have occurred within the five calendar years immediately preceding the date of LCSW application. If the social worker completed supervision in another jurisdiction, the social worker shall have the supervision verified by the regulatory authority in the other jurisdiction. If such verification is impossible, the social worker may request that the Council accept alternate verification of supervision.

(D) Has passed the Clinical examination administered nationally by ASWB.

(2) Licensed Master Social Worker (LMSW).

(A) Has been conferred a master's degree in social work from a CSWE-accredited social work program, or a doctoral degree in social work from an accredited university, and has documentation in the form of a university transcript of successfully completing a field placement in social work.

(B) Has passed the Master's examination administered nationally by ASWB.

(3) Licensed Baccalaureate Social Worker (LBSW).

(A) Has been conferred a baccalaureate degree in social work from a CSWE accredited social work program.

(B) Has passed the Bachelors examination administered nationally by ASWB.

(b) Specialty Recognition. The following education and experience is required for specialty recognitions.

(1) Licensed Master Social Worker-Advanced Practitioner (LMSW-AP).

(A) Is currently licensed in the State of Texas or meets the current requirements for licensure as an LMSW.

(B) While fully licensed as a social worker, has had 3000 hours of [Council-approved] supervised professional non-clinical social work experience over a period of 24 to 48 months, or its equivalent if the experience was completed in another jurisdiction. Supervised [Council-approved supervised] professional experience must comply with §781.404 of this title and all other applicable laws and rules.

(C) Has had a minimum of 100 hours of [Council-approved] supervision, over the course of the 3000 hours of experience, with a Council-approved supervisor. Supervised experience must have occurred within the five calendar years immediately preceding the date of LMSW-AP application. If supervision was completed in another jurisdiction, the social worker must have the supervision verified by the regulatory authority in the other jurisdiction. If such verification is impossible, the social worker may request that the Council accept alternate verification of supervision.

(D) Has passed the Advanced Generalist examination administered nationally by the ASWB.

(2) Independent Non-clinical Practice.

(A) Is currently licensed in the State of Texas as an LBSW or LMSW.

(B) While fully licensed as a social worker has had 3000 hours of [Council-approved] supervised full-time social work experience over a minimum two-year period, but within a maximum five-year

period or its equivalent if the experience was completed in another state. Supervised [Council-approved supervised] professional experience must comply with §781.404 of this title and all other applicable laws and rules.

(C) Has had a minimum of 100 hours of [Council-approved] supervision, over the course of the 3000 hours of experience, with a Council-approved supervisor. Supervised experience must have occurred within the 5 calendar years immediately preceding the date of application for IPR specialty recognition. If supervision was completed in another jurisdiction, the social worker shall have the supervision verified by the regulatory authority in the other jurisdiction. If such verification is impossible, the social worker may request that the Council accept alternate verification.

(c) Applicants for a license must complete the Council's jurisprudence examination and submit proof of completion at the time of application.

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 20, 2020.

TRD-202004915

Darrel D. Spinks

Executive Director

Texas State Board of Social Worker Examiners

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 305-7706



22 TAC §781.402

The Texas Behavioral Health Executive Council proposes amended §781.402, relating to clinical supervision for LCSW and non-clinical supervision for independent practice recognition.

Overview and Explanation of the Proposed Rule. The proposed amended rule, in conjunction with other rule amendments published in this edition of the *Texas Register*, will no longer require the preapproval of a supervision plan in order to accrue supervised experience required for the issuance of a license as a clinical social worker (LCSW) or for independent practice recognition for a baccalaureate social worker (LBSW) or a master social worker (LMSW). Supervised experience will still be required, at the same requisite level that is currently in place, but documentation of the required supervised experience will now only be submitted to the Executive Council when the applicant is applying for either the LCSW or independent practice recognition. The Executive Council anticipates the proposed amendment will address the backlog of applications and expedite future applications received.

If a rule will pertain to the qualifications necessary to obtain a license then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed amendment pertains to supervised experience requirements for licensure as an LCSW or for independent practice recognition for an LBSW or LMSW; therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Social Worker Examiners, in accordance with §505.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater efficiencies in the application and licensing process while still maintaining the same requirements and standards for obtaining a license. Therefore, it is anticipated that applications will be processed faster, increasing the amount of licensed and qualified professionals in Texas, while still maintaining the same minimum requirements for competency. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a gov-

ernment program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §505.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this in-

stance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Sections 781.102, 781.302, 781.401, 781.403, 781.404, and 781.406 are affected by this proposed rule; no other code, articles or statutes are affected by this section.

§781.402. Clinical Supervision for LCSW and Non-Clinical Supervision for Independent Practice Recognition.

(a) A person who has obtained a temporary license may not begin the supervision process toward independent non-clinical practice or independent clinical practice until the regular license is issued.

(b) To accrue supervised clinical experience required for the issuance of a LCSW:

(1) an LMSW shall complete a supervision plan form prescribed by the Council, or a form with substantially equivalent information, and signed by both the LMSW and the Council-approved clinical supervisor;

(2) the Council-approved clinical supervisor shall keep a supervision file on the LMSW that includes the supervision plan, list of locations where the LMSW provides supervised clinical services, and a log of clinical experience and supervision earned by the LMSW;

(3) the Council-approved clinical supervisor shall submit a completed and signed supervision verification form prescribed by the Council when the LMSW submits an application for re-categorization; and

(4) the LMSW shall submit an application for re-categorization of his or her licensure to LCSW upon fulfillment of the supervision requirements.

[(b) An LMSW who plans to apply for the LCSW must:]

[(1) within 30 days of initiating supervision; submit to the Council one clinical supervisory plan for each location of practice for approval by the Council or its designee;]

[(2) submit a current job description from the agency in which the social worker is employed with a verification of authenticity from the agency director or his or her designee on agency letterhead. In order for a plan to be approved, the position description or other relevant documentation must demonstrate that the duties of the position are clinical as defined in this chapter;]

[(3) submit a separate supervision verification form for each location of practice to the Council for approval within 30 days of the end of each supervisory plan with each supervisor. If the supervisor does not recommend that the supervisee is eligible to examine for LCSW, the supervisor must indicate such on the clinical supervision verification form and provide specific reasons for not recommending the supervisee. The Council may consider the supervisor's reservations as it evaluates the supervision verification submitted by the supervisee;]

[(4) submit a new supervisory plan within 30 days of changing supervisors or practice location; and]

[(5) submit an application for re-categorizing his/her licensure to Licensed Clinical Social Worker.]

(c) An LMSW who plans to apply for the LCSW may not open an independent social work practice to provide clinical social work to clients.

(d) To accrue supervised experience required for an LBSW or an LMSW to apply for Independent Practice Recognition the LBSW or LMSW shall:

(1) complete a supervision plan form prescribed by the Council, or a form with substantially equivalent information, and signed by both the LBSW or LMSW and the Council-approved supervisor;

(2) the Council-approved supervisor shall keep a supervision file on the LBSW or LMSW that includes the supervision plan, list of locations where the LBSW or LMSW provides supervised services, and a log of experience and supervision earned by the LBSW or LMSW;

(3) the Council-approved supervisor shall submit a completed and signed supervision verification form prescribed by the Council when the LBSW or LMSW submits an application for Independent Practice Recognition; and

(4) submit an application for Independent Practice Recognition upon fulfillment of the supervision requirements.

[(d) An LBSW or an LMSW who plans to apply for the Independent Practice Recognition must:]

[(1) submit one supervisory plan to the Council for each location of practice for approval by the Council or its designee within 30 days of initiating supervision;]

[(2) submit a current job description from the agency in which the social worker is employed with a verification of authenticity from the agency director or his or her designee on agency letterhead or submit a copy of the contract or appointment under which the LBSW or LMSW intends to work, along with a statement from the potential supervisor that the supervisor has reviewed the contract and is qualified to supervise the LBSW or LMSW in the setting;]

[(3) submit a separate supervision verification form for each practice location to the Council within 30 days of the end of each supervisory plan with each supervisor. If the supervisor does not recommend that the supervisee is eligible for independent practice recognition, the supervisor must provide specific reasons for not recommending the supervisee. The Council may consider the supervisor's reservations as it evaluates the supervision verification that the supervisee submits; and]

[(4) submit a new supervisory plan within 30 days of changing supervisors or practice location.]

(e) A licensee who is required to be supervised as a condition of initial licensure, continued licensure, or disciplinary action must:

(1) submit one supervisory plan for each practice location to the Council for approval by the Council or its designee within 30 days of initiating supervision;

(2) submit a current job description from the agency in which the social worker is employed with a verification of authenticity from the agency director or his or her designee on agency letterhead or submit a copy of the contract or appointment under which the licensee intends to work, along with a statement from the potential supervisor that the supervisor has reviewed the contract and is qualified to supervise the licensee in the setting;

(3) ensure that the supervisor submits reports to the Council on a schedule determined by the Council. In each report, the su-

pervisor must address the supervisee's performance, how closely the supervisee adheres to statutes and rules, any special circumstances that led to the imposition of supervision, and recommend whether the supervisee should continue licensure. If the supervisor does not recommend the supervisee for continued licensure, the supervisor must provide specific reasons for not recommending the supervisee. The Council may consider the supervisor's reservations as it evaluates the supervision verification the supervisee submits; and

(4) notify the Council immediately if there is a disruption in the supervisory relationship or change in practice location and submit a new supervisory plan within 30 days of the break or change in practice location.

(f) This rule shall apply to all pending applications, supervision plans awaiting review or previously approved, as well as all future applications filed with the Council.

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 20, 2020.

TRD-202004916

Darrel D. Spinks

Executive Director

Texas State Board of Social Worker Examiners

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 305-7706



22 TAC §781.403

The Texas Behavioral Health Executive Council proposes amended §781.403, relating to independent practice recognition (non-clinical).

Overview and Explanation of the Proposed Rule. The proposed amended rule, in conjunction with other rule amendments published in this edition of the *Texas Register*, will no longer require the preapproval of a supervision plan in order to accrue supervised experience required for the issuance of a license as a clinical social worker (LCSW) or for independent practice recognition for a baccalaureate social worker (LBSW) or a master social worker (LMSW). Supervised experience will still be required, at the same requisite level that is currently in place, but documentation of the required supervised experience will now only be submitted to the Executive Council when the applicant is applying for either the LCSW or independent practice recognition. The Executive Council anticipates the proposed amendment will address the backlog of applications and expedite future applications received.

If a rule will pertain to the qualifications necessary to obtain a license then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed amendment pertains to supervised experience requirements for licensure as an LCSW or for independent practice recognition for an LBSW or LMSW; therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Social Worker Examiners, in accordance with §505.2015 of the Tex. Occ. Code, previously voted

and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater efficiencies in the application and licensing process while still maintaining the same requirements and standards for obtaining a license. Therefore, it is anticipated that applications will be processed faster, increasing the amount of licensed and qualified professionals in Texas, while still maintaining the same minimum requirements for competency. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or de-

crease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §505.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied

with Chapters 505 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Sections 781.102, 781.302, 781.401, 781.402, 781.404, and 781.406 are affected by this proposed rule; no other code, articles or statutes are affected by this section.

§781.403. Independent Practice Recognition (Non-Clinical).

(a) An LBSW or LMSW who seeks to obtain [Council approval for] the specialty recognition of independent non-clinical practice shall meet requirements and parameters set by the Council in §781.401 of this title (relating to Qualifications for Licensure).

(b) An individual supervising an LBSW for independent non-clinical practice recognition shall be an LBSW recognized for independent non-clinical practice; an LMSW recognized for independent non-clinical practice; an LMSW-AP; or an LCSW. The supervisor shall be Council-approved.

(c) An individual supervising an LMSW for the independent non-clinical practice recognition shall be Council-approved and shall be an LMSW recognized for independent non-clinical practice, an LMSW-AP, or an LCSW.

(d) A person who has obtained only the temporary license may not begin supervision until the Council issues a regular license.

(e) The Council may use the Internal Revenue Service (IRS) guidelines developed in 1996 to demonstrate whether a professional is an independent contractor or an employee. These guidelines revolve around the control an employer has in an employer-employee relationship, in which the employer has the right to control the "means and details" by which services are performed.

(1) Behavioral control. The employer can control the employee's behavior by giving instructions about how the work gets done rather than simply looking at the end products of work. The more detailed the instructions, the more control the employer exercises. An employer requiring that employees be trained for the job is also an example of behavioral control, though contractors may also go through training.

(2) Financial control. The employer determines the amount and regularity of payments to employees. A contractor is typically paid when he/she completes the work, and the contractor usually sets a timeframe for completing the work. The most important element of financial control is that a contractor has more freedom to make business decisions that affect the profitability of his/her work. A contractor, for instance, may invest in renting an office or buying equipment, while the employee does not. While employees are usually reimbursed for job-related expenses, the contractor may or may not be reimbursed, but lack of reimbursement usually signals that a worker is independent. An independent contractor often makes his or her services available to other potential clients, while an employee does not.

(3) Relationship of the parties. The intent of the relationship is significant. The relationship is usually outlined in the written contract and gives one party more control than the other. If a company gives a worker employee benefits, the worker is an employee. The ability to terminate the relationship is another evidence of control in the relationship. If the employer-employee relationship appears to be permanent, it denotes an employee, not contractor, relationship. If a

worker performs activities that are a key aspect of the company's regular business, that denotes an employee status.

(f) An LBSW or LMSW who plans to apply for the specialty recognition of non-clinical independent practice shall follow procedures set out in §781.402 of this title (relating to Clinical Supervision for LCSW and Non-Clinical Supervision for LMSW-AP and Independent Practice Recognition).

(g) An LBSW or LMSW may practice independently when the LMSW or LBSW holds the independent practice specialty recognition, or when under a supervision plan for independent practice but the Council-approved supervisor is still responsible for the acts or omissions of the supervisee while providing services under the supervision plan [that has been approved by the Council].

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 20, 2020.

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Darrel D. Spinks

Executive Director

Texas State Board of Social Worker Examiners

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For further information, please call: (512) 305-7706



22 TAC §781.404

The Texas Behavioral Health Executive Council proposes amended §781.404, relating to recognition as a Council-approved supervisor and the supervision process.

Overview and Explanation of the Proposed Rule. The proposed amended rule, in conjunction with other rule amendments published in this edition of the *Texas Register*, will no longer require the preapproval of a supervision plan in order to accrue supervised experience required for the issuance of a license as a clinical social worker (LCSW) or for independent practice recognition for a baccalaureate social worker (LBSW) or a master social worker (LMSW). Supervised experience will still be required, at the same requisite level that is currently in place, but documentation of the required supervised experience will now only be submitted to the Executive Council when the applicant is applying for either the LCSW or independent practice recognition. The Executive Council anticipates the proposed amendment will address the backlog of applications and expedite future applications received.

If a rule will pertain to the qualifications necessary to obtain a license, then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed amendment pertains to supervised experience requirements for licensure as an LCSW or for independent practice recognition for an LBSW or LMSW; therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Social Worker Examiners, in accordance with §505.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with

Chapters 505 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater efficiencies in the application and licensing process while still maintaining the same requirements and standards for obtaining a license. Therefore, it is anticipated that applications will be processed faster, increasing the amount of licensed and qualified professionals in Texas, while still maintaining the same minimum requirements for competency. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency;

it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §505.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Sections 781.102, 781.302, 781.401, 781.402, 781.403, and 781.406 are affected by this proposed rule; no other code, articles or statutes are affected by this section.

§781.404. Recognition as a Council-approved Supervisor and the Supervision Process.

(a) Types of supervision include:

(1) administrative or work-related supervision of an employee, contractor or volunteer that is not related to qualification for licensure, practice specialty recognition, a disciplinary order, or a condition of new or continued licensure;

(2) clinical supervision of a Licensed Master Social Worker in a setting in which the LMSW is providing clinical services; the supervision may be provided by a Licensed Professional Counselor, Licensed Psychologist, Licensed Marriage and Family Therapist, Licensed Clinical Social Worker or Psychiatrist. This supervision is not related to qualification for licensure, practice specialty recognition, a disciplinary order, or a condition of new or continued licensure;

(3) clinical supervision of a Licensed Master Social Worker, who is providing clinical services and is under a [Council-approved] supervision plan to fulfill supervision requirements for achieving the LCSW; a Licensed Clinical Social Worker who is a Council-approved supervisor delivers this supervision;

(4) non-clinical supervision of a Licensed Master Social Worker or Licensed Baccalaureate Social Worker who is providing non-clinical social work service toward qualifications for independent non-clinical practice recognition; this supervision is delivered by a Council-approved supervisor;

(5) non-clinical supervision of a Licensed Master Social Worker who is providing non-clinical social work service toward qualifications for the LMSW-AP; this supervision is delivered by a Council-approved supervisor; or

(6) Council-ordered supervision of a licensee by a Council-approved supervisor pursuant to a disciplinary order or as a condition of new or continued licensure.

(b) A person who wishes to be a Council-approved supervisor must file an application and pay the applicable fee.

(1) A Council-approved supervisor must be actively licensed in good standing by the Council as an LBSW, an LMSW, an LCSW, or be recognized as an Advanced Practitioner (LMSW-AP), or hold the equivalent social work license in another jurisdiction. The person applying for Council-approved status must have practiced at his/her category of licensure for two years. The Council-approved supervisor shall supervise only those supervisees who provide services that fall within the supervisor's own competency.

(2) The Council-approved supervisor is responsible for the social work services provided within the supervisory plan.

(3) The Council-approved supervisor must have completed a supervisor's training program acceptable to the Council.

(4) The Council-approved supervisor must complete three hours of continuing education every biennium in supervision theory, skills, strategies, and/or evaluation.

(5) The Council-approved supervisor must designate at each license renewal that he/she wishes to continue Council-approved supervisor status.

(6) The Council-approved supervisor must submit required documentation and fees to the Council.

(7) When a licensee is designated Council-approved supervisor, he or she may perform the following supervisory functions.

(A) An LCSW may supervise clinical experience toward the LCSW license, non-clinical experience toward the Advanced Practitioner specialty recognition, non-clinical experience toward the Independent Practice Recognition (non-clinical), and Council-ordered probated suspension;

(B) An LMSW-AP may supervise non-clinical experience toward the Advanced Practitioner specialty recognition; non-clinical experience toward the non-clinical Independent Practice Recognition; and Council-ordered probated suspension for non-clinical practitioners;

(C) An LMSW with the Independent Practice Recognition (non-clinical) who is a Council-approved supervisor may supervise an LBSW's or LMSW's non-clinical experience toward the non-clinical Independent Practice Recognition; and an LBSW or LMSW (non-clinical) under Council-ordered probated suspension;

(D) An LBSW with the non-clinical Independent Practice Recognition who is a Council-approved supervisor may supervise an LBSW's non-clinical experience toward the non-clinical Independent Practice Recognition; and an LBSW under Council-ordered probated suspension.

(8) The approved supervisor must renew the approved supervisor status in conjunction with the biennial license renewal. The approved supervisor may surrender supervisory status by documenting the choice on the appropriate Council renewal form and subtracting the supervisory renewal fee from the renewal payment. If a licensee who has surrendered supervisory status desires to regain supervisory status, the licensee must reapply and meet the current requirements for approved supervisor status.

(9) A supervisor must maintain the qualifications described in this section while he or she is providing supervision.

(10) A Council-approved supervisor who wishes to provide any form of supervision [~~Council-approved~~] or Council-ordered supervision must comply with the following:

(A) The supervisor is obligated to keep legible, accurate, complete, signed supervision notes and must be able to produce such documentation for the Council if requested. The notes shall document the content, duration, and date of each supervision session.

(B) A social worker may contract for supervision with written approval of the employing agency. A copy of the approval must accompany the supervisory plan submitted to the Council.

(C) A Council-approved supervisor may not charge or collect a fee or anything of value from his or her employee or contract employee for the supervision services provided to the employee or contract employee.

(D) Before entering into a supervisory plan [~~agreement~~], the supervisor shall be aware of all conditions of exchange with the clients served by her or his supervisee. The supervisor shall not provide supervision if the supervisee is practicing outside the authorized scope of the license. If the supervisor believes that a social worker is practicing outside the scope of the license, the supervisor shall make a report to the Council.

(E) A supervisor shall not be employed by or under the employment supervision of the person who he or she is supervising.

(F) A supervisor shall not be a family member of the person being supervised.

(G) A supervisee must have a clearly defined job description and responsibilities.

(H) A supervisee who provides client services for payment or reimbursement shall submit billing to the client or third-party payers which clearly indicates the services provided and who provided the services, and specifying the supervisee's licensure category and the fact that the licensee is under supervision.

(I) If either the supervisor or supervisee has an expired license or a license that is revoked or suspended during supervision, supervision hours accumulated during that time will be accepted only if the licensee appeals to and receives approval from the Council.

(J) A licensee must be a current Council-approved supervisor in order to provide professional development supervision toward licensure or specialty recognition, or to provide Council-ordered supervision to a licensee. Providing supervision without having met all requirements for current, valid Council-approved supervisor status may be grounds for disciplinary action against the supervisor.

(K) The supervisor shall ensure that the supervisee knows and adheres to Subchapter B, Rules of Practice, of this Chapter.

(L) The supervisor and supervisee shall avoid forming any relationship with each other that impairs the objective, professional judgment and prudent, ethical behavior of either.

(M) Should a supervisor become subject to a Council disciplinary order, that person is no longer a Council-approved supervisor and must so inform all supervisees, helping them to find alternate supervision. The person may reapply for Council-approved supervisor status by meeting the terms of the disciplinary order and having their license in good standing, in addition to submitting an application for Council-approved supervisor, and proof of completion of a 40-hour Council-approved supervisor training course, taken no earlier than the date of execution of the Council order.

(N) The Council may deny, revoke, or suspend Council-approved supervisory status for violation of the Act or rules. Continuing to supervise after the Council has denied, revoked, or suspended Council-approved supervisor status, or after the supervisor's supervisory status expires, may be grounds for disciplinary action against the supervisor.

(O) If a supervisor's Council-approved status is expired, suspended, or revoked, the supervisor shall refund all supervisory fees the supervisee paid after the date the supervisor ceased to be Council-approved.

(P) A supervisor is responsible for developing a well-conceptualized supervision plan with the supervisee, and for updating that plan whenever there is a change in agency of employment, job function, goals for supervision, or method by which supervision is provided.

(Q) All Council-approved supervisors shall have taken a Council-approved supervision training course by January 1, 2014 in order to renew Council-approved supervisor status. The Council recognizes that many licensees have had little, if any, formal education about supervision theories, strategies, problem-solving, and accountability, particularly LBSWs who may supervise licensees toward the IPR. Though some supervisors have functioned as employment supervisors for some time and have acquired practical knowledge, their prac-

tical supervision skills may be focused in one practice area, and may not include current skills in various supervision methods or familiarity with emerging supervisory theories, strategies, and regulations. Therefore, the Council values high-quality, contemporary, multi-modality supervision training to ensure that all supervisors have refreshed their supervisory skills and knowledge in order to help supervisees practice safely and effectively.

(11) A Council-approved supervisor who wishes to provide supervision towards licensure as an LCSW or towards specialty recognition in Independent Practice (IPR) or Advanced Practitioner (LMSW-AP), which is supervision for professional growth, must comply with the following:

(A) Supervision toward licensure or specialty recognition may occur in one-on-one sessions, in group sessions, or in a combination of one-on-one and group sessions. Session may transpire in the same geographic location, or via audio, web technology or other electronic supervision techniques that comply with HIPAA and Texas Health and Safety Code, Chapter 611, and/or other applicable state or federal statutes or rules.

(B) Supervision groups shall have no fewer than two members and no more than six.

(C) Supervision shall occur in proportion to the number of actual hours worked, with a base line of one hour of supervision for every 40 hours worked. If the supervisee works full-time, supervision shall occur on average at least twice a month and for no less than four hours per month; if the supervisee works part-time (at least 20 hours per week), supervision shall occur on average at least once a month and no less than two hours per month. Supervisory sessions shall last at least one hour and no more than two hours per session. No more than 10 hours of supervision may be counted in any one month, or 30-day period, as appropriate, towards satisfying minimum requirements for licensure or specialty recognition.

(D) The Council considers supervision toward licensure or specialty recognition to be supervision which promotes professional growth. Therefore, all supervision formats must encourage clear, accurate communication between the supervisor and the supervisee, including case-based communication that meets standards for confidentiality. Though the Council favors supervision formats in which the supervisor and supervisee are in the same geographical place for a substantial part of the supervision time, the Council also recognizes that some current and future technology, such as using reliable, technologically-secure computer cameras and microphones, can allow personal face-to-face, though remote, interaction, and can support professional growth. Supervision formats must be clearly described in the supervision plan, explaining how the supervision strategies and methods of delivery meet the supervisee's professional growth needs and ensure that confidentiality is protected. ~~[The plan must be approved by the Council.]~~

(E) Supervision toward licensure or specialty recognition must extend over a full 3000 hours over a period of not less than 24 full months and a period of not more than 48 full months for LCSW or LMSW-AP or not more than 60 full months for Independent Practice Recognition (IPR). Even if the individual completes the minimum of 3000 hours of supervised experience and minimum of 100 hours of supervision prior to 24 months from the start date of supervision, supervision which meets the Council's minimum requirements shall extend to a minimum of 24 full months. A month is a 30-day period or the length of the actual calendar month, whichever is longer.

(F) The supervisor and the supervisee bear professional responsibility for the supervisee's professional activities.

(G) If the supervisor determines that the supervisee lacks the professional skills and competence to practice social work under a regular license, the supervisor shall develop and implement a written remediation plan for the supervisee.

(H) Supervised ~~[Council-approved supervised]~~ professional experience ~~required for [towards]~~ licensure must comply with §781.401 of this title (relating to Qualifications for Licensure) and §781.402 of this title (relating to Clinical Supervision for LCSW and Non-Clinical Supervision for LMSW-AP and Independent Practice Recognition) of this title and all other applicable laws and rules.

(12) A Council-approved supervisor who wishes to provide supervision required as a result of a Council order must comply with this title, all other applicable laws and rules, and/or the following.

(A) A licensee who is required to be supervised as a condition of initial licensure, continued licensure, or disciplinary action must:

(i) submit one supervisory plan for each practice location to the Council for approval by the Council or its designee within 30 days of initiating supervision;

(ii) submit a current job description from the agency in which the social worker is employed with a verification of authenticity from the agency director or his or her designee on agency letterhead or submit a copy of the contract or appointment under which the licensee intends to work, along with a statement from the potential supervisor that the supervisor has reviewed the contract and is qualified to supervise the licensee in the setting;

(iii) ensure that the supervisor submits reports to the Council on a schedule determined by the Council. In each report, the supervisor must address the supervisee's performance, how closely the supervisee adheres to statutes and rules, any special circumstances that led to the imposition of supervision, and recommend whether the supervisee should continue licensure. If the supervisor does not recommend the supervisee for continued licensure, the supervisor must provide specific reasons for not recommending the supervisee. The Council may consider the supervisor's reservations as it evaluates the supervision verification the supervisee submits; and

(iv) notify the Council immediately if there is a disruption in the supervisory relationship or change in practice location and submit a new supervisory plan within 30 days of the break or change in practice location.

(B) The supervisor who agrees to provide Council-ordered supervision of a licensee who is under Council disciplinary action must understand the Council order and follow the supervision stipulations outlined in the order. The supervisor must address with the licensee those professional behaviors that led to Council discipline, and must help to remediate those concerns while assisting the licensee to develop strategies to avoid repeating illegal, substandard, or unethical behaviors.

(C) Council-ordered and mandated supervision timeframes are specified in the Council order.

~~{(e) A licensee who submits one of the following: a Clinical Supervision Plan, a Non-Clinical Supervision Plan, or a Council-Ordered Supervision Plan, to the Council for approval, shall receive a written response from the Council of either approval or deficiency related to the plan. If no written response is received by the licensee within four weeks of submission of the plan, it is the responsibility of the licensee who has submitted the plan to follow-up with the Council office related to receipt and/or status of the plan within 60 days of submission. If written approval or deficiency is sent to the last known~~

address of the licensee, a Council response related to acceptance of the plan shall be considered to have been sent. Supervision and supervised experience hours are not acceptable to meet minimum requirements towards licensure or specialty recognition or to satisfy the terms of a Council order if not accrued under a Council-approved plan without explicit authorization from the Council.]

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 20, 2020.

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Darrel D. Spinks

Executive Director

Texas State Board of Social Worker Examiners

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 305-7706



22 TAC §781.406

The Texas Behavioral Health Executive Council proposes amended §781.406, relating to Required Documentation of Qualifications for Licensure.

Overview and Explanation of the Proposed Rule. The proposed amended rule, in conjunction with other rule amendments published in this edition of the *Texas Register*, will no longer require the preapproval of a supervision plan in order to accrue supervised experience required for the issuance of a license as a clinical social worker (LCSW) or for independent practice recognition for a baccalaureate social worker (LBSW) or a master social worker (LMSW). Supervised experience will still be required, at the same requisite level that is currently in place, but documentation of the required supervised experience will now only be submitted to the Executive Council when the applicant is applying for either the LCSW or independent practice recognition. The Executive Council anticipates the proposed amendment will address the backlog of applications and expedite future applications received.

If a rule will pertain to the qualifications necessary to obtain a license then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed amendment pertains to supervised experience requirements for licensure as an LCSW or for independent practice recognition for an LBSW or LMSW; therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Social Worker Examiners, in accordance with §505.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or

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

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater efficiencies in the application and licensing process while still maintaining the same requirements and standards for obtaining a license. Therefore, it is anticipated that applications will be processed faster, increasing the amount of licensed and qualified professionals in Texas, while still maintaining the same minimum requirements for competency. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to pre-

pare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §505.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Sections 781.102, 781.302, 781.401, 781.402, 781.403, and 781.404 are affected by this proposed rule; no other code, articles or statutes are affected by this section.

§781.406. *Required Documentation of Qualifications for Licensure.*

(a) Application form. An applicant for licensure must submit a completed official application form with all requested information.

(b) Education verification.

(1) The applicant's education must be documented by official college transcripts from social work educational units accredited by CSWE.

(2) Degrees for licensure as an LBSW or LMSW must be from programs accredited or in candidacy for accreditation by CSWE.

(c) Experience verification.

(1) An applicant's experience for licensure or for specialty recognition must meet the requirements of §781.401 of this title (relating to Qualifications for Licensure), §781.402 of this title (relating to Clinical Supervision for LCSW and Non-Clinical Supervision for [LMSW-AP and] Independent Practice Recognition), and §781.404 of this title (relating to Recognition as a Council-approved Supervisor and the Supervision Process). The applicant must document the names and addresses of supervisors; beginning and ending dates of supervision; job description; and average number of hours of social work activity per week. The applicant must further document the appropriate supervision plan and verification form[, both approved by the Council, for each practice location. If any elements described in the supervision plan change, including but not limited to work hours, full- or part-time work status, location of supervision, or name of supervisor, the applicant must submit the appropriate verification form within 30 days of the change or supervision termination. The applicant must submit a new, complete supervision plan for Council approval within 30 days of beginning the new supervision agreement].

(2) The applicant's experience must have been in a position providing social work services, under the supervision of a qualified supervisor, with written evaluations to demonstrate satisfactory performance.

(3) Supervised experience must have occurred within the five calendar years immediately preceding the date of application.

(4) The applicant must maintain and, upon request, provide to the Council documentation of employment status, pay vouchers, or supervisory evaluations.

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 20, 2020.

TRD-202004919

Darrel D. Spinks

Executive Director

Texas State Board of Social Worker Examiners

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 305-7706



TITLE 25. HEALTH SERVICES

PART 11. CANCER PREVENTION AND RESEARCH INSTITUTE OF TEXAS

CHAPTER 703. GRANTS FOR CANCER PREVENTION AND RESEARCH

25 TAC §703.3, §703.26

The Cancer Prevention and Research Institute of Texas ("CPRIT" or "the Institute") proposes an amendment to 25 Texas Administrative Code §703.3(b)(4), requiring that a Request for Applications specify any minimum level of efforts for Principal Investigators, co-Principal Investigators, and other key personnel stated; and §703.26(e)(12), related to reimbursement of a grant recipient's professional association dues and fees.

Background and Justification

The proposed amendment to §703.3(b)(4) clarifies that in the Request for Applications, the Institute may specify the minimum level of effort, if any, that a Principal Investigator, co-Principal Investigator, or other specified key personnel must maintain for the grant project. The proposed change to §703.26(e)(12) clarifies that professional association membership fees or dues for an individual employed by a grant recipient are not allowable for reimbursement. However, membership fees or dues paid by the grant recipient for the entity's membership in business, technical, and professional organizations may be an allowable expense.

Fiscal Note

Kristen Pauling Doyle, Deputy Executive Officer and General Counsel for the Cancer Prevention and Research Institute of Texas, has determined that for the first five-year period the rule changes are in effect, there will be no foreseeable implications relating to costs or revenues for state or local government due to enforcing or administering the rules.

Public Benefit and Costs

Ms. Doyle has determined that for each year of the first five years the rule changes are in effect the public benefit anticipated due to enforcing the rules will be clarification regarding the required level of effort required for personnel working on grant projects, and the reimbursement status of professional association membership fees or dues.

Small Business, Micro-Business, and Rural Communities Impact Analysis

Ms. Doyle has determined that the rule change will not affect small businesses, micro businesses, or rural communities.

Government Growth Impact Statement

The Institute, in accordance with 34 Texas Administrative Code §11.1, has determined that during the first five years that the proposed rule change will be in effect:

- (1) the proposed rule change will not create or eliminate a government program;
- (2) implementation of the proposed rule change will not affect the number of employee positions;
- (3) implementation of the proposed rule change will not require an increase or decrease in future legislative appropriations;
- (4) the proposed rule change will not affect fees paid to the agency;
- (5) the proposed rule change will not create new rule;

(6) the proposed rule change will not expand existing rule;

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

(8) The rule change is unlikely to have an impact on the state's economy. Although the change is likely to have neutral impact on the state's economy, the Institute lacks enough data to predict the impact with certainty.

Submit written comments on the proposed rule changes to Ms. Kristen Pauling Doyle, General Counsel, Cancer Prevention and Research Institute of Texas, P.O. Box 12097, Austin, Texas 78711, no later than January 4, 2021. The Institute asks parties filing comments to indicate whether they support the rule revision proposed by the Institute and, if a party requests a change, to provide specific text to include in the rule. Parties may submit comments electronically to kdoyle@cprit.texas.gov or by facsimile transmission to (512) 475-2563.

Statutory Authority

The Institute proposes the rule change under the authority of the Texas Health and Safety Code Annotated, §102.108, which provides the Institute with broad rule-making authority to administer the chapter. Ms. Doyle has reviewed the proposed amendment and certifies the proposal to be within the Institute's authority to adopt.

There is no other statute, article, or code affected by these rules.

§703.3. Grant Applications.

(a) The Institute shall accept Grant Applications for Cancer Research and Cancer Prevention programs to be funded by the Cancer Prevention and Research Fund or the proceeds of general obligation bonds issued on behalf of the Institute in response to standard format Requests for Applications issued by the Institute.

(b) Each Request for Applications shall be publicly available through the Institute's Internet website. The Institute reserves the right to modify the format and content requirements for the Requests for Applications from time to time. Any modifications will be available through the Institute's Internet website. The Request for Applications shall:

(1) Include guidelines for the proposed projects and may be accompanied by instructions provided by the Institute.

(2) State the criteria to be used during the Grant Review Process to evaluate the merit of the Grant Application, including guidance regarding the range of possible scores.

(A) The specific criteria and scoring guidance shall be developed by the Chief Program Officer in consultation with the Review Council.

(B) When the Institute will use a preliminary evaluation process as described in §703.6 of this chapter (relating to Grant Review Process) for the Grant Applications submitted pursuant to a particular Grant Mechanism, the Request for Applications shall state the criteria and Grant Application components to be included in the preliminary evaluation.

(3) Specify limits, if any, on the number of Grant Applications that may be submitted by an entity for a particular Grant Mechanism to ensure timely and high-quality review when a large number of Grant Applications are anticipated.

(4) Specify the minimum level of effort, if any, for the Principal Investigator, co-Principal Investigator, and other specified key personnel of an entity approved for a Grant Award.

(c) Requests for Applications for Cancer Research and Cancer Prevention projects issued by the Institute may address, but are not limited to, the following areas:

- (1) Basic research;
- (2) Translational research, including proof of concept, pre-clinical, and Product Development activities;
- (3) Clinical research;
- (4) Population based research;
- (5) Training;
- (6) Recruitment to the state of researchers and clinicians with innovative Cancer Research approaches;
- (7) Infrastructure, including centers, core facilities, and shared instrumentation;
- (8) Implementation of the Texas Cancer Plan; and
- (9) Evidence based Cancer Prevention education, outreach, and training, and clinical programs and services.

(d) An otherwise qualified applicant is eligible solely for the Grant Mechanism specified by the Request for Applications under which the Grant Application was submitted.

(e) The Institute may limit the number of times a Grant Application not recommended for a Grant Award during a previous Grant Review Cycle may be resubmitted in a subsequent Grant Review Cycle. The Request for Applications will state the resubmission guidelines, including specific instructions for resubmissions.

(f) Failure to comply with the material and substantive requirements set forth in the Request for Applications may serve as grounds for disqualification from further consideration of the Grant Application by the Institute. A Grant Application determined by the Institute to be incomplete or otherwise noncompliant with the terms or instructions set forth by the Request for Applications shall not be eligible for consideration of a Grant Award.

(g) Only those Grant Applications submitted via the designated electronic portal designated by the Institute by the deadline, if any, stated in the Request for Applications shall be eligible for consideration of a Grant Award.

(1) Nothing herein shall prohibit the Institute from extending the submission deadline for one or more Grant Applications upon a showing of good cause, as determined by the Chief Program Officer.

(2) A request to extend the Grant Application submission deadline must be in writing and sent to the CPRIT Helpdesk via electronic mail, within 24 hours of the submission deadline.

(3) The Institute shall document any deadline extension granted, including the good cause for extending the deadline and will cause the documentation to be maintained as part of the Grant Review Process records.

(h) The Grant Applicant shall certify that it has not made and will not make a donation to the Institute or any foundation created to benefit the Institute.

(1) Grant Applicants that make a donation to the Institute or any foundation created to benefit the Institute on or after June 14, 2013, are ineligible to be considered for a Grant Award.

(2) For purposes of the required certification, the Grant Applicant includes the following individuals or the spouse or dependent child(ren) of the following individuals:

(A) the Principal Investigator, Program Director, or Company Representative;

(B) a Senior Member or Key Personnel listed on the Grant Application; and

(C) an officer or director of the Grant Applicant.

(3) Notwithstanding the foregoing, one or more donations exceeding \$500 by an employee of a Grant Applicant not described by paragraph (2) of this subsection shall be considered to be made on behalf of the Grant Applicant for purposes of the certification.

(4) The certification shall be made at the time the Grant Application is submitted.

(5) The Chief Compliance Officer shall compare the list of Grant Applicants to a current list of donors to the Institute and any foundation created to benefit the Institute.

(6) To the extent that the Chief Compliance Officer has reason to believe that a Grant Applicant has made a donation to the Institute or any foundation created to benefit the Institute, the Chief Compliance Officer shall seek information from the Grant Applicant to resolve any issue. The Grant Application may continue in the Grant Review Process during the time the additional information is sought and under review by the Institute.

(7) If the Chief Compliance Officer determines that the Grant Applicant has made a donation to the Institute or any foundation created to benefit the Institute, then the Institute shall take appropriate action. Appropriate action may entail:

(A) Withdrawal of the Grant Application from further consideration; or

(B) Return of the donation, if the return of the donation is possible without impairing Institute operations.

(8) If the donation is returned to the Applicant, then the Grant Application is eligible to be considered for a Grant Award.

(i) Grant Applicants shall identify by name all sources of funding contributing to the project proposed for a Grant Award. A Grant Applicant for a Product Development Research Grant Award must provide a capitalization table that includes those individuals or entities that have an investment, stock or rights in the company. The Institute shall make the information provided by the Grant Applicant available to Scientific Research and Prevention Programs Committee members, Institute employees, independent contractors participating in the Grant Review Process, Program Integration Committee Members and Oversight Committee Members for purposes of identifying potential Conflicts of Interest prior to reviewing or taking action on the Grant Application. The information shall be maintained in the Institute's Grant Review Process records.

(j) A Grant Applicant shall indicate if the Grant Applicant is currently ineligible to receive Federal or State grant funds due to debarment or suspension or if the Grant Applicant has had a grant terminated for cause within five years prior to the submission date of the Grant Application. For purposes of the provision, the term Grant Applicant includes the personnel, including collaborators or contractors, who will be working on the Grant Award. A Grant Applicant is not eligible to receive a Grant Award if the Grant Applicant is debarred, suspended, ineligible or otherwise excluded from participation in a federal or state grant award.

(k) The Institute may require each Grant Applicant for a Cancer Research Grant Award for Product Development to submit an application fee.

(1) The Chief Executive Officer shall adopt a policy regarding the application fee amount.

(2) The Institute shall use the application fee amounts to defray the Institute's costs associated with the Product Development review processes, including due diligence and intellectual property reviews, as specified in the Request for Application.

(3) Unless a request to submit the fee after the deadline has been approved by the Institute, the Institute may administratively withdraw a Grant Application if the application review fee is not received by the Institute within seven business days of the Grant Application submission deadline.

(4) Upon a written request from the Grant Applicant, the Institute may refund the application fee to the Grant Applicant if the Grant Applicant withdraws the Grant Application or the Grant Application is otherwise removed from the Grant Review Process prior to the review of the Grant Application by the Scientific Research and Prevention Programs Committees. The Institute's decision regarding return of the application fee is final.

(l) During the course of administrative review of the Grant Application, the Institute may contact the Grant Applicant to seek clarification on information provided in the Grant Application or to request additional information if such information clarifies the Grant Application. The Institute shall keep a record of requests made under this subsection for review by the Chief Compliance Officer.

§703.26. Allowable Costs.

(a) A cost is an Allowable Cost and may be charged to the Grant Award if it is reasonable, allocable, and adequately documented.

(1) A cost is reasonable if the cost does not exceed that which would be incurred by a prudent individual or organization under the circumstances prevailing at the time the decision was made to incur the cost; and is necessary for the performance of the Grant Award defined in the Scope of Work in the Grant Contract.

(2) A cost is allocable if the cost:

(A) Benefits the Grant Award either directly or indirectly, subject to Indirect Cost limits stated in the Grant Contract;

(B) Is assigned the Grant Award in accordance with the relative benefit received;

(C) Is allowed or not prohibited by state laws, administrative rules, contractual terms, or applicable regulations;

(D) Is not included as a cost or used to meet Matching Fund requirements for any other Grant Award in either the current or a prior period; and

(E) Conforms to any limitations or exclusions set forth in the applicable cost principles, administrative rules, state laws, and terms of the Grant Contract.

(3) A cost is adequately documented if the cost is supported by the organization's accounting records and documented consistent with §703.24 of this title (relating to Financial Status Reports).

(b) Grant Award funds must be used for Allowable Costs as provided by the terms of the Grant Contract, Chapter 102, Texas Health and Safety Code, the Institute's administrative rules, and the Uniform Grant Management Standards (UGMS) adopted by the Comptroller's Office. If guidance from the Uniform Grant Management Standards on a particular issue conflicts with a specific provision of the Grant Contract, Chapter 102, Texas Health and Safety Code or the Institute's administrative rules, then the Grant Contract, statute, or Institute administrative rule shall prevail.

(c) An otherwise Allowable Cost will not be eligible for reimbursement if the Grant Recipient incurred the expense outside of the Grant Contract term, unless the Grant Recipient has received written approval from the Institute's Chief Executive Officer to receive reimbursement for expenses incurred prior to the effective date of the Grant Contract.

(d) An otherwise Allowable Cost will not be eligible for reimbursement if the benefit from the cost of goods or services charged to the Grant Award is not realized within the applicable term of the Grant Award. The Grant Award should not be charged for the cost of goods or services that benefit another Grant Award or benefit a period prior to the Grant Contract effective date or after the termination of the Grant Contract.

(e) Grant Award funds shall not be used to reimburse unallowable expenses, including, but not limited to:

(1) Bad debt, such as losses arising from uncollectible accounts and other claims and related costs.

(2) Contributions to a contingency reserve or any similar provision for unforeseen events.

(3) Contributions and donations made to any individual or organization.

(4) Costs of entertainment, amusements, social activities, and incidental costs relating thereto, including tickets to shows or sports events, meals, alcoholic beverages, lodging, rentals, transportation and gratuities.

(5) Costs relating to food and beverage items, unless the food item is related to the issue studied by the project that is the subject of the Grant Award.

(6) Fines, penalties, or other costs resulting from violations of or failure to comply with federal, state, local or Indian tribal laws and regulations.

(7) An honorary gift or a gratuitous payment.

(8) Interest and other financial costs related to borrowing and the cost of financing.

(9) Legislative expenses such as salaries and other expenses associated with lobbying the state or federal legislature or similar local governmental bodies, whether incurred for purposes of legislation or executive direction.

(10) Liability insurance coverage.

(11) Benefit replacement pay or legislatively-mandated pay increases for eligible general revenue-funded state employees at Grant Recipient state agencies or universities.

(12) Professional association fees or dues for an individual employed by the Grant Recipient. Professional association fees or dues for the Grant Recipient's membership in business, technical, and professional organizations may be allowed, with prior approval from the Institute, if:

(A) the professional association is not involved in lobbying efforts; and

(B) the Grant Recipient demonstrates how membership in the professional association benefits the Grant Award project(s) [or an individual].

(13) Promotional items and costs relating to items such as T-shirts, coffee mugs, buttons, pencils, and candy that advertise or promote the project or Grant Recipient.

(14) Fees for visa services.

(15) Payments to a subcontractor if the subcontractor working on a Grant Award project employs an individual who is a Relative of the Principal Investigator, Program Director, Company Representative, Authorized Signing Official, or any person designated as Key Personnel for the same Grant Award project (collectively referred to as "affected Relative"), and:

(A) the Grant Recipient will be paying the subcontractor with Grant Award funds for any portion of the affected Relative's salary; or

(B) the Relative submits payment requests on behalf of the subcontractor to the Grant Recipient for payment with Grant Award funds.

(C) For exceptional circumstances, the Institute's Chief Executive Office may grant an exception to allow payment of Grant Award funds if the Grant Recipient notifies the Institute prior to finalizing the subcontract. The Chief Executive Officer must notify the Oversight Committee in writing of the decision to allow reimbursement for the otherwise unallowable expense.

(D) Nothing herein is intended to supersede a Grant Recipient's internal policies, to the extent that such policies are stricter.

(16) Fundraising.

(17) Tips or gratuities.

(f) The Institute is responsible for making the final determination regarding whether an expense shall be considered an Allowable Cost.

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

Filed with the Office of the Secretary of State on November 20, 2020.

TRD-202004930

Heidi McConnell

Chief Operating Officer

Cancer Prevention and Research Institute of Texas

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 305-8487



TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 21. TRADE PRACTICES

SUBCHAPTER AA. CONSUMER CHOICE HEALTH BENEFIT PLANS

The Texas Department of Insurance proposes to repeal 28 TAC §§21.3525 - 21.3528 and to amend §§21.3530, 21.3535, 21.3542, 21.3543, and 21.3544, concerning required notices for consumer choice health benefit plans. The proposed amendments implement Senate Bill 1852, 86th Legislature (2019), remove the requirement that health carriers obtain signed consumer choice disclosure statements on renewal, address other items related to when and how disclosure statements are

signed and maintained, and make other modifications to make disclosures easier for consumers to understand.

EXPLANATION. The department proposes amending §§21.3530, 21.3535, 21.3542, 21.3543, and 21.3544 to remove the renewal requirement for a carrier to sign a disclosure statement at renewal. A prospective policyholder is only required to sign a disclosure statement when applying for initial coverage. These amendments conform the sections to Insurance Code §1507.006.

The proposed amendments also include nonsubstantive editing changes to use plain language to conform to the agency's current style, and formatting changes to improve the disclosure form's readability.

Descriptions of the proposed amendments to the sections follow.

Repeal of §§21.3525 - 21.3528. Insurer Notice on Application, Insurer Notice on Policy, HMO Notice on Application, and HMO Notice on Evidence of Coverage. The repeal of §§21.3525 - 21.3528 removes unnecessary duplication of Insurance Code §1507.005(a).

Section 21.3530. Health Carrier Disclosure. The amendments to §21.3530 clarify the required elements of a written disclosure for consumer choice plans. The changes to subsection (a) clarify that the disclosure should be provided in a manner that enables a consumer to retain a copy. Additionally, the requirements for Form CCP 1 are removed from subsection (a) and similar requirements are proposed in new subsection (c).

Subsection (b) is amended to provide that Form CCP 1 may be used to fulfill the requirements of the section and is available on the department's website.

New subsection (c) incorporates standards of readability into the disclosure forms. Subsection (c) is also drafted to make it clear that Form CCP 1 is not adopted by reference, but can be used by carriers if they so choose. Subsection (c)(1) provides for an acknowledgment that the consumer choice health benefit plan being offered or purchased does not provide some or all state-mandated health benefits. Subsection (c)(2) creates a requirement that the consumer purchasing the health plan be identified on the form. Subsection (c)(3) better describes the type of detail needed to sufficiently describe the difference between the consumer choice plan and a similar plan containing the state-mandate. Subsection (c)(4) creates a requirement that will notify consumers if their state-mandates change on renewal in a way that requires a change to the consumer-signed disclosure form. Subsection (c)(5) specifies the information that must be provided to consumers so they can research a similar health plan that contains all state-mandates, as is required by current §21.3542(d). That requirement is proposed to be removed from §21.3542 and incorporated in to §21.3530(c)(6)(C). Subsection (c)(6) requires insurers to provide places for consumers to affirm that they understand four things: that the consumer choice plan does not contain the same level of coverage as a state-mandated plan (which brings language similar to what is required in the policies and contracts into the disclosure); that more information about consumer choice health benefit plans is available from the department on the department website or by calling the TDI helpline (an affirmation currently required by §21.3542(d)); that the health carrier has offered the opportunity to purchase a state-mandated plan that contains all Texas-required benefits and coverages; and, for plans issued in the individual market, that if the plan does not meet the consumer's needs, in most cases the consumer will not be able to get a new plan until the

next open enrollment period. Subsection (c)(7) requires that a prospective or current policyholder or contract holder be informed that the prospective or current policyholder or contract holder has the right to a copy of the written disclosure statement. In an effort to ensure that consumers are not confused by this disclosure, subsection (c)(8) requires a sentence in English and Spanish that informs consumers they should not sign the form if they do not understand it. Subsection (c)(9) requires that forms provided at the initial purchase must contain a space for the consumer to sign. Subsection (c)(10) requires that the health plan notify the consumer how to access additional information about consumer choice plans from the department.

Current subsections (c) and (d) are redesignated as (d) and (e).

Redesignated subsection (d) is amended to require provision of the written disclosure form at least 60 days before the policy or contract renewal date.

New subsection (f) requires a health carrier to request a signature on the written disclosure form at the time of initial coverage or enrollment and when a policyholder renews coverage under a different plan than that for which the original disclosure statement was signed.

Current subsections (e) - (i) are redesignated as (g) - (k), and citations to these subsections in the other subsections are updated as appropriate to reflect this change.

Redesignated subsection (g) is revised to delete the words "or current" because the provisions in the subsection are only applicable to someone applying for coverage.

Redesignated subsection (h) is amended to provide clarification of who receives a written disclosure. The subsection is also amended to remove references to current policyholders, because the provisions in the subsection are only applicable to someone applying for coverage.

Redesignated subsection (i) is amended to clarify that a health carrier must, on request, provide the prospective or current policyholder or contract holder with a copy of the written disclosure statement free of charge.

Redesignated subsection (k) is amended to provide that disclosure forms must be filed within six months of the effective date of the rules and to conform to current agency style.

Section 21.3535. Retention of Disclosure. Section 21.3535 is amended to provide a five-year retention requirement for signed disclosure forms. Because disclosures are not signed every year, the requirement to retain signed forms for five years after a plan terminates effectively results in a retention period for the same amount of time as the existing requirement.

Subsection (a)(1) is amended to provide that insurers should retain copies of plan documents, because the department cannot confirm that the written disclosure has been filled out properly without knowing the mandates that were excluded from the plan.

Subsection (b) is amended to substitute the term "electronically" for "by facsimile or email transmission."

Subsection (c) is amended to address only renewals where a current policyholder or contract holder is not required to sign a disclosure statement. This change is made because written disclosure forms will no longer be signed on renewal.

Section 21.3542. Offer of State-Mandated Plan. Section 21.3542(d) is deleted because the requirement for a health plan to obtain an affirmation that it offered a plan containing

all state mandates on a separate document was moved to the acknowledgments in §21.3530(c)(6)(C). Requiring that this information be in one document will benefit consumers and will create more continuity between health plans.

Section 21.3543. Required Plan Filings. Section 21.3543, which contains the filing rules associated with consumer choice plans, is amended to incorporate the requirement contained in current §21.3530(i) that a disclosure form must be filed for approval. Subsection (1) is amended to clarify that the consumer choice plan must be filed separately from any state-mandated plan. Subsection (2) is amended to require that the disclosure be filed for approval before use, no longer tying the disclosure to the filing of the plan itself. This amendment will make it clearer how to address instances when a health plan makes changes to the disclosure but not the health plan.

Section 21.3544. Required Annual Reporting. Section 21.3544 is amended to change the annual reporting requirements for information on consumer choice plans. Amendments to subsection (a) clarify that Form CCP 2 is adopted by reference, and, therefore, submission of the data must be made using that form. This will help the department gather the information consistently from many health plans. In subsection (a), current paragraphs (3), (5), and (6) are deleted, because the department believes it is of limited benefit for health plans to keep providing the information required by those paragraphs. This information has seldom, if ever, been requested from the department. Existing paragraph (4) is renumbered as paragraph (3), and new paragraph (4) is added as a better way to collect the information previously requested under §21.3543(2)(B). By changing to the language in paragraph (4), the department should still acquire the information that has been requested in the past by the legislature, with fewer data points.

Current subsection (b) is deleted because it provided a definition for a reporting requirement that was repealed from subsection (a). New subsection (b) is added to establish what constitutes the average premium index rate for the purpose of subsection (a) of the section.

In addition, the proposed amendments 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 standardizing references to the department's website and the phrasing used to describe the electronic submission of documents; deleting the word "the" where it is unnecessarily placed before Insurance Code citations; and capitalizing the word "Commissioner" where it appears in lowercase, replacing the word "subchapter" with "title" in citations to the Texas Administrative Code, and replacing the word "shall" with "must" to adhere to current agency style.

The department received comments on an informal draft posted on the department's website on July 1, 2020. The department considered those comments when drafting this proposal.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Rachel Bowden, Director, Regulatory Initiatives for the Life and Health Lines Office, has determined that during each year of the first five years the proposed amendments and repeals 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 statute. Ms. Bowden 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. Bowden 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 and repeals are in effect, Ms. Bowden expects that enforcing the proposed amendments and repeals will have the public benefits of ensuring that the department's rules conform to Insurance Code Chapter 1507 and will make disclosures under the rules easier for Texas consumers to understand.

In addition, Ms. Bowden estimates that while some individual costs associated with the repeals and amendments are increased in some cases, the overall cost of complying with the amended rules will be the same as, or lower than, the cost of complying with the current rules. Lower costs will result from the elimination of data reporting that has not proved useful. The costs for obtaining and maintaining disclosure statements should be the same.

The department anticipates that, by amending its disclosure form, a health carrier will incur the following new costs to comply with the proposed amendments to §21.3530: (i) one-time costs for additional staff time needed to develop the written disclosure statement; and (ii) one-time staff wages and filing fees for updated disclosure forms.

The department estimates that it will take an administrative assistant between one and two hours to update the disclosure form and a compliance officer between 1/2 and one hour to review the disclosure form for each consumer choice plan offered by the company. Based on a review of previous filings, the department estimates that a typical carrier will have to update one disclosure form in each applicable market. An issuer may have to update between one and three disclosure forms, depending on whether the issuer offers plans in the individual, small-group, and large-group markets. The department's cost analysis of wages for staff to perform required compliance tasks is based on information from the Labor Market & Career Information (LCMI) Department of the Texas Workforce Commission at texaswages.com/WDAAWages.

Office and administrative support workers in Texas earn a mean hourly wage of \$18.54. Compliance officers working in Texas earn a mean hourly wage of \$35.91. In total, the department estimates that carriers will spend between \$37 and \$219 in one-time costs for staff to update the disclosure forms.

Health carriers must file with the department their updated disclosure forms for the department's approval. Under Insurance Code §1701.053 the department is authorized to charge a \$100 fee for any form filed by a health carrier with the department. However, the department will not charge this fee for disclosure forms that are filed separately from other forms (health carriers will still incur a transaction fee of up to \$34 for filing through the SERFF filings system). A compliance officer will also spend an estimated two hours filing the form with the department. Based on the wage data previously cited, the department estimates that health carriers will incur \$72 in wages associated with making the necessary filing. A health carrier's total cost will depend on the number of disclosure forms the health carrier files with the department. A health carrier could avoid the filing fee costs if the written disclosure statement is included as a supplemental form with other policy forms or plan documents and submitted to the department in one filing. A health carrier marketing multiple

consumer choice plans could also submit one filing containing multiple variations of the written disclosure statement, along with a statement identifying the previously approved policy forms or plan documents with which the written disclosure statements will be used. To help mitigate a health carrier's filing costs, the department is allowing health carriers six months from the effective date of the rule to update and file for approval their written disclosure forms that conform with the proposed consolidated Form CCP 1.

The department anticipates that some carriers may incur additional filing fees under the amendments to §21.3543, because the amendments require that a consumer choice plan be filed separately from any state-mandated plan. The cost to each health carrier will depend on how many consumer choice plans the carrier offers, how often the carrier makes filings, and whether the carrier has chosen in the past to combine consumer choice plans and state-mandated plans in a single filing. Many health carriers already submit separate filings for consumer choice plans and state-mandated plans. Based on a review of filing data, the department estimates that the average carrier makes one plan filing per year in each market in which they offer a consumer choice plan. Depending on whether an issuer offers consumer choice plans to individuals, small groups, or large groups, an issuer may spend between \$134 and \$402 on additional filing fees annually, based on a \$100 state form filing fee and a \$34 fee for using the SERFF filing system.

The department anticipates that any costs resulting from the amendments to §21.3543 will be more than offset by reduction in costs resulting from the amendments to §21.3544 by simplifying reporting under that section. When the current version of this section was proposed in January of 2004, (29 TexReg 297), the department estimated that the data collection requirements would cost health carriers between \$1,000 and \$5,000 annually. Adjusted for inflation based on the CPI Inflation Calculator provided by the U.S. Bureau of Labor Statistics available at www.bls.gov/data/inflation_calculator.htm, the department estimates costs in August of 2020 (the most recent month for which data is available) to be between \$1,403 and \$7,017 annually. Currently, the data collection requires reporting of 240 lines of data. As proposed, the data collection will require reporting of only 96 lines of data, eliminating 60% of the data currently required, including data elements that issuers have reported are more difficult to maintain, such as the number of consumers who were previously uninsured. The department anticipates that this change will result in a cost savings for issuers ranging from \$842 to \$4,210 annually, presuming that eliminating 60% of the data will eliminate 60% of the cost of the data collection.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. The department has determined that the proposed amendments and repeals will not have an adverse economic effect or a disproportionate economic impact on small or micro businesses or on rural communities because, as addressed in the cost note, the department estimates that the rules will result in overall cost savings that exceed any new costs imposed by the rules. The cost analysis previously described is not expected to vary for small or micro businesses. Likewise, the anticipated savings from the reduction in data collection requirements is expected to provide the same benefits for small and micro businesses. Considering both new costs and cost savings, the proposed amendments to §21.3530 and §§21.3542 - 21.3544 are expected to slightly reduce the cost of compliance for all carriers, including small or micro businesses. 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, taken together, the proposed amendments and repeal will decrease the total cost imposed on regulated persons. Therefore, no additional rule amendments are required.

GOVERNMENT GROWTH IMPACT STATEMENT. The department has determined that for each year of the first five years that the proposed amendments and repeal are in effect, the proposal:

- 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 limit an existing regulation;
- will not increase or decrease the number of individuals subject to the rules' 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 January 4, 2021. 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 January 4, 2021. If the department holds a public hearing, the department will consider written and oral comments presented at the hearing.

DIVISION 3. REQUIRED NOTICES

28 TAC §§21.3525 - 21.3528

STATUTORY AUTHORITY. The department proposes the repeal of 28 TAC §§21.3525, 21.3526, 21.3527, and 21.3528 under Insurance Code §1507.009 and Insurance Code §36.001.

Insurance Code §1507.009 provides that the Commissioner adopt rules necessary to implement Chapter 1507.

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

§21.3525. *Insurer Notice on Application.*

§21.3526. *Insurer Notice on Policy.*

§21.3527. *HMO Notice on Application.*

§21.3528. *HMO Notice on Evidence of Coverage.*

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-202004841

James Person

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 676-6584



28 TAC §§21.3530, §21.3535

STATUTORY AUTHORITY. The department proposes amendments to 28 TAC §21.3530 and §21.3535 under Insurance Code §§36.001, 1507.005, 1507.006, and 1507.009.

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

Insurance Code §1507.005 provides that each written application for participation in a standard health benefit plan must contain certain language.

Insurance Code §1507.006 requires health carriers providing standard health plans to provide a proposed policyholder or policyholder with certain written disclosures. The section also requires each applicant for initial coverage to sign the disclosure statement provided by the health carrier, and it requires the carrier to retain the signed disclosure statement.

Insurance Code §1507.009 provides that the Commissioner adopt rules necessary to implement Chapter 1507.

CROSS-REFERENCE TO STATUTE. Sections 21.3530 and 21.3535 implement Insurance Code §1507.005 and §1507.006.

§21.3530. *Health Carrier Disclosure.*

(a) A health carrier offering or providing a consumer choice health benefit plan must provide each prospective or current policyholder or contract holder with a written disclosure statement in a manner that gives the policyholder or contract holder the ability to keep a copy of the disclosure statement [prescribed in Form CCP 4 provided by the department for that purpose]. The disclosure statement [information provided in Form CCP 4] must provide a sufficient description of the [reduced benefit or the] state-mandated health benefits that are reduced or not included in the plan to enable the prospective or current policyholder or contract holder [consumer] to make an informed decision. [about whether the consumer choice plan being offered or purchased provides sufficient coverage for the consumer's needs. Form CCP 4:]

[(1) acknowledges that the consumer choice health benefit plan being offered or purchased does not provide some or all state-mandated health benefits;]

{(2) lists those state-mandated health benefits not included under the consumer choice health benefit plan;}

{(3) provides a notice that purchase of the plan may limit future coverage options in the event the policyholder's, contract holder's, or certificate holder's health changes and needed benefits are not covered under the consumer choice health benefit plan;}

{(4) requires the prospective or current policyholder or contract holder to sign an acknowledgement that the prospective or current policyholder or contract holder has received the written disclosure statement; and}

{(5) informs the prospective or current policyholder or contract holder that the prospective or current policyholder or contract holder has the right to a copy of the written disclosure statement free of charge.}

(b) [A health carrier may obtain] Form CCP 1 fulfills the requirements of this section and is available on [by making a request to the Life and Health Lines Office Intake, Mail Code 106-1E, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 or 333 Guadalupe, Austin, Texas 78701, or by accessing] the department's website at www.tdi.texas.gov.

(c) If a health carrier chooses to generate its own disclosure statement, it must comply with readability standards applicable to forms reviewed under Chapter 3 of this title (relating to Life, Accident, and Health Insurance and Annuities) and Chapter 11 of this title (relating to Health Maintenance Organizations) and the paper copy must use at least 12-point type. The disclosure statement also must:

(1) acknowledge that the consumer choice health benefit plan being offered or purchased does not provide some or all state-mandated health benefits;

(2) identify the consumer choice health benefit plan being offered or purchased;

(3) in plain language, list each health benefit or coverage not provided at the state-mandated level in the consumer choice health benefit plan, define the listed health benefit or coverage, describe the level of benefit or coverage in the consumer choice plan being offered, and describe the level of benefit or coverage that would be provided in a state-mandated plan;

(4) when applicable because the health carrier has materially modified a consumer choice plan in a way that necessitates a change to the disclosure, or when the disclosure must be updated to reflect changes in state law, contain the following language, in bold type, directly above the list required by paragraph (3) of this subsection, as applicable:

(A) "The benefits or coverages you are agreeing to on this renewal are different from your current plan."; or

(B) "The benefits required by state law have changed since you first received this disclosure.";

(5) identify the state-mandated plan that is most like the consumer choice health benefit plan being offered, and provide:

(A) a phone number where the consumer can purchase that state-mandated plan; and

(B) a URL that connects the consumer either to the summary of benefits and coverage for that state-mandated plan or, if one is not available, to the outline of coverage, written plan description, or other similar summary document for the state-mandated plan;

(6) contain acknowledgments, which require applicants for initial coverage or enrollment to initial to affirm understanding, of the following:

(A) that the consumer choice health benefit plan does not provide the same level of coverage required in a state-mandated plan;

(B) that more information about consumer choice health benefit plans is available from the department either online at www.tdi.texas.gov/consumer/consumerchoice.html, or by calling the TDI Consumer Help Line at 1-800-252-3439;

(C) that the health carrier offered the opportunity to purchase a state-mandated plan that contains all benefits and coverages required in Texas; and

(D) if the plan is being issued in the individual market, that if the plan does not meet the consumer's needs, in most cases the consumer will not be able to get a new plan until the next open enrollment period;

(7) inform the prospective or current policyholder or contract holder that the prospective or current policyholder or contract holder has the right to a copy of the written disclosure statement;

(8) contain the following language in bold type: "Don't sign this document if you don't understand it. No firme este documento si no lo comprende."; and

(9) for initial coverage or enrollment, provide space for the prospective or current policyholder or contract holder to print and sign their name, and to sign to acknowledge receipt of the disclosure statement.

(d) [(e)] A health carrier must provide the written disclosure statement described in subsection (a) of this section:

(1) to a prospective policyholder or contract holder, not later than the time of the offer of a consumer choice health benefit plan, except as provided by subsection (e) [(d)] of this section;

(2) to a current policyholder or contract holder, at least 60 days before the policy or contract renewal date [along with any offer to renew the contract or policy].

(e) [(d)] A health carrier must provide the written disclosure statement described in subsection (a) of this section to a prospective or current policyholder or contract holder applying for coverage through the federal health benefit exchange as follows:

(1) at the time of application, if the federal health benefit exchange provides a mechanism for a health carrier to provide the written disclosure statement and obtain a signature at the time of application; or

(2) if the health carrier is unable to provide the written disclosure and obtain a signature at the time of application, the health carrier must:

(A) mail the written disclosure statement to the prospective or current policyholder or contract holder no later than three business days from the date the health carrier receives the application from the federal health benefit exchange; and

(B) provide either a link to the written disclosure statement directly on the healthcare.gov website, or a reference and link to the written disclosure statement in the summary of benefits and coverage or the plan brochure provided on the healthcare.gov website.

(f) A health carrier must request a signature on the written disclosure statement:

(1) at the time of initial coverage or enrollment; and

(2) any time a policyholder is renewing coverage under a different consumer choice plan from the plan for which the initial disclosure statement was signed, including instances where the health carrier discontinues a plan, consistent with Insurance Code §1202.051, concerning Renewability and Continuation of Individual Health Insurance Policies; Insurance Code §1271.307, concerning Renewability of Coverage: Individual Health Care Plans and Conversion Contracts; and Insurance Code §1501.109, concerning Refusal to Renew; Discontinuation of Coverage.

(g) [(e)] Except as provided by subsection (i) [(g)] of this section, when a health carrier provides the written disclosure statement referenced in subsection (a) of this section to a prospective [or current] policyholder or contract holder:

(1) through an agent, the agent may not transmit the application to the health carrier for consideration until the agent has secured the signed written disclosure statement from the applicant; and

(2) directly to the applicant, the health carrier may not process the application until the health carrier has secured the signed written disclosure statement from the applicant.

(h) [(f)] When a health carrier provides the written disclosure statement described in subsection (a) of this section in the manner described by subsection (e)(2) [(d)(2)] of this section to a prospective policyholder or contract holder, the health carrier must:

(1) request that the prospective [or current] policyholder or contract holder sign and return the written disclosure statement described in subsection (a) of this section, and

(2) provide a method [for the prospective or current policyholder or contract holder] to return the signed written disclosure statement to the health carrier at no cost to the prospective [or current] policyholder or contract holder.

(i) [(g)] The health carrier must, on request, provide the prospective or current policyholder or contract holder with a copy of the written disclosure statement free of charge.

(j) [(h)] When a health carrier is offering or issuing a consumer choice health benefit plan to an association, the health carrier must satisfy the requirements of subsection (e) [(d)] of this section by providing the written disclosure statement to prospective or existing certificate holders.

(k) [(i)] A health carrier offering or issuing a consumer choice health benefit plan to a prospective or current policyholder, contract holder, or an association must update and file with the Commissioner [commissioner], for approval, its written disclosure statement that conforms with this section [Form CCP 4] no later than six months [one year] from the effective date of this section [rule].

§21.3535. *Retention of Disclosure.*

(a) A health carrier must, for a period of five [six] years after the date a consumer choice health benefit plan terminates:

(1) retain in the health carrier's records the signed disclosure statement required by §21.3530 of this title [subchapter] (relating to Health Carrier Disclosure), [and] the written affirmation required by §21.3542 of this title [subchapter] (relating to Offer of State-Mandated Plan), and plan documents that show which benefits or coverages were not provided at the state-mandated level in the issued consumer choice health benefit plan; and

(2) on request from the department, provide copies [a copy] of the retained documents [signed disclosure statement and/or written affirmation] to the department.

(b) A health carrier may accept receipt of a signed disclosure and [or] written affirmation electronically [by facsimile or electronic transmission], but the [such] carrier remains responsible for compliance with subsection (a)(2) of this section.

(c) For renewals where a current policyholder or contract holder is not required to sign a disclosure statement, [If subsequent to the issuance of a policy or evidence of coverage, a policyholder or contract holder does not return the signed disclosure statement to the health carrier,] the health carrier may satisfy the requirements of subsection (a)(1) of this section by furnishing proof that the health carrier tendered the disclosure statement [with a request to sign and return it,] to the policyholder or contract holder in accordance with §21.3530(d)(2) [§21.3530(e)(2)] 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 16, 2020.

TRD-202004842

James Person

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 676-6584



DIVISION 4. ADDITIONAL REQUIREMENTS

28 TAC §§21.3542 - 21.3544

STATUTORY AUTHORITY. The department proposes amendments to 28 TAC §§21.3542 - 21.3544 under Insurance Code §§36.001, 1507.006, 1507.007, and 1507.009.

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

Insurance Code §1507.006 requires health carriers providing standard health plans to provide a proposed policyholder or policyholder with certain written disclosures. The section also requires each applicant for initial coverage to sign the disclosure statement provided by the health carrier, and it requires the carrier to retain the signed disclosure statement.

Insurance Code §1507.007 provides that a health carrier that offers one or more standard health plans under Chapter 1507 must also offer at least one accident or sickness insurance policy that provides state-mandated benefits and is otherwise authorized by the Insurance Code.

Insurance Code §1507.009 provides that the Commissioner adopt rules necessary to implement Chapter 1507.

CROSS-REFERENCE TO STATUTE. Section 21.3542 implements Insurance Code §1507.007. Section 21.3543 implements Insurance Code §1507.005 and §1507.006. Section 21.3544 implements Insurance Code § 36.001.

§21.3542. *Offer of State-Mandated Plan.*

(a) A health carrier that offers the opportunity to apply for one or more consumer choice health benefit plans under this section [to a person or entity] must also, no later than at the time of application, offer

the opportunity to apply for an accident and sickness insurance policy or evidence of coverage in the same category that reasonably approximates the consumer choice health benefit plan offered, that includes state-mandated health benefits, and that is otherwise authorized by the Insurance Code.

(b) With regard to health plans required by subsection (a) of this section, a health carrier must:

(1) use the same sources and methods of distribution to market both consumer choice health benefit plans and health benefit plans required by this subsection, and a health carrier that markets consumer choice health benefit plans through online marketplaces, other than the federal health exchange, must use the same sources and methods of distribution to market both consumer choice health benefit plans and state-mandated health benefit plans required by this subsection;

(2) make the offer of the health plans, the premium cost of the plans, as well as any additional details regarding them, contemporaneously with and in the same manner as the offer and premium cost of, and other details regarding, the consumer choice health benefit plan policy or evidence of coverage; and

(3) provide at least the following information:

(A) a description of how the person or entity may apply for or enroll in each offered policy or evidence of coverage; and

(B) the benefits or services available, or both, and the premium cost under each offered policy or evidence of coverage.

(c) A health carrier may not apply more stringent or detailed requirements related to the application process for a consumer choice health benefit plan, or for a policy or evidence of coverage offered in accordance with subsection (a) of this section, than it applies for other health benefit plans offered by the health carrier.

~~[(d) A health carrier offering a consumer choice health benefit plan must obtain from each prospective policyholder or contract holder, at or before the time of application, a written affirmation that the health carrier also offered a policy or evidence of coverage in compliance with subsection (a) of this section. A health carrier may combine on a single form this written affirmation and the acknowledgement of the written disclosure statement required by §21.3530(a)(4) of this subchapter (relating to Health Carrier Disclosure).]~~

§21.3543. Required Plan Filings.

A health carrier must ~~[shall]~~:

(1) file the consumer choice health benefit plan separate from any state-mandated health benefit plan with the department ~~[Filings and Operations Division]~~ in accordance with:

(A) ~~[the]~~ Insurance Code Chapter 1271 and Chapter 11 of this title (relating to Health Maintenance Organizations) including the filing fee requirements; and

(B) ~~[the]~~ Insurance Code Chapter 1701 and Chapter 3, Subchapter A of this title (relating to Requirements for Filing of Policy Forms, Riders, Amendments, Endorsements for Life, Accident, and Health Insurance and Annuities) including the filing fee requirements; ~~[.]~~

(2) before use, file for approval with the department its ~~[include with the filing of a consumer choice health benefit plan:]~~

~~[(A)] disclosures required by §21.3530 of this title~~ [subchapter] (relating to Health Carrier Disclosure) and[;]

~~[(B) a statement of the reduction in premium resulting from the differences in coverage and design between the consumer~~

~~choice health benefit plan and an identical plan providing all state-mandated health benefits;]~~

~~[(C)] certification of compliance with §21.3542 of this title~~ [subchapter] (relating to Offer of State-Mandated Plan); and

(3) ~~[(D)]file,~~ for informational purposes, the rates to be used with a consumer choice health benefit plan.

§21.3544. Required Annual Reporting.

(a) Health carriers offering a consumer choice health benefit plan must ~~[shall]~~ file annually with the department a data certification, not later than April 1 of each year, ~~[in the manner prescribed]~~ on Form CCP 2, Consumer Choice Health Benefit Plans Data Certification, Rev. 05/20. The data certification includes the following, each set out by plan type ~~[provided by the department, a certification stating the following]~~:

(1) the total number of consumer choice health benefit plans newly issued and renewed covering Texas lives ~~[by type of plan]~~;

(2) the total number of Texas lives (including members/employees, spouses, and dependents) covered under newly issued and renewed consumer choice health benefit plans;

~~[(3) the total number of consumer choice health benefit plans covering Texas lives that were cancelled or non-renewed during the previous calendar year (and were not in effect after December 31), as well as the total number of Texas lives covered under those plans, and gross premiums paid for coverage of Texas lives under those plans;]~~

~~[(4)] the gross premiums received for newly issued and renewed consumer choice health benefit plans covering Texas lives; and~~

(4) the average premium index rate for consumer choice plans and state-mandated plans.

~~[(5) the number of consumer choice health benefit plans covering individuals and groups in Texas that were uninsured for at least two months prior to issue, and the number of Texas lives covered under those plans; and]~~

~~[(6) the number of consumer choice health benefit plans in force in Texas on December 31, and the number of Texas lives covered under those plans, based on the first three digits of the five-digit ZIP Code of:]~~

~~[(A) the employer's principal place of business in Texas, for any employer-based plan; and]~~

~~[(B) the individual's place of residence, for individual or group non-employer based plans.]~~

(b) For the purpose of subsection (a) of this section, the average premium index rate is the earned premium divided by the member months for each set of plans, given per member per month, where member months is the number of people enrolled in a plan times the months of enrollment. For projected average premium index rates, the earned premium and member months should reflect a best estimate.

~~[(b) For purposes of this subsection, gross premiums shall be the total amount of monies collected by the health carrier for health benefit plans during the applicable calendar year or the applicable calendar quarter. Gross premiums shall include premiums collected for individual and group consumer choice health benefit plans. Gross premiums shall also include premiums collected under group certificates issued or delivered to individuals (in this state), regardless of where the health carrier issues or delivers the master policy.]~~

(c) Form CCP 2 is available on [can be obtained from the Texas Department of Insurance, Filings and Operations Division, MC

106-1E, P.O. Box 149104, Austin, Texas 78714-9104. The form can also be obtained from] the department's website at www.tdi.texas.gov [internet web site @ www.tdi.state.tx.us].

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-202004843

James Person

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 676-6584



PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 116. GENERAL PROVISIONS-- SUBSEQUENT INJURY FUND

28 TAC §116.11

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (DWC) proposes to amend 28 Texas Administrative Code §116.11, Request for Reimbursement from the Subsequent Injury Fund, to update its method for receiving Subsequent Injury Fund (SIF) requests from system participants.

EXPLANATION. Section 116.11 applies to an insurance carrier's request to SIF for reimbursement pursuant to Texas Labor Code §403.006. Currently, §116.11 requires reimbursement requests be filed with the SIF administrator in writing, but the rule does not require an insurance carrier to use DWC forms when requesting reimbursement or specify the manner of delivery of the SIF request. DWC seeks to improve the security of protected private claim data contained in a SIF request. Submissions by mail lack the security and privacy protections required for protected health information. Use of electronic transmission and elimination on paper serves the interest of protecting private health data. Electronic submission is defined as transmission of information by facsimile, electronic mail, electronic data interchange, or any other similar method and does not include telephonic communication. SIF developed DWC forms for each type of SIF request. DWC has not required use of DWC forms for SIF requests. Requiring insurance carriers to use DWC forms to submit SIF requests should increase DWC's efficiency in processing of the requests.

To address these issues, DWC proposes amending 28 TAC §116.11, Request for Reimbursement from the Subsequent Injury Fund, to require insurance carriers to electronically submit requests for reimbursement using Forms DWC Form-095 through DWC Form-098 as it applies to their specific request. Requiring insurance carriers to electronically submit requests using the applicable DWC form should reduce the time and costs currently spent managing paper mail.

The proposed amendments will require that all §116.11(a)(1) - (5) requests will be electronically submitted and on the appropriate

SIF-request form. Subsections (c) and (f) will require electronic submission and use of DWC Form-095, *Overturned Order or Designated Doctor Opinion*. Subsection (d) will require electronic submission and use of DWC Form-096, *Refund of Death Benefits*. Subsection (e) will require electronic submission and use of DWC Form-097, *Multiple Employment*. Subsection (g) will require electronic submission and use of DWC Form-098, *Pharmaceutical*.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Dan Paschal, deputy commissioner of Policy and Customer Services, 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 section. This determination was made because the proposed amendments do not add to or decrease state revenues, and because local governments are not involved in enforcing the proposed amendments. Further, by complying with the proposed amendments, expenditures of local governments, as self-insureds, may decrease by eliminating paper and mailing expense.

Mr. Paschal 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. Paschal expects that administering the proposed amendments will have the public benefit of increased efficiency in processing SIF requests.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. DWC has determined that the proposed amendments will not have an adverse economic effect or a disproportionate economic impact on small or micro businesses, or on rural communities. Instead, the proposed amendments result in cost savings to system participants, including small or micro businesses, by eliminating paper and mailing expense. As a result, and in accordance with Government Code §2006.002(c), DWC is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. DWC has determined that this proposal does not impose a possible cost on regulated persons.

GOVERNMENT GROWTH IMPACT STATEMENT. DWC 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 not expand, limit, or repeal an existing regulation;
- will not increase or decrease the number of individuals subject to the rule's applicability; or
- will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. DWC has determined that no private real property interests are affected by this proposal, and 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. DWC will consider any written comments on the proposal that are received no later than 5:00 p.m., Central time, on January 7, 2021. Send your comments to RuleComments@tdi.texas.gov; or to Cynthia Guillen, MS-4D, Texas Department of Insurance, Division of Workers' Compensation, Legal Services, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

To request a public hearing on the proposal, submit a request before the end of the comment period, and separate from any comments, to RuleComments@tdi.texas.gov; or to Cynthia Guillen, Texas Department of Insurance, Division of Workers' Compensation, Legal Services, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. The request for public hearing must be separate from any comments and received by DWC no later than 5:00 p.m., Central time, on December 22, 2020. If DWC holds a public hearing, it will consider written and oral comments presented at the hearing.

STATUTORY AUTHORITY. DWC proposes amended §116.11 under the following statutory authority:

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner of workers' compensation shall 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 authorizes the commissioner to adopt rules as necessary for the implementation and enforcement of the Act.

Labor Code §401.024 defines electronic submission and provides that the commissioner of workers' compensation by rule may permit or require use of electronic transmission for transmitting any authorized or required data.

Labor Code §403.006 describes the SIF account and outlines reimbursement liability.

Labor Code §408.0041 provides that an insurance carrier is entitled to apply for and receive reimbursement from SIF for any overpayment of benefits paid based on the opinion of the designated doctor if that opinion is reversed or modified by a final order of the division or a court.

Labor Code §408.042 provides that an insurance carrier is entitled to apply for and receive reimbursement from SIF for the amount of income and death benefits paid to an injured worker that are based on wages paid from a non-injury employer.

CROSS-REFERENCE TO STATUTE. Section 116.11 implements Labor Code §§403.006, 403.007, 408.042, and 408.084.

§116.11. *Request for Reimbursement from the Subsequent Injury Fund.*

(a) An insurance carrier may request:

(1) reimbursement from the Subsequent Injury Fund (SIF) under ~~[, pursuant to]~~ Labor Code §403.006(b)(2)~~;~~ for an overpayment of income, death, or medical benefits when the insurance carrier has made an unrecoupable overpayment pursuant to the decision of an ad-

ministrative law judge, ~~[or] the Appeals Panel, [appeals panel]~~ or an interlocutory order, and that decision or order is reversed or modified by final arbitration, order, or decision of the commissioner, State Office of Administrative Hearings, or a court of last resort;

(2) reimbursement from the SIF under ~~[pursuant to]~~ Labor Code §403.007(d)~~;~~ for death benefits paid to the SIF before a legal beneficiary was determined to be entitled to receive death benefits;

(3) for a compensable injury that occurs on or after July 1, 2002, reimbursement from the SIF for the amount of income benefits paid to an injured employee based on ~~[attributable to]~~ multiple employment and paid under ~~[pursuant to]~~ Labor Code §408.042;

(4) for a compensable injury that occurs on or after September 1, 2007, reimbursement from the SIF for the amount of income, death benefits, or a combination paid to an injured employee or a legal beneficiary based on ~~[attributable to]~~ multiple employment and paid under ~~[pursuant to]~~ Labor Code §408.042;

(5) reimbursement from the SIF, under ~~[pursuant to]~~ Labor Code §408.0041(f) and (f-1), for an overpayment of benefits made by the insurance carrier based on the opinion of the designated doctor if that opinion is reversed or modified by a final arbitration award or a final order or decision of the commissioner or a court; or

(6) reimbursement from the SIF made in accordance with rules adopted by the commissioner under ~~[pursuant to]~~ Labor Code §413.0141. For purposes of this subsection only, an injury is determined not to be compensable following:

(A) The final decision of the commissioner or the judgment of the court of last resort; or

(B) A claimant's failure to respond within one year of a timely dispute of compensability filed by an insurance carrier. In this instance only, the effective date of the determination of noncompensability ~~[non compensability]~~ is one year from the date the insurance carrier filed the dispute ~~[is filed]~~ with the division. ~~[by the insurance carrier.]~~

(i) A determination under this paragraph does not constitute final adjudication. It does not preclude a party from pursuing their claim through the division's dispute resolution process, and it does not permit a health care provider to pursue a private claim against the claimant.

(ii) If the claim is later determined to be compensable, the insurance carrier must ~~[shall]~~ reimburse the SIF for any initial pharmaceutical payment that ~~[which]~~ the SIF previously reimbursed to the insurance carrier. The insurance carrier's reimbursement of the SIF must ~~[shall]~~ be paid within the timeframe the insurance carrier has to comply with the agreement, decision and order, or other judgment that ~~[which]~~ found the claim to be compensable.

(b) The amount of reimbursement ~~[that]~~ the insurance carrier may be entitled to is equal to the amount of unrecoupable overpayments paid and does not include any amounts the insurance carrier overpaid voluntarily or as a result of its own errors. An unrecoupable overpayment of income or death benefits for the purpose of reimbursement from the SIF only includes those benefits that were overpaid by the insurance carrier pursuant to an interlocutory order, a designated doctor's ~~[doctor]~~ opinion, or a decision, which were finally determined to be not owed and which, in the case of an overpayment of income or death benefits to the injured employee or legal beneficiary, were not recoverable or convertible from other income or death benefits.

(c) To request ~~[Requests for]~~ reimbursement under ~~[attributable to]~~ subsection (a)(1) of this section~~;~~ for insurance carrier claims of benefit overpayments made under an interlocutory order or

decision of the commissioner that is later reversed or modified by final arbitration, order, decision of the commissioner, the State Office of Administrative Hearings, or court of last resort, an insurance carrier must: [shall be filed with the SIF administrator in writing and include:]

(1) submit the request electronically in the form and manner prescribed by the division;

(2) [(4)] provide a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested, including how it was calculated;

(3) [(2)] provide a detailed payment record showing the dates and ~~[of payments, the]~~ amounts of the payments, ~~[purpose of payments, the]~~ payees, type of benefits and ~~[the]~~ periods of benefits paid, all plain language notices (PLNs) about ~~[regarding]~~ the payment of benefits, all certifications of maximum medical improvement and ~~;~~ all assignments of impairment rating, and documentation that shows ~~[demonstrates that]~~ the overpayment was unrecoupable as described in subsection (b) of this section, if applicable;

(4) [(3)] provide the name, address, and federal employer identification number of the payee (insurance carrier) for any reimbursement that may be due;

(5) [(4)] provide copies of all relevant orders and decisions (benefit review conference reports, interlocutory orders, contested case hearing decisions and orders, ~~[Benefit Review Conferences, Interlocutory Orders, Contested Case Hearing Decisions & Orders,]~~ Appeals Panel decisions, ~~[Decisions,]~~ and court ~~[Court]~~ orders) relating to the requested reimbursement and show ~~[regarding the payment for which reimbursement is being requested along with an indication of]~~ which document is the final decision on the matter;

(6) [(5)] provide copies of all relevant reports and DWC forms ~~[filed by]~~ the employer filed with the insurance carrier; and

(7) [(6)] provide ~~[if the request is based on an overpayment of medical benefits,]~~ copies of all medical bills, ~~[and]~~ preauthorization request documents, relevant independent review organization (IRO) decisions, medical fee dispute decisions, contested case hearing decisions and orders, Appeals Panel decisions, and court orders on medical disputes associated with the overpayment, if the request is based on an overpayment of medical benefits. ~~[as well as all relevant Independent Review Organization (IRO) decisions, fee dispute decisions and Contested Case Hearing Decisions and Orders, Appeals Panel Decisions, and court orders regarding medical disputes.]~~

(d) To request ~~[Requests for]~~ reimbursement under ~~[pursuant to]~~ subsection (a)(2) of this section ~~for~~ ~~;~~ related to a reimbursement of death benefits paid to the SIF before ~~[prior to]~~ a legal beneficiary is ~~[being]~~ determined to be entitled to receive death benefits, an insurance carrier must: ~~[shall be filed with the SIF administrator in writing and include:]~~

(1) submit the request electronically in the form and manner prescribed by the division;

(2) [(4)] provide a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested, including how it was calculated;

(3) [(2)] provide a detailed payment record showing the dates and amounts of payments, ~~[the amounts of the payments, purpose of payments, the]~~ payees, and ~~[the]~~ periods of benefits paid;

(4) [(3)] provide the name, address, and federal employer identification number of the payee (insurance carrier) for any reimbursement that may be due;

(5) [(4)] provide the documentation the legal beneficiary submitted ~~[provided]~~ with the claim for death benefits under ~~[in accordance with]~~ §122.100 of this title (relating to Claim for Death Benefits); and

(6) [(5)] provide ~~[if applicable,]~~ the final award of the commissioner~~;~~ or the final judgment of a court of competent jurisdiction determining that the legal beneficiary is entitled to the death benefits.

(e) To request ~~[Requests for]~~ reimbursement under ~~[pursuant to]~~ subsections ~~[subsection]~~ (a)(3) or (4) of this section~~;~~ regarding multiple employment, the requester must submit the request ~~[shall be submitted]~~ on an annual basis for the payments made during the same or previous fiscal year. The fiscal year begins each September 1 ~~[1st]~~ and ends on August 31 ~~[31st]~~ of the next calendar year. For example, insurance carrier payments made during the fiscal year from September 1, 2009, through August 31, 2010, must be submitted by August 31, 2011. Any claims for insurance carrier payments related to multiple employment that are not submitted within the required timeframe will not be reviewed for reimbursement. To request reimbursement under subsections (a)(3) or (4), an insurance carrier must: ~~[These requests shall be filed with the SIF administrator in writing and include:]~~

(1) submit the request electronically in the form and manner prescribed by the division;

(2) [(4)] provide a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested, including how it was calculated;

(3) [(2)] provide a detailed payment record showing the dates and amounts of payments, ~~[the amounts of the payments, purpose of payments, the]~~ payees, type of benefits and ~~[the]~~ periods of benefits paid, all PLNs about ~~[regarding]~~ the payment of benefits, and ~~[as well as]~~ documentation that shows ~~[that]~~ the overpayment was unrecoupable as described in subsection (b) of this section, if applicable;

(4) [(3)] provide the name, address, and federal employer identification number of the payee (insurance carrier) for any reimbursement that may be due;

(5) [(4)] provide information documenting the injured employee's average weekly wage amounts paid from all ~~nonclaim~~ ~~[non claim]~~ employment held at the time of the work-related ~~[work related]~~ injury under ~~[pursuant to]~~ §122.5 of this title (relating to Employee's Multiple Employment Wage Statement); and

(6) [(5)] provide information documenting the injured employee's average weekly wage amounts paid based on employment with the claim employer.

(f) To request ~~[Requests for]~~ reimbursement under ~~[attributable to]~~ subsection (a)(5) of this section, for insurance carrier claims of benefit overpayments made pursuant to a designated doctor's ~~[doctor]~~ opinion that is later reversed or modified by a final arbitration award or a final order or decision of the commissioner or a court, an insurance carrier must: ~~[shall be filed with the SIF administrator in writing and include:]~~

(1) submit the request electronically in the form and manner prescribed by the division;

(2) [(4)] provide a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested, including how it was calculated;

(3) [(2)] provide a detailed payment record showing the dates and ~~[of payments, the]~~ amounts of ~~[the]~~ payments, ~~[purpose of payments, the]~~ payees, type of benefits and ~~[the]~~ periods of benefits paid~~;~~ PLNs about ~~[regarding]~~ the payment of benefits, and all certi-

fications of maximum medical improvement and [all] assignments of impairment rating;

(4) [(3)] provide the name, address, and federal employer identification number of the payee (insurance carrier) for any reimbursement that may be due;

(5) [(4)] provide copies of all relevant designated doctors' [doctor] opinions (including responses to letters of clarification) and orders and decisions (IRO decisions, interlocutory orders, contested case hearing decisions and orders, [Interlocutory Orders, Contested Case Hearing Decisions and Orders,] arbitration awards, Appeals Panel decisions, [Decisions,] and court [Court] orders) relating to [regarding] the designated doctor's [doctor] opinion and the payment[, made pursuant to the designated doctor's [doctor] opinion for which reimbursement is being requested, and indicate [along with an indication of] which document is the final decision on the matter;

(6) [(5)] provide copies of all relevant reports and DWC forms [filed by] the employer filed with the insurance carrier; and

(7) [(6)] provide [for an overpayment of medical benefits,] copies of all medical bills and preauthorization request documents associated with an [the] overpayment of medical benefits.

(g) To request [Requests for] reimbursement under subsection (a)(6) of this section regarding [attributable to] initial pharmaceutical coverage, a requester must submit the request [shall be submitted] in the same or [in the] following fiscal year after a determination that the injury is not compensable. [in accordance with subsection (a)(6) of this section.] The fiscal year begins each September 1 [1st] and ends on August 31 [31st] of the next calendar year. For example, if an injury is determined to be not compensable during the fiscal year from September 1, 2009, through August 31, 2010, the request for reimbursement under [pursuant to] Labor Code §413.0141 must be submitted by August 31, 2011. Any claims for insurance carrier payments related to initial pharmaceutical coverage that are not submitted within the required timeframe will not be reviewed for reimbursement. An insurance carrier must: [The requests shall be filed with the SIF administrator in writing and include:]

(1) submit the request electronically in the form and manner prescribed by the division;

(2) [(4)] provide a claim-specific summary of the reason the insurance carrier is seeking reimbursement and the total amount of reimbursement requested;

(3) [(2)] provide a detailed payment record showing the dates of payments, [specifically] including documentation on dates of payment of initial pharmaceutical coverage (i.e., during the first seven days following the date of injury), payment [; the] amounts, [of the payments ,the purpose of payments, the] and payees[, and the periods of benefits paid];

(4) [(3)] provide the name, address, and federal employer identification number of the payee (insurance carrier) for any reimbursement that may be due;

(5) [(4)] provide documentation that the pharmaceutical services were provided during the first seven days following the date of injury, not counting the actual date the injury occurred, and identify [which is to include a description of] the prescribed pharmaceutical services; [service(s);] and

(6) [(5)] provide documentation of;

(A) the final resolution of any dispute either from the commissioner or court of last resort that [which] determines the injury

is not compensable; [either from the commissioner or court of last resort,] or [documentation of]

(B) a claimant's failure to respond in accordance with subsection (a)(6)(B) of this section.

(h) The prescribed forms under this section are on the division's website at www.tdi.texas.gov/wc/index.html. An insurance carrier seeking reimbursement from the SIF must [shall] timely provide to the SIF administrator by electronic transmission, as that term is used in §102.5(h) of this title, all forms and documentation reasonably required by the SIF administrator to determine entitlement to reimbursement or payment from the SIF and the amount of reimbursement to which the insurance carrier is entitled. The insurance carrier must also provide notice to the SIF of any relevant pending dispute, litigation, or other information that may affect the request for reimbursement.

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 18, 2020.

TRD-202004866

Kara Mace

Deputy Commissioner of Legal Services

Texas Department of Insurance, Division of Workers' Compensation

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 804-4703



TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 363. FINANCIAL ASSISTANCE PROGRAMS

The Texas Water Development Board ("TWDB" or "board") proposes amendments to 31 Texas Administrative Code (TAC) §§363.1, 363.4, 363.12, 363.13, 363.15, 363.16, 363.31, 363.41 - 363.43, 363.1303, 363.1304, 363.1307, and 363.1309.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENT

This rulemaking is proposed under the authority of the Texas Water Code §6.101 which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State. The rulemaking is proposed under the additional authority of Texas Water Code Chapter 15, Subchapters G and H, §16.342, and Chapter 17 Subchapters D, E and F, which provides the TWDB with the authority to which provides the TWDB with the authority to adopt rules necessary to carry out its duties.

The purpose of the proposed rule is to implement legislative changes from the 86th Legislative Session and to clarify certain aspects of TWDB rules related to state-funded financial assistance programs. This rulemaking will implement legislative changes from House Bill 3339, 86th Texas Legislative Session (HB 3339), which standardized and consolidated water conservation plan requirements for TWDB financial assistance

programs. The rule also makes non-substantive changes to the general provisions of Chapter 363 in order to conform with changes made to Subchapter D (related to Flood Financial Assistance), which implements Senate Bill 7, 86th Texas Legislative Session (SB 7). The proposed rules include various minor changes to conform rule text with agency practice, including the addition of definitions of agency terms.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS

Subchapter A. General Provisions.

Division 1. Introductory Provisions.

§363.1. Scope of Subchapter.

Section 363.1 is amended to show that Chapter 363, Subchapter A applies to the newly created Flood Infrastructure Fund, which was created by SB 7.

§363.4. Activities Funded.

Section 363.4 is amended to clarify that the board may provide financial assistance under this chapter for the newly created Flood Infrastructure Fund, which was created by SB 7.

Division 2. General Application Procedures.

§363.12. General, Legal, and Fiscal Information.

The requirement in Section 363.12 that the applicant submit the application in writing is deleted in order to clarify that the applicant may submit the application via the TWDB's Online Loan Application. Section 363.12(2)(A)(vii) is amended to clarify that the source of repayment is only required in the application for financial assistance requiring repayment. Section 363.12(2)(A)(xii)(V) is added to require an applicant to attest that the applicant is or will become in compliance with all of its material contracts and Section 363.12(2)(A)(xii)(VI) is amended to require the applicant to attest that at the time of the applicant and for the duration of any financial assistance provided by the TWDB, the applicant will remain in compliance with all applicable state and federal laws, rules and regulations.

Conforming changes are made to §363.12(2)(B) (see changes to §363.13).

§363.13. Preliminary Engineering Feasibility Report.

The heading of §363.13 is amended to reflect the correct title of the document mentioned in that section. Conforming changes are made throughout the Chapter.

Section 363.13 is also amended to require a general description of the existing system in the Preliminary Engineering Feasibility Report, which is consistent with TWDB practice.

§363.15. Required Water Conservation Plan.

Section 363.15 is amended to reflect legislative changes from HB 3339, including updating the citation to the new Water Code provision. Section 363.15 is also amended to state that only one copy of the water conservation plan is required. The exceptions are amended to conform to the language of HB 3339.

§363.16. Pre-design Funding Option.

Section 363.16(b) is amended to allow for the pre-design funding option for flood projects funded from the Flood Infrastructure Fund. This change is made in order to allow the Board to commit to planning, acquisition, design, and construction phases for flood projects through the FIF. The Flood Infrastructure Fund pro-

gram provides extensive requirements for cooperation among entities affected by each flood project and provides extensive design requirements in order to ensure projects are successful.

Section 363.16 is amended to state that the contracts for engineering services at this point may be submitted in draft form.

Section 363.16 is also amended to clarify that any required water conservation plan must be adopted prior to closing. This change is consistent with TWDB practice.

Conforming changes are made pursuant to amendments to §363.13.

Division 3. Formal Action by the Board.

§363.31. Board Consideration of Application.

Section 363.31 is amended to state that the TWDB will not duplicate funding from federal sources. This change is made to satisfy federal requirements and to ensure the public interest is served by TWDB funding.

Division 4. Prerequisites to Release of State Funds.

§363.41. Engineering Design Approvals.

Section 363.41 is amended to clarify that the contract documents discussed in this section may be submitted in draft form during this phase. Section 363.41 is also amended to clarify when and how applicants should send a copy of certain documents to the Texas Commission on Environmental Quality. Section 363.41(a)(4) is added to require a high-resolution digital, searchable copy of the plans and specifications in order to update rule text in accordance with agency practice and advancing technology. Section 363.41(b) is amended to state that the iron and steel requirements of that subsection may apply to flood projects and to clarify the heading for exemptions.

§363.42. Loan Closing.

Section 363.42 is amended to conform to legislative changes from HB 3339 related to the required water conservation plans.

§363.43. Release of Funds.

Section 363.43 is amended to conform to agency practice related to release of funds for multiple construction contracts. Conforming changes are made pursuant to amendments to §363.13.

Subchapter M. State Water Implementation Fund for Texas and State Water Implementation Revenue Fund for Texas.

§363.1303. Prioritization System.

Section 363.1303 is amended to state that an applicant who will submit a complete application must do so by the deadline established by the executive administrator, rather than within 30 days. This amendment reflects current practice and allows more flexibility.

§363.1304. Prioritization Criteria.

Section 363.1304 is amended to fix typographical errors. Section 363.1304(7) is amended to clarify that points will not be given for principal forgiveness or grants from the TWDB for the prioritization criteria related to local contributions to be made to the project.

§363.1307. Pre-design Funding Option.

Section 363.1307 is amended to state that contracts for engineering services may be in draft form during this phase. Section 363.1307 is also amended to clarify that any required water con-

servation plan must be adopted prior to closing. This change is consistent with TWDB practice. Conforming changes are made pursuant to amendments to §363.13.

§363.1309. Findings Required.

Section 363.1309 is amended to conform to legislative changes from HB 3339 related to the required water conservation plan.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration.

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for either state or local governments. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply. Furthermore, the requirement in Section 2001.0045 does not apply because these rules are amended to reduce the burden or responsibilities imposed on regulated persons by the rule; are amended to decrease the persons' cost for compliance with the rule; are necessary to protect water resources of this state as authorized by the Water Code; and are necessary to implement legislation.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as it implements legislation and clarifies requirements in TWDB rules in order to facilitate financial assistance for water, wastewater, and flood projects.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not

meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to implement legislation and clarify TWDB rules.

Even if the proposed rule were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather Texas Water Code §§15.439 and 16.4021. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT

The board evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to implement legislation and clarify requirements in TWDB rules in order to facilitate financial assistance for water, wastewater, and flood projects. The proposed rule would substantially advance this stated purpose by updating citations to new law, including requirements of new legislation, and updating language to conform to agency and industry practice. The proposed rule will also require borrowers of TWDB funds to attest that they are or will be in compliance with all of their material contracts and will require borrowers to remain in compliance with all applicable state and federal laws, rules, and regulations during the term of the financial assistance from the TWDB.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that administers financial assistance programs for water, wastewater, and flood projects.

Nevertheless, the board further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and

enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rule implement TWDB financial assistance programs that are voluntary for local governments to participate in. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

SUBMISSION OF COMMENTS

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. Comments will be accepted until 5:00 p.m. of the 31st day following publication the *Texas Register*. Include "Chapter 363" in the subject line of any comments submitted.

SUBCHAPTER A. GENERAL PROVISIONS

DIVISION 1. INTRODUCTORY PROVISIONS

31 TAC §363.1, §363.4

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §§6.101, 15.439, 16.342, and 16.4021. Additionally, this rulemaking is proposed under the authority of Texas Water Code Chapter 15, Subchapters G and H, and Chapter 17, Subchapters D, E, and F.

Texas Water Code Chapters 15, 16, and 17 are affected by this rulemaking.

§363.1. *Scope of Subchapter.*

This subchapter shall govern the board's programs of financial assistance under the following programs established by the Texas Water Code:

- (1) in Chapter 15:
 - (A) Water Assistance Fund under Subchapter B;
 - (B) Water Loan Assistance Fund under Subchapter C;
 - (C) Storage Acquisition Program authorized under Subchapter E;
 - (D) Colonia Self-Help Program authorized under Subchapter P;

(E) Program for Water and Wastewater Financial Assistance for Disadvantaged Rural Communities authorized under Subchapter O;

(F) Water Infrastructure Fund under Subchapter Q; [and]

(G) State Water Implementation Fund for Texas and State Water Implementation Revenue Fund for Texas under Subchapter M; and [-]

(H) Flood Infrastructure Fund under Subchapter I;

(2) in Chapter 16, state participation in the purchase or acquisition of facilities under Subchapters E and F;

(3) in Chapter 17:

(A) the programs of assistance under the Texas water development funds; and

(B) the programs of assistance under the water financial assistance bond program (Development Fund II, Subchapter L), including:

(i) financing of water supply projects under Subchapter D;

(ii) water quality enhancement projects including municipal solid waste facilities under Subchapter F;

(iii) flood control projects under Subchapter G; and

(iv) economically distressed areas projects under Subchapter K; [-]

(4) in Chapter 17, Revenue Bond Program under Subchapter I; and

(5) in Chapter 36, Groundwater District Loan Program, under Subchapter L.

§363.4. *Activities Funded.*

The board may provide financial assistance under this chapter for one or more elements of construction defined in Texas Water Code, §17.001(8) or a flood project defined in Texas Water Code, §15.531(2).

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

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For further information, please call: (512) 463-7686



DIVISION 2. GENERAL APPLICATION PROCEDURES

31 TAC §§363.12, 363.13, 363.15, 363.16

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §§6.101, 15.439, 16.342, and 16.4021. Additionally, this rulemaking is proposed under the authority of Texas Water Code

Chapter 15, Subchapters G and H, and Chapter 17, Subchapters D, E, and F.

Texas Water Code Chapters 15, 16, and 17 are affected by this rulemaking.

§363.12. General, Legal, and Fiscal Information.

An application will be in the form and in numbers prescribed by the executive administrator.

(1) The executive administrator may request any additional information needed to evaluate the application[;] and may return any incomplete applications. [The following are required to be considered an administratively complete application:]

[(1) A political subdivision shall submit an application for financial assistance in writing.]

(2) The following information is required on all applications to the board for financial assistance to be considered an administratively complete application: [-]

(A) General, fiscal and legal information required includes:

- (i) the name and address of the political subdivision;
- (ii) a citation of the law under which the political subdivision operates and was created;
- (iii) the total cost of the project;
- (iv) the amount of financial assistance being requested;
- (v) a description of the project;
- (vi) the name, address, e-mail, and telephone number of the authorized representative, engineer and any other consultant(s);
- (vii) for financial assistance requiring repayment, the source of repayment and the status of legal authority to pledge selected revenues;
- (viii) the financing plan for repaying the total cost of the project;
- (ix) the political subdivision's default history;
- (x) the most recent annual financial statements and latest monthly and year-to-date financial reports for the General Fund and Utility Fund of the political subdivision;
- (xi) a certified copy of a resolution of the political subdivision's governing body requesting financial assistance from the board, authorizing the submission of the application, and designating the authorized representative for executing the application, and for appearing before the board;
- (xii) a notarized affidavit from the authorized representative stating that:

(I) for a political subdivision, the decision to request financial assistance from the board was made in a public meeting held in accordance with the Open Meetings Act (Texas Government Code, Chapter 551);

(II) the information submitted in the application is true and correct according to the best knowledge and belief of the representative;

(III) the applicant has no litigation or other proceedings pending or threatened against the applicant that would ma-

terially adversely affect the financial condition of the applicant or the ability of the applicant to issue debt;

(IV) the applicant has no pending, threatened, or outstanding judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issue of any kind or nature by EPA, the Texas Commission on Environmental Quality, Texas Comptroller, Texas Secretary of State, or any other federal, state or local government, except for such actions identified in the affidavit; [and]

(V) the applicant is, or will become, in compliance with all of its material contracts; and

VI ([V]) the applicant is and will remain during the term of any financial assistance received from the board, in compliance [comply] with all applicable federal laws, rules, and regulations as well as the laws of this state and the rules and regulations of the board.

(xiii) any special request for repayment structure that reflects the particular needs of the political subdivision.

(B) Preliminary Engineering feasibility report. An applicant shall submit an engineering feasibility report in accordance with §363.13 of this title (relating to Preliminary Engineering Feasibility Report [Data]).

(C) Environmental assessment. An applicant shall submit an environmental assessment in accordance with §363.14 of this title (relating to Environmental Assessment).

(D) Required water conservation plan. An applicant shall submit a water conservation plan prepared in accordance with §363.15 of this title (relating to Required Water Conservation Plan).

(E) Required water loss audit. An applicant that is a retail public utility that provides potable water shall submit its most recent water loss audit in accordance with §358.6 of this title (relating to Water Loss Audits), unless it has previously been submitted.

(F) Funding from other sources. If additional funds are necessary to complete the project, or if the applicant has applied for and/or received a commitment from any other source for the project or any aspect of the project, an applicant shall submit a listing of those sources, including total project costs, financing terms, and current status of the funding requests.

(G) Additional application information. An applicant shall submit any additional information requested by the executive administrator as necessary to complete the financial, legal, engineering, and environmental reviews.

§363.13. Preliminary Engineering Feasibility Report [Data].

(a) An Applicant shall submit copies of a preliminary engineering feasibility report, signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, shall provide:

- (1) a description and purpose of the project;
- (2) the entities to be served and current and future population;
- (3) the cost of the project;
- (4) a description of alternatives considered and reasons for the selection of the project proposed;
- (5) sufficient information to evaluate the engineering feasibility of the project; [and]
- (6) maps and drawings as necessary to locate and describe the project area; and [-]

(7) a general description of the existing system.

(b) The executive administrator may request additional information or data as necessary to evaluate the project.

§363.15. Required Water Conservation Plan.

(a) An applicant, if not eligible for an exemption under subsection (c) of this section, shall submit, with its application, a copy ~~[two copies]~~ of its water conservation plan for approval, in accordance with Water Code §16.4021. The executive administrator shall review all water conservation plans submitted as part of an application for financial assistance for a project and shall determine if the plans meet the requirements of this section.

(b) The water conservation plan required under subsection (a) of this section must be new or revised to include five-year and ten-year targets for water savings, unless the applicant has implemented an approved water conservation plan that meets the requirements of this section, and that has been in effect for less than five years. The water conservation plan shall include an evaluation of the applicant's water and wastewater system and customer water use characteristics to identify water conservation opportunities and shall set goals to be accomplished by water conservation measures. The water conservation plan shall provide information in response to the following minimum requirements. If the plan does not provide information for each minimum requirement, the applicant shall include in the plan an explanation of why the requirement is not applicable.

(1) Minimum requirements. Water conservation plans shall include the following elements:

(A) a utility profile including, but not limited to, information regarding population and customer data, water use data, water supply system data, and wastewater system data at the most detailed level of water use data currently available and in accordance with the methodology and guidance for calculating water use and conservation developed and maintained by the executive administrator in coordination with the commission under Water Code §16.403. The utility profile must include the classification of water sales and uses for the following sectors, as appropriate:

- (i) residential;
 - (I) single-family;
 - (II) multi-family;
- (ii) commercial;
- (iii) institutional;
- (iv) industrial;
- (v) agricultural; and
- (vi) wholesale.

(B) specific, quantified five-year and ten-year targets for water savings to include goals for water loss programs and goals for municipal use in total gallons per capita per day and residential gallons per capita per day. As used herein, "municipal use" means the use of potable water or sewer effluent for residential, commercial, industrial, agricultural, institutional, and wholesale uses by an individual or entity that supplies water to the public for human consumption;

(C) a schedule for implementing the plan to achieve the applicant's targets and goals;

(D) a method for tracking the implementation and effectiveness of the plan;

(E) a master meter to measure and account for the amount of water diverted from the source of supply;

(F) a program for universal metering of both customer and public uses of water, for meter testing and repair, and for periodic meter replacement;

(G) measures to determine and control water loss (for example, periodic visual inspections along distribution lines; annual or monthly audit of the water system to determine illegal connections, abandoned services, etc.);

(H) a program of leak detection, repair, and water loss accounting for the water transmission, delivery, and distribution system;

(I) a program of continuing public education and information regarding water conservation;

(J) a water rate structure which is not "promotional," i.e., a rate structure which is cost-based and which does not encourage the excessive use of water;

(K) a means of implementation and enforcement which shall be evidenced by:

(i) a copy of the ordinance, resolution, or tariff indicating official adoption of the water conservation plan by the applicant; and

(ii) a description of the authority by which the applicant will implement and enforce the conservation plan;

(L) documentation that the regional water planning groups for the service area of the applicant have been notified of the applicant's water conservation plan; and

(M) a current drought contingency plan which includes specific water supply or water demand management measures and, at a minimum, includes, trigger conditions, demand management measures, initiation and termination procedures, a means of implementation, and measures to educate and inform the public regarding the drought contingency plan.

(2) Additional conservation strategies. The water conservation plan may also include any other water conservation practice, method, or technique that the applicant deems appropriate.

(c) Pursuant to Water Code §16.4021 [~~§§15.106(e), 17.125(e), 17.277(e), and 17.857(e)~~], an applicant is not required to provide a water conservation plan if the board determines an emergency exists; the amount of financial assistance to be provided is \$500,000 or less; ~~[or]~~ the applicant demonstrates and the board finds that implementation of a water conservation program is not reasonably necessary to facilitate water conservation; [or] the application is for flood control purposes under Water Code, Chapter 17, Subchapter G; the application is for a flood project under Water Code, Chapter 15, Subchapter I; or the financial assistance is to fund a project that consists of construction outside this state.

(1) An emergency exists when:

(A) a public water system or wastewater system has already failed, or is in a condition which poses an imminent threat of failure, causing the health and safety of the citizens served to be endangered;

(B) sudden, unforeseen demands are placed on a water system or wastewater system (i.e., because of military operations or emergency population relocation);

(C) a disaster has been declared by the governor or president; or

(D) the governor's Division of Emergency Management of the Texas Department of Public Safety has determined that an emergency exists.

(2) If the board determines that an emergency exists and commits to financial assistance without requiring a water conservation plan, the applicant must report whether the emergency continues to exist every six months after the board commits to financial assistance. If the Executive Administrator finds that the emergency no longer exists, the applicant must submit a water conservation plan within six months of the finding.

(d) Pursuant to Water Code §16.4021(g) [~~§§15.106(d)(e), 15.208(d), 17.125(e), 17.277(e), and 17.857(e)~~], if the applicant will utilize the project financed by the board to furnish water or wastewater services to another entity that in turn will furnish the water or wastewater services to the ultimate consumer, the applicant shall:

(1) submit its own water conservation plan before closing on the financial assistance; and

(2) submit the other entity's water conservation plan, if one exists, before closing on the financial assistance; and

(3) require, by contract, that the other entity adopt a water conservation plan that conforms to the board's requirements and submit it to the board. If the requirement is to be included in an existing water or wastewater service contract, it may be included, at the earliest of the renewal or substantial amendment of that contract, or by other appropriate measures.

(e) The board will accept a water conservation plan determined by the commission to satisfy the requirements of 30 TAC Chapter 288 for purposes of meeting the minimum requirements of subsection (b) of this section.

(f) Water conservation plans that are submitted to the TCEQ and copied to the board under Water Code §16.402 must contain the applicable minimum requirements for water conservation plans established by the Commission in its rules at 30 TAC Chapter 288.

(g) Annual reports.

(1) Each entity that is required to submit a water conservation plan to the board or the commission, other than a recipient of financial assistance from the board, shall file a report annually not later than May 1st to the executive administrator on the entity's progress in implementing each of the minimum requirements in the water conservation plan.

(2) Recipients of financial assistance from the board shall maintain an approved water conservation plan in effect until all financial obligations to the state have been discharged and shall file a report with the executive administrator on the applicant's progress in implementing each of the minimum requirements in its water conservation plan and the status of any of its customers' water conservation plans required by contract, within one year after closing on the financial assistance and annually thereafter until all financial obligations to the state have been discharged.

(3) Annual reports prepared for the Commission providing the information required by this subsection may be provided to the board to fulfill the board's reporting requirements.

(h) The following are violations of board rules for purposes of Water Code §16.402:

(1) failure to submit a water conservation plan containing the minimum requirements in subsections (b) and (f) of this section; and

(2) failure to timely submit a complete annual report on the entity's progress in implementing its plan that addresses each element in its water conservation plan, as required by Water Code §16.402 and subsection (g) of this section.

§363.16. Pre-design Funding Option.

(a) This loan application option will provide an eligible applicant that meets all applicable board requirements an alternative to secure a commitment and close a loan for the pre-design, design or building costs associated with a project. Under this option, a loan may be closed and funds necessary to complete planning and design activities released. If planning requirements have not been satisfied, design and building funds will be held or escrowed and released in the sequence described in this section. After planning and environmental review, the executive administrator may require the applicant to make changes in order to proceed with the project. If the portion of a project associated with funds in escrow cannot proceed, the loan recipient shall use the escrowed funds to redeem bonds purchased by the board in inverse order of maturity.

(b) Except for flood projects funded through the Flood Infrastructure Fund, flood [~~Flood~~] control and municipal solid waste projects are not eligible for funding under this option.

(c) The executive administrator may recommend to the board the use of this section if, based on available information, there appear to be no significant permitting, social, environmental, engineering, or financial issues associated with the project. An application for pre-design funding may be considered by the board despite a negative recommendation from the executive administrator.

(d) Applications for pre-design funding must include the following information:

(1) for loans including building cost, a preliminary engineering feasibility report which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs and budget including sources of funds; current and future populations and projected flows; alternatives considered; and a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project;

(2) contracts for engineering services, which may be in draft form;

(3) evidence that an approved water conservation plan will be adopted prior to closing [the release of funds];

(4) all information required in §363.12 of this title (relating to General, Legal and Fiscal Information); and

(5) any additional information the executive administrator may request to complete evaluation of the application.

(e) After board commitment and completion of all closing and release prerequisites as specified in §363.42 of this title (relating to Loan Closing) and §363.43 of this title (relating to Release of Funds), funds will be released in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase;

(2) for design costs, after receipt of executed contracts for the design phase and upon approval of an engineering feasibility report as specified in §363.13 of this title (relating to Engineering Feasibility Report [~~Data~~]) and compliance with §363.14 of this title (relating to Environmental Assessment) as applicable; and

(3) for building costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.

(f) Board staff will use preliminary environmental data provided by the applicant, as specified in subsection (d) of this section and make a written report to the executive administrator on known or potential significant social or environmental concerns. Subsequently, these projects must have a favorable executive administrator's recommendation which is based upon a full environmental review during planning, as provided under §363.14 of this title (relating to Environmental Assessment), as applicable.

(g) The executive administrator will advise the board concerning projects that involve major economic or administrative impacts to the applicant resulting from environmentally related special mitigative or precautionary measures from an environmental assessment under §363.14 of this title (relating to Environmental Assessment), as applicable.

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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DIVISION 3. FORMAL ACTION BY THE BOARD

31 TAC §363.31

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §§6.101, 15.439, 16.342, and 16.4021. Additionally, this rulemaking is proposed under the authority of Texas Water Code Chapter 15, Subchapters G and H, and Chapter 17, Subchapters D, E, and F.

Texas Water Code Chapters 15, 16, and 17 are affected by this rulemaking.

§363.31. *Board Consideration of Application.*

The executive administrator shall submit the application to the board with comments concerning financial assistance. The application will be scheduled on the agenda for board consideration at the earliest practical date. The applicant and other interested parties known to the board shall be notified of the time and place of such meeting. If the applicant has received an obligation of federal funds from any federal source [by the United States Department of Agriculture-Rural Development] that would duplicate funding from the board for the same project, as evidenced in writing from the applicable federal agency [United States Department of Agriculture-Rural Development], or if the applicant has incurred such an obligation, the executive administrator shall not submit the application to the board and shall notify the applicant that its application will no longer be considered for this reason, unless good cause is shown that the application should be submitted to the board.

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DIVISION 4. PREREQUISITES TO RELEASE OF STATE FUNDS

31 TAC §§363.41 - 363.43

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §§6.101, 15.439, 16.342, and 16.4021. Additionally, this rulemaking is proposed under the authority of Texas Water Code Chapter 15, Subchapters G and H, and Chapter 17, Subchapters D, E, and F.

Texas Water Code Chapters 15, 16, and 17 are affected by this rulemaking.

§363.41. *Engineering Design Approvals.*

(a) An applicant with a commitment of financial assistance from the board shall obtain Executive Administrator approval of contract documents, including engineering plans and specifications and bid documents, prior to receiving bids and awarding construction contracts. The applicant shall submit two copies of contract documents, which shall be as detailed as would be required for submission to contractors bidding on the work, and which shall be consistent with the engineering feasibility information submitted with the application. These contract documents may be submitted in draft form. For [An additional copy of the contract documents is required for] water supply projects requiring commission review, the applicant shall send an additional copy to the commission. The contract documents must contain the following:

(1) provisions assuring compliance with the board's rules and all relevant statutes;

(2) provisions providing for the political subdivision to retain a minimum of 5.0% of the progress payments otherwise due to the contractor until the building of the project is substantially complete and a reduction in the retainage is authorized by the executive administrator;

(3) a contractor's act of assurance form to be executed by the contractor which shall warrant compliance by the contractor with all laws of the State of Texas and all rules and published policies of the board; [and]

(4) a high-resolution digital, searchable copy of the plans and specifications; and

(5) [(4)] any additional conditions that may be requested by the executive administrator.

(b) Engineering Design Approvals for those Projects Required to use Iron or Steel Products Produced in the United States.

(1) Except as provided by subsections (c) and (d) of this section, this section applies to Projects with the board and resulting bid documents submitted to the board or construction contracts entered into after September 1, 2017.

(2) In this section, the following terms have the assigned meanings:

(A) Iron and steel products--Products made primarily of iron or steel that are permanently incorporated into the public water system, treatment works, [or] agricultural water conservation Project, or flood project, including, but not limited to: lined or unlined pipes and fittings, manhole covers and other municipal castings, hydrants, tanks, flanges, pipe clamps and restraints, valves, structural steel, reinforced precast concrete, construction materials.

(B) Manufacturing Process--The application of a process to alter the form or function of materials or elements of a product in a manner that adds value and transforms the materials or elements into a new finished product functionally different from a finished product produced merely from assembling the materials into a product or elements into a product.

(C) Mechanical and electrical components, equipment, systems, and appurtenances--Include, but are not limited to, pumps, motors, gear reducers, drives (including variable frequency drives), electric/pneumatic/manual accessories used to operate valves (such as electric valve actuators), mixers, gates, motorized screens (such as traveling screens), blowers/aeration equipment, compressors, meters, sensors, controls and switches, supervisory control and data acquisition (SCADA), membrane bioreactor systems, membrane filtration systems, filters, clarifiers and clarifier mechanisms, rakes, grinders, disinfection systems, presses (including belt presses), conveyors, cranes, HVAC (excluding ductwork), water heaters, heat exchangers, generators, cabinetry and housings (such as electrical boxes/enclosures), lighting fixtures, electrical conduit, emergency life systems, metal office furniture, shelving, laboratory equipment, analytical instrumentation, dewatering equipment, electrical supports/covers/shielding, and other appurtenances related to an electrical system necessary for operation or concealment. An electrical system includes all equipment, facilities, and assets owned by an electric utility, as that term is defined in §31.002 Utilities Code.

(D) Political subdivision--Includes a county, municipality, municipal utility district, water control and improvement district, special utility district, and other types of water districts, including those created under Texas Constitution Article III, Section 52 or Article XVI, Section 59, and nonprofit water supply corporations created and operating under Texas Water Code, Chapter 67.

(E) Produced in the United States--With respect to iron or steel products, a product for which all manufacturing processes, from initial melting through application of coatings, occur in the United States, other than metallurgical processes to refine steel additives.

(F) Project--A contract between the board and a person or political subdivision.

(3) Political subdivisions and persons with Projects funded with financial assistance from the board shall obtain Executive Administrator approval of contract documents, including engineering plans and specifications and bid documents, prior to receiving bids and awarding construction contracts. Except as provided by subsections (c) and (d) of this section, contract documents and bid documents provided to all bidders must include language requiring that any iron or steel products produced through a manufacturing process used in the Project, be produced in the United States, specifically where funds will be used to:

(A) construct, remodel, or alter buildings, structures, or infrastructure; or

(B) supply a material for a project between the board and a person or a political subdivision; or

(C) finance, refinance, or provide money from funds administered by the board for a project.

(c) Exemptions from subsection (b) of this section.

(1) Section 363.41(b)(3) does not apply if the board or Executive Administrator has made a determination that:

(A) iron or steel products, produced in the United States, to be used in the Project are not:

(i) produced in sufficient quantities; or

(ii) reasonably available at the time contract documents and bid documents are executed with contractors or subcontractors; or

(iii) of a satisfactory quality to be used in the Project; or

(B) the use of iron or steel products produced in the United States will increase the total cost of the Project by more than 20 percent; or

(C) complying with the use of iron or steel products as required by this section is inconsistent with the public interest.

(2) The following components are exempt from complying with §363.41(b)(3) as they are not iron or steel products:

(A) mechanical and electrical components, equipment, systems, and appurtenances; and

(B) iron or steel products that are not permanently incorporated into a Project.

(d) Section 363.41(b) does not apply where the board has adopted a resolution approving an application for financial assistance before May 1, 2019, for any portion of financing as described by §§15.432 or 15.472, Water Code.

§363.42. *Loan Closing.*

(a) Instruments needed for closing. The documents which shall be required at the time of closing shall include the following:

(1) if not closing under the pre-design funding option, evidence that requirements and regulations of all identified local, state and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) a certified copy of the bond ordinance, order or resolution adopted by the governing body authorizing the issuance of debt to be sold to the board, or an executed promissory note and loan agreement, that is acceptable to the executive administrator and which shall have sections providing as follows:

(A) if loan proceeds are to be deposited into an escrow account at the closing on all or a portion of the loan, then an escrow account shall be created that shall be separate from all other accounts and funds, as follows:

(i) the account shall be maintained by an escrow agent as defined in §363.2 of this title (relating to Definitions of Terms);

(ii) funds shall not be released from the escrow account without written approval by the executive administrator;

(iii) upon request of the executive administrator, the escrow account statements shall be provided to the executive administrator;

(iv) the investment of any loan proceeds deposited into an approved escrow account shall be handled in a manner that complies with the Public Funds Investment Act, Texas Government Code, Chapter 2256; and

(v) the escrow account shall be adequately collateralized in a manner sufficient to protect the board's interest in the project and that complies with the Public Funds Collateral Act, Texas Government Code, Chapter 2257;

(B) that a construction account shall be created which shall be separate from all other accounts and funds of the applicant;

(C) that a final accounting be made to the board of the total sources and authorized use of project funds within 60 days of the completion of the project and that any surplus loan funds be used in a manner as approved by the executive administrator;

(D) that an annual audit of the political subdivision, prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant be provided annually to the executive administrator;

(E) that the political subdivision shall fix and maintain rates and collect charges to provide adequate operation, maintenance and insurance coverage on the project in an amount sufficient to protect the board's interest;

(F) that, if applicable, the political subdivision shall document the adoption and implementation of an approved water conservation program for the duration of the loan, in accordance with §363.15 of this title;

(G) that the political subdivision shall maintain current, accurate and complete records and accounts in accordance with generally accepted accounting principles necessary to demonstrate compliance with financial assistance related legal and contractual provisions;

(H) that the political subdivision covenants to abide by the board's rules and relevant statutes, including the Texas Water Code, Chapters 15, 16, and 17;

(I) that the political subdivision, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the political subdivision's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis substantially in the manner required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the board and the beneficial owner of the political subdivision's obligations, if the board sells or otherwise transfers such obligations, and the beneficial owners of the board's bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12;

(J) that all payments shall be made to the board via wire transfer at no cost to the board;

(K) that the partial redemption of bonds or other authorized securities be made in inverse order of maturity;

(L) that insurance coverage be obtained and maintained in an amount sufficient to protect the board's interest in the project;

(M) that the political subdivision shall establish a dedicated source of revenue for repayment; and

(N) any other recitals mandated by the executive administrator;

(3) if applicable, evidence that the political subdivision has adopted a water conservation program in accordance with §363.15 of this title (relating to Required Water Conservation Plan);

(4) unqualified approving opinions of the attorney general of Texas and if bonds are issued, a certification from the comptroller of public accounts that such debt has been registered in that office;

(5) if bonds are issued, an unqualified approving opinion by a recognized bond attorney acceptable to the executive administrator, or if a promissory note and loan agreement is used, an opinion from the corporation's attorney which is acceptable to the executive administrator;

(6) executed escrow agreement entered into by the entity and an escrow agent satisfactory to the executive administrator, in the event that funds are escrowed, or a certificate of trust as defined in §363.2 of this title, if applicable; and

(7) other or additional data and information, if deemed necessary by the executive administrator.

(b) Certified transcript. Within 60 days of closing, the political subdivision shall submit a transcript of proceedings relating to the debt purchased by the board which shall contain those instruments normally furnished a purchaser of debt.

(c) Additional closing requirements for bonds. A political subdivision shall be required to comply with the following closing requirements if the applicant issues bonds that are purchased by the board:

(1) all bonds shall be closed in book-entry-only form;

(2) the political subdivision shall use a paying agent/registrant that is a Depository Trust Company (DTC) participant;

(3) the political subdivision shall be responsible for paying all DTC closing fees assessed to the political subdivision by the board's custodian bank directly to the board's custodian bank;

(4) the political subdivision shall provide evidence to the board that one fully registered bond has been sent to the DTC or to the political subdivision's paying agent/registrant prior to closing; and

(5) if bonds are being sold to the board, the political subdivision shall provide a private placement memorandum containing a detailed description of the issuance of debt to be sold to the board that is acceptable to the executive administrator.

§363.43. Release of Funds.

(a) Release of funds for planning, design and permits. Prior to the release of funds for planning, design, and permits, the political subdivision shall submit for approval to the executive administrator the following documents:

(1) a statement as to sufficiency of funds if additional funds are necessary to complete the activity;

(2) certified copies of each contract under which revenues for repayment of the political subdivision's debt will accrue;

(3) executed consultant contracts relating to services provided for planning, design, and/or permits;

(4) unless funds are released under the pre-design funding option, documentation that the requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations; and

(5) other such instruments or documents as the board or executive administrator may require.

(b) Pre-design funding. The funds needed for the total estimated cost of the engineering planning, and design cost if the preliminary engineering feasibility report required under §363.13 of this title (relating to Preliminary Engineering Feasibility Report [Data]) has been approved, the cost of issuance associated with the loan, and any associated capitalized interest will be released to the loan recipient and the remaining funds will be escrowed to the escrow agent until all applicable requirements in subsections (a) and (c) of this section and §363.16 of this title (relating to Pre-design Funding Option) have been met.

(c) Release of funds for building purposes. Prior to the release of funds for building purposes, the political subdivision shall submit for approval to the executive administrator the following documents:

(1) a tabulation of all bids received and an explanation for any rejected bids or otherwise disqualified bidders;

(2) one executed original copy of each construction contract the effectiveness and validity of which is contingent upon the receipt of board funds;

(3) evidence that the necessary acquisitions of land, leases, easements and rights-of-way have been completed or that the applicant has the legal authority necessary to complete the acquisitions;

(4) a statement as to sufficiency of funds if additional funds are necessary to complete the project;

(5) certified copies of each contract under which revenues to the project will accrue;

(6) documentation that all requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including permits and authorizations; and

(7) other such instruments or documents as the board or executive administrator may require.

(d) Release of funds for projects constructed through one or more construction contracts. For projects constructed through one or more construction contracts, the executive administrator may approve the release of funds for all or a portion of the estimated project cost, provided all requirements of subsection (c) of this section have been met, only for the construction contract that has been approved for construction [at least one of the construction contracts].

(e) Escrow of funds. The executive administrator may require the escrow of an amount of project funding related to contracts which have not met the requirements of subsection (c) of this section at the time of loan closing.

(f) Release of funds in installments to water supply corporations. Funds may be released to water supply corporations in installments and pursuant to the provisions 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.

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Ashley Harden

General Counsel

Texas Water Development Board

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For further information, please call: (512) 463-7686

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SUBCHAPTER M. STATE WATER IMPLEMENTATION FUND FOR TEXAS AND STATE WATER IMPLEMENTATION REVENUE FUND FOR TEXAS

31 TAC §§363.1303, 363.1304, 363.1307, 363.1309

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §§6.101, 15.439, 16.342, and 16.4021. Additionally, this rulemaking is proposed under the authority of Texas Water Code Chapter 15, Subchapters G and H, and Chapter 17, Subchapters D, E, and F.

Texas Water Code Chapters 15, 16, and 17 are affected by this rulemaking.

§363.1303. *Prioritization System.*

(a) The board will establish deadlines for application submissions. The executive administrator will provide the prioritization of those applications to the board for approval as soon thereafter as practicable. To be considered for prioritization, an applicant must provide adequate information to establish that the applicant qualifies for funding, to describe the project comprehensively, and to establish the cost of the project, as well as any other information requested by the executive administrator. The executive administrator will develop and provide an abridged application to gather information necessary for prioritization. If an applicant submits an abridged application for prioritization purposes, the applicant must submit a complete application to the board by the deadline established by the executive administrator within 30 days after the board meeting at which the applicant's project received priority for funding, or the project will lose its priority ranking and the board may commit to other projects consistent with the prioritization.

(b) For each application that the executive administrator has determined has adequate information for prioritization purposes and prior to each board meeting at which applications may be considered for prioritization, the executive administrator shall:

(1) prioritize the applications by the criteria identified in §363.1304 of this title (relating to Prioritization Criteria); and

(2) provide to the board a prioritized list of all complete applications as recommended by the executive administrator, the amount of funds requested, and the priority of each application received.

(c) The board will identify the amount of funds available from SWIFT and SWIRFT for new applications by category, establish the structure of financing and the terms of any subsidy, and will consider applications according to §363.1304 of this title. The board reserves the right to limit the amount of funding available to an individual entity.

§363.1304. *Prioritization Criteria.*

The executive administrator will prioritize applications based on the following point system:

(1) Projects will be evaluated on the criteria provided in paragraphs (2) - (5) of this section. The points awarded for paragraphs

(2) - (5) of this section shall be the lesser of the sum of the points for paragraph (2) - (5), or 50 points.

(2) Either stand-alone projects or projects in conjunction with other recommended water management strategies relying on the same volume of water that the project relies on, in accordance with Chapter 357 of this title (relating to Regional Water Planning), that will serve in total when the project water supply volume is fully operational:

(A) at least 10,000 population, but not more than 249,999 population, 6 points; or

(B) at least 250,000 population, but not more than 499,999 population, 12 points; or

(C) at least 500,000 population, but not more than 749,999 population, 18 points; or

(D) at least 750,000 population, but not more than 999,999 population, 24 points; or

(E) at least 1,000,000 population, 30 points; or

(F) less than 10,000 population, zero points.

(3) Projects that will serve a diverse urban and rural population:

(A) serves one or more urban populations and one rural population, 10 points; and

(B) for each additional rural population served, 4 points up to a maximum of 30 points; or

(C) serves only an urban population, or only a rural population, zero points.

(4) As specified in the application, projects which provide regionalization:

(A) serves additional entities other than the applicant, 5 points ~~[point]~~ per each political subdivision served for a maximum of 30 points; or

(B) serves only applicant, zero points.

(5) Projects that meet a high percentage of the water supply needs of the water users to be served calculated from those served and needs that will be met during the first decade the project becomes operational, based on state water plan data:

(A) at least 50 percent of needs met, 10 points; or

(B) at least 75 percent of needs met, 20 points; or

(C) at least 100 percent of needs met, 30 points; or

(D) less than 50 percent of needs met, zero points.

(6) Projects will receive additional points of the project's score on each of the criteria of paragraphs (7) - (12) of this section.

(7) Local contribution to be made to implement the project, including federal funding, and including up-front capital, such as funds already invested in the project or cash on hand and/or in-kind services to be invested in the project, provided that points will not be given for principal forgiveness or grants from the board ~~[a prior loan through the board that included a loan forgiveness component]~~:

(A) other funding at least 10 percent, but not more than 19 percent, of total project cost, 1 point; or

(B) other funding at least 20 percent, but not more than 29 percent, of total project cost, 2 points; or

(C) other funding at least 30 percent, but not more than 39 percent, of total project cost, 3 points; or

(D) other funding at least 40 percent, but not more than 49 percent, of total project cost, 4 points; or

(E) other funding at least 50 percent of total project cost, 5 points; or

(F) other funding less than 10 percent of total project cost, zero points.

(8) Financial capacity of the applicant to repay the financial assistance provided:

(A) applicant's household cost factor is less than or equal to 1 percent, 2 points; or

(B) applicant's household cost factor is greater than 1 percent but not more than 2 percent, 1 point; or

(C) applicant's household cost factor is greater than 2 percent, zero points.

(9) Projects which address an emergency need:

(A) applicant, or entity to be served by the project, is included on the list maintained by the Commission of local public water systems that have a water supply that will last less than 180 days without additional rainfall, or is otherwise affected by a Commission emergency order, and drought contingency plan has been implemented by the applicant or entity to be served, 3 points; plus

(B) water supply need is anticipated to occur in an earlier decade than identified in the most recent state water plan, 1 point; plus

(C) applicant has used or applied for federal funding for emergency, 1 point; or

(D) none of the above, zero points.

(10) Projects which are ready to proceed:

(A) preliminary planning and/or design work (30 percent of project total) has been completed or is not required for the project, 3 points; plus

(B) applicant is able to begin implementing or constructing the project within 18 months of application deadline, 3 points; plus

(C) applicant has acquired all water rights associated with the project or no water rights are required for the project, 2 points; or

(D) none of the above, zero points.

(11) Entities that have demonstrated water conservation or projects which will achieve water conservation, including preventing the loss of water:

(A) for municipal projects, applicant has already demonstrated significant water conservation savings, as determined by comparing the highest rolling four-year average total gallons per capita per day within the last twenty years to the average total gallons per capita per day for the most recent four-year period based on board water use data; or significant water conservation savings will be achieved by implementing the proposed project, as determined by comparing the conservation to be achieved by the project with the average total gallons per capita per day for most recent four-year period:

(i) 2 to 5.9 percent total gallons per capita per day reduction, 2 points; or

(ii) 6 to 9.9 percent total gallons per capita per day reduction, 4 points; or

(iii) 10 to 13.9 percent total gallons per capita per day reduction, 6 points; or

(iv) 14 to 17.9 percent total gallons per capita per day reduction, 8 points; or

(v) 18 percent or greater total gallons per capita per day reduction, 10 points; or

(vi) less [Less] than 2 percent total gallons per capita per day reduction, zero points.

(B) for municipal projects, applicant has achieved the water loss threshold established by §358.6 of this title (relating to Water Loss Audits), as demonstrated by most recently submitted water loss audit:

(i) less than the threshold, 5 points; or

(ii) at or above the threshold, zero points.

(C) for wholesale water providers, applicant has already demonstrated significant water conservation savings, as determined by comparing the highest rolling four-year average total gallons per capita per day within the last twenty years to the average total gallons per capita per day for the most recent four-year period based on board water use data for customers affiliated with the application; or significant water conservation savings will be achieved by implementing the proposed project, as determined by comparing the conservation to be achieved by the project with the average total gallons per capita per day for the most recent four-year period for customers affiliated with the application.

(i) 2 to 5.9 percent total gallons per capita per day reduction, 2 points; or

(ii) 6 to 9.9 percent total gallons per capita per day reduction, 4 points; or

(iii) 10 to 13.9 percent total gallons per capita per day reduction, 6 points; or

(iv) 14 to 17.9 percent total gallons per capita per day reduction, 8 points; or

(v) 18 percent or greater total gallons per capita per day reduction, 10 points; or

(vi) less [Less] than 2 percent total gallons per capita per day reduction, zero points.

(D) for agricultural projects, significant water efficiency improvements will be achieved by implementing the proposed project, as determined by the projected percent improvement:

(i) 1 to 1.9 percent increase in water use efficiency, 1 point; or

(ii) 2 to 5.9 percent increase in water use efficiency, 3 points; or

(iii) 6 to 9.9 percent increase in water use efficiency, 6 points; or

(iv) 10 to 13.9 percent increase in water use efficiency, 9 points; or

(v) 14 to 17.9 percent increase in water use efficiency, 12 points; or

(vi) 18 percent or greater increase in water use efficiency, 15 points; or

(vii) less than 1 percent increase in water use efficiency, zero points.

(12) Priority assigned by the applicable regional water planning group within the project sponsor's primary planning region:

(A) top 80 to top 61 percent of regional project ranking, 3 points; or

(B) top 60 to top 41 percent of regional project ranking, 6 points; or

(C) top 40 to top 21 percent of regional project ranking, 9 points; or

(D) top 20 to top 11 percent of regional project ranking, 12 points; or

(E) top 10 percent of regional project ranking, 15 points; or

(F) less than 80 percent of regional project ranking, zero points.

(13) If two or more projects receive the same priority ranking, priority will be assigned based on the relative score(s) from paragraph (11) of this section. If after considering the relative scores of the projects based on the criteria of paragraph (11) of this section, then priority will be assigned based on the relative score(s) from paragraph (9) of this section.

§363.1307. Pre-design Funding Option.

(a) This loan application option will provide an eligible applicant that meets all applicable board requirements an alternative to secure a commitment and close a loan for the pre-design, design or construction costs associated with funding of a project under §363.1305 of this subchapter (relating to Use of Funds). Under this option, a loan may be closed and funds necessary to complete planning and design activities released. If planning requirements have not been satisfied, design and construction funds will be held or escrowed and released in the sequence described in this section. Following completion of planning activities and environmental assessment, the executive administrator may require the applicant to make changes in order to proceed with the project. If the portion of a project associated with funds in escrow cannot proceed, the loan recipient shall use the escrowed funds to redeem bonds purchased by the board in inverse order of maturity.

(b) Reservoir projects are eligible for a board commitment to fund planning, permitting, acquisition, and design costs under this option. Applicants for reservoir construction funds must complete planning, permitting, acquisition, and design before receiving a commitment to fund reservoir construction costs.

(c) The executive administrator may recommend to the board the use of this section if, based on available information, there appear to be no significant permitting, environmental, engineering, or financial issues associated with the project. An application for pre-design funding may be considered by the board despite a negative recommendation from the executive administrator.

(d) Applications for pre-design funding must include the following information:

(1) for loans including construction cost, preliminary engineering feasibility report, [data] which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs and budget including sources of funds; current

and future populations and projected water needs and sources; and a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project;

(2) contracts for engineering services, which may be in draft form;

(3) evidence that an approved water conservation plan will be adopted prior to closing [~~the release of loan funds~~];

(4) all information required in §363.12 of this chapter (relating to General, Legal and Fiscal Information); and

(5) any additional information the executive administrator may request to complete evaluation of the application.

(e) After board commitment and completion of all closing and release prerequisites as specified in §363.42 of this chapter (relating to Loan Closing) and §363.43 of this chapter (relating to Release of Funds), funds will be released in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase;

(2) for acquisition and design costs, after receipt of executed contracts for the design phase and upon approval of an engineering feasibility report as specified in §363.13 of this chapter (relating to Preliminary Engineering Feasibility Report [~~Data~~]) and compliance with §363.14 of this chapter (relating to Environmental Assessment); and

(3) for construction costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.

(f) The executive administrator will use preliminary environmental data provided by the applicant, as specified in subsection (d) of this section, together with information available to the executive administrator, and make a written report to the board on known or potential significant social or environmental concerns.

(g) The executive administrator will advise the board concerning projects that involve major economic or administrative impacts to the applicant resulting from environmentally related special mitigative or precautionary measures from an environmental assessment under §363.14 of this chapter.

§363.1309. Findings Required.

(a) The executive administrator shall submit the application for financing under this subchapter to the board with comments concerning financial assistance. The application will be scheduled on the agenda for board consideration at the earliest practical date. The applicant and other interested parties known to the board shall be notified on the time and place of such meeting.

(b) The board shall grant the application only if the board finds that at the time the application for financial assistance was made that:

(1) the applicant has submitted and implemented a water conservation plan in accordance with Texas Water Code §16.4021 and §363.15 of this chapter [~~§14.4274~~];

(2) the applicant satisfactorily completed a request by the executive administrator or a regional water planning group for information relevant to the project for which the financial assistance is sought, including a water infrastructure financing survey under Texas Water Code §16.053(q); and

(3) the applicant has acknowledged its legal obligation to comply with any applicable requirements of federal law relating to contracting with disadvantaged business enterprises, and any applicable

state law relating to contracting with historically underutilized businesses.

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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Ashley Harden

General Counsel

Texas Water Development Board

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For further information, please call: (512) 463-7686



CHAPTER 371. DRINKING WATER STATE REVOLVING FUND

SUBCHAPTER D. APPLICATION FOR ASSISTANCE

31 TAC §371.31

The Texas Water Development Board ("TWDB" or "board") proposes an amendment to 31 TAC §371.31, concerning Timeliness of Application and Required Application Information.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENT.

This rulemaking is proposed under the authority of the Texas Water Code §6.101 which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State. The rulemaking is proposed under the additional authority of Texas Water Code §15.605 which provides the TWDB with the authority to adopt rules necessary to carry out Chapter 15, Subchapter J.

The purpose of the proposed rule is to conform rule text with agency practice for the Drinking Water State Revolving Fund program administered by the TWDB.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Subchapter D. Application for Assistance.

§371.31 Timeliness of Application and Required Application Information.

Section 371.31(b)(2)(E) is added to require an applicant to attest that the applicant is or will become in compliance with all of its material contracts and Section 371.31(b)(2)(F) is amended to require the applicant to attest that at the time of the application and for the duration of any financial assistance provided by the TWDB, the applicant will remain in compliance with all applicable state and federal laws, rules and regulations. This change is consistent with TWDB practice.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five

years the rule is in effect, there is no expected additional cost to state or local governments resulting from the administration.

This rule is not expected to result in reductions in costs to either state or local governments. There is no change in costs for state or local governments. This rule is not expected to have any impact on state or local revenues. The rule does not require any increase in expenditures for state or local governments as a result of administering the rule. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from this rule.

Because the rule will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rule is in effect, the public will benefit from the rulemaking as it is intended to strengthen application requirements in order to facilitate financial assistance for water projects.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to strengthen application requirements in order to facilitate financial assistance for water projects.

Even if the proposed rule were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the fed-

eral government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather is proposed under the authority of Texas Water Code §15.605. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT

The board evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to strengthen application requirements in order to facilitate financial assistance for water projects. The proposed rule will advance this purpose by requiring borrowers of TWDB funds to attest that they are or will be in compliance with all of its material contracts. Further, the rule change requires borrowers of TWDB to remain in compliance with all applicable state and federal laws, rules, and regulations during the term of the financial assistance from the TWDB.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that administers financial assistance programs for water, wastewater, and flood projects.

Nevertheless, the board further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject

to the rule's applicability; or (8) positively or adversely affect this state's economy.

SUBMISSION OF COMMENTS

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. COMMENTS MUST INCLUDE REFERENCE TO CHAPTER 371 IN THE SUBJECT LINE. Comments will be accepted until 5:00 p.m. of the 31st day following publication the *Texas Register*.

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101 and §15.605.

Texas Water Code Chapter 15 is affected by this rulemaking.

§371.31. *Timeliness of Application and Required Application Information.*

(a) (No change.)

(b) Required application information. For eligible public Applicants, an application shall be in the form and number of copies prescribed by the executive administrator and, in addition to any other information that may be required by the executive administrator or the Board, the Applicant shall provide the following documentation:

(1) a resolution from its governing body that shall:

(A) request financial assistance, identifying the amount of requested assistance;

(B) designate the authorized representative to act on behalf of the governing body; and

(C) authorize the representative to execute the application, appear before the Board on behalf of the Applicant, and submit such other documentation as may be required by the executive administrator;

(2) a notarized affidavit from the authorized representative stating that:

(A) the decision to request financial assistance from the Board was made in a public meeting held in accordance with the Open Meetings Act (Texas Government Code, Chapter 551) and after providing all such notice as is required by the Open Meetings Act or, for a corporation, that the decision to request financial assistance from the Board was made in a meeting open to all customers after providing all customers written notice at least 72 hours prior to such meeting;

(B) the information submitted in the application is true and correct according to best knowledge and belief of the representative;

(C) the Applicant has no outstanding judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issues of any kind or nature by EPA, the Commission, Texas Comptroller of Public Accounts, the Utility Commission, Texas Office of the Secretary of State, or any other federal, state, or local government, that would materially affect the Applicant's ability to repay its debt, or identifying such judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issue as may be outstanding for the Applicant;

(D) the Applicant warrants compliance with the representations made in the application in the event that the Board provides the financial assistance; [and]

(E) the Applicant is, or will become, in compliance with all of its material contracts; and

(F) [(E)] the Applicant is, and will remain during the term of any financial assistance received from the board, in compliance [empty] with all applicable federal laws, rules, and regulations as well as the laws of this State and the rules and regulations of the Board;

(3) copies of the following project documents:

(A) any draft or executed contracts for consulting services to be used by the Applicant in applying for financial assistance or constructing the proposed project, including but not limited to, financial advisor, engineer, and bond counsel; and

(B) contracts for engineering services should include the scope of services, level of effort, costs, project schedules, and other information necessary for adequate review by the executive administrator. A project schedule shall be provided with the contract; the schedule must provide firm timelines for the completion of each phase of a project and note the milestones within the phase of the project;

(4) a citation to the specific legal authority in the Texas Constitution and statutes under which the Applicant is authorized to provide the service for which the Applicant is receiving financial assistance as well as the legal documentation identifying and establishing the legal existence of the Applicant;

(5) if the Applicant provides or will provide wastewater service to another service provider, or receives such service from another service provider, the proposed agreement, contract, or other documentation which legally establishes such service relationship, with the final and binding agreements provided prior to closing;

(6) documentation of the ownership interest, with supporting legal documentation, for the property on which the proposed project shall be located, or if the property is to be acquired, certification that the Applicant has the necessary legal power and authority to acquire the property;

(7) if financing of the project will require a contractual loan agreement or the sale of bonds to the Board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts, for a duration specified by the executive administrator, under which the Applicant's gross income is expected to accrue. Before the financial assistance is closed, an Applicant shall submit executed copies of such contracts to the executive administrator;

(8) if the bonds to be sold to the Board are revenue bonds secured by a subordinate lien, a copy of the authorizing instrument of the governing body for all prior and outstanding bonds shall be furnished;

(9) if a bond election is required by law to authorize the issuance of bonds to finance the project, the executive administrator may require Applicant to provide the election date and election results necessary for the issuance of the bonds as part of the application or prior to closing;

(10) an audit of the Applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant, unless an alternative method of establishing a reliable accounting of the financial records of the Applicant is approved by the executive administrator; and

(11) a listing of all the funds used for the project, including funds already expended from sources other than financial assistance offered from the Board, such as from participating local government entities or prior-issued debt.

(12) Preliminary Engineering Feasibility Report signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, must provide:

- (A) a description and purpose of the project;
- (B) the entities to be served and current and future population;
- (C) the cost of the project;
- (D) a description of alternatives considered and reasons for the selection of the project proposed;
- (E) sufficient information to evaluate the engineering feasibility of the project;
- (F) maps and drawings as necessary to locate and describe the project area; and
- (G) any other information the executive administrator determines is necessary to evaluate the project.

(c) (No change.)

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

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Ashley Harden

General Counsel

Texas Water Development Board

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For further information, please call: (512) 463-7686



CHAPTER 375. CLEAN WATER STATE REVOLVING FUND

SUBCHAPTER D. APPLICATION FOR ASSISTANCE

31 TAC §375.41

The Texas Water Development Board ("TWDB" or "board") proposes an amendment to 31 TAC §375.41.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENT.

This rulemaking is proposed under the authority of the Texas Water Code §6.101 which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State. The rulemaking is proposed under the additional authority of Texas Water Code §15.605 which provides the TWDB with the authority to adopt rules necessary to carry out Chapter 15, Subchapter J.

The purpose of the proposed rule is to conform rule text with agency practice for the Clean Water State Revolving Fund program administered by the TWDB.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Subchapter D. Application for Assistance.

§375.41 Timeliness of Application and Required Application Information.

Section 375.41(b)(2)(E) is added to require an applicant to attest that the applicant is or will become in compliance with all of its material contracts and Section 375.41(b)(2)(F) is amended to require the applicant to attest that at the time of the application and for the duration of any financial assistance provided by the TWDB, the applicant will remain in compliance with all applicable state and federal laws, rules and regulations. This change is consistent with TWDB practice.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years the rule is in effect, there is no expected additional cost to state or local governments resulting from the administration.

This rule is not expected to result in reductions in costs to either state or local governments. There is no change in costs for state or local governments. This rule is not expected to have any impact on state or local revenues. The rule does not require any increase in expenditures for state or local governments as a result of administering the rule. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from this rule.

Because the rule will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rule is in effect, the public will benefit from the rulemaking as it is intended to strengthen application requirements in order to facilitate financial assistance for wastewater projects.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the envi-

ronment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to strengthen application requirements in order to facilitate financial assistance for wastewater projects.

Even if the proposed rule were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather is proposed under the authority of Texas Water Code §15.605. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT

The board evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to strengthen application requirements in order to facilitate financial assistance for wastewater projects. The proposed rule will advance this purpose by requiring borrowers of TWDB funds to attest that they are or will be in compliance with all of its material contracts. Further, the rule change requires borrowers of TWDB to remain in compliance with all applicable state and federal laws, rules, and regulations during the term of the financial assistance from the TWDB.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that administers financial assistance programs for water, wastewater, and flood projects.

Nevertheless, the board further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and re-

duce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

SUBMISSION OF COMMENTS

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. COMMENTS MUST INCLUDE REFERENCE TO CHAPTER 371 IN THE SUBJECT LINE. Comments will be accepted until 5:00 p.m. of the 31st day following publication the *Texas Register*.

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §§6.101 and 15.605.

Texas Water Code Chapter 15 is affected by this rulemaking.

§375.41. Timeliness of Application and Required Application Information.

(a) (No change.)

(b) Required application information. For eligible public Applicants, an application shall be in the form and number of copies prescribed by the executive administrator and, in addition to any other information that may be required by the executive administrator or the Board, the Applicant shall provide the following documentation:

(1) a resolution from its governing body that shall:

(A) request financial assistance, identifying the amount of requested assistance;

(B) designate the authorized representative to act on behalf of the governing body; and

(C) authorize the representative to execute the application, appear before the Board on behalf of the Applicant, and submit such other documentation as may be required by the executive administrator;

(2) a notarized affidavit from the authorized representative stating that:

(A) the decision to request financial assistance from the Board was made in a public meeting held in accordance with the Open Meetings Act (Texas Government Code, Chapter 551) and after providing all such notice as is required by the Open Meetings Act or, for a corporation, that the decision to request financial assistance from the Board was made in a meeting open to all customers after providing all customers written notice at least 72 hours prior to such meeting;

(B) the information submitted in the application is true and correct according to best knowledge and belief of the representative;

(C) the Applicant has no outstanding judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issues of any kind or nature by EPA, the Commission, Texas Comptroller of Public Accounts, the Utility Commission, Texas Office of the Secretary of State, or any other federal, state, or local government, that would materially affect the Applicant's ability to repay its debt, or identifying such judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issue as may be outstanding for the Applicant;

(D) the Applicant warrants compliance with the representations made in the application in the event that the Board provides the financial assistance; [and]

(E) the Applicant is, or will become, in compliance with all of its material contracts; and

(F) ~~[(E)]~~ the Applicant is, and will remain during the term of any financial assistance received from the board, in compliance ~~[eomply]~~ with all applicable federal laws, rules, and regulations as well as the laws of this State and the rules and regulations of the Board;

(3) copies of the following project documents:

(A) any draft or executed contracts for consulting services to be used by the Applicant in applying for financial assistance or constructing the proposed project, including but not limited to, financial advisor, engineer, and bond counsel; and

(B) contracts for engineering services should include the scope of services, level of effort, costs, project schedules, and other information necessary for adequate review by the executive administrator. A project schedule shall be provided with the contract; the schedule must provide firm timelines for the completion of each phase of a project and note the milestones within the phase of the project;

(4) a citation to the specific legal authority in the Texas Constitution and statutes under which the Applicant is authorized to provide the service for which the Applicant is receiving financial assistance as well as the legal documentation identifying and establishing the legal existence of the Applicant;

(5) if the Applicant provides or will provide wastewater service to another service provider, or receives such service from another service provider, the proposed agreement, contract, or other documentation which legally establishes such service relationship, with the final and binding agreements provided prior to closing;

(6) documentation of the ownership interest, with supporting legal documentation, for the property on which the proposed project shall be located, or if the property is to be acquired, certification that the Applicant has the necessary legal power and authority to acquire the property;

(7) if financing of the project will require a contractual loan agreement or the sale of bonds to the Board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts, for a duration specified by the executive administrator, under which the Applicant's gross income is expected to accrue. Before the financial assistance is closed, an Applicant shall submit executed copies of such contracts to the executive administrator;

(8) if the bonds to be sold to the Board are revenue bonds secured by a subordinate lien, a copy of the authorizing instrument of the governing body for all prior and outstanding bonds shall be furnished;

(9) if a bond election is required by law to authorize the issuance of bonds to finance the project, the executive administrator may require Applicant to provide the election date and election results necessary for the issuance of the bonds as part of the application or prior to closing;

(10) an audit of the Applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant, unless an alternative method of establishing a reliable accounting of the financial records of the Applicant is approved by the executive administrator; and

(11) a listing of all the funds used for the project, including funds already expended from sources other than financial assistance offered from the Board, such as from participating local government entities or prior-issued debt.

(12) Preliminary Engineering Feasibility Report signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, must provide:

(A) a description and purpose of the project;

(B) the entities to be served and current and future population;

(C) the cost of the project;

(D) a description of alternatives considered and reasons for the selection of the project proposed;

(E) sufficient information to evaluate the engineering feasibility of the project;

(F) maps and drawings as necessary to locate and describe the project area; and

(G) any other information the executive administrator determines is necessary to evaluate the project.

(c) (No change.)

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

Filed with the Office of the Secretary of State on November 20, 2020.

TRD-202004926

Ashley Harden

General Counsel

Texas Water Development Board

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 463-7686



TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION SUBCHAPTER V. FRANCHISE TAX

34 TAC §3.586

The Comptroller of Public Accounts proposes amendments to §3.586, concerning margin: nexus, in response to the United States Supreme Court decision in *South Dakota v. Wayfair, Inc.*, 139 S. Ct. 2080 (2018).

The comptroller amends subsection (d)(12)(B) to improve readability and replace the phrase "is not doing business" with "does not have physical presence". The amendment is necessary because although we do not consider a limited partner to have physical presence in Texas when its limited partnership is doing business in Texas, the limited partner may be doing business in Texas under our economic nexus provision in subsection (f).

The comptroller amends subsection (e) to add guidance concerning the beginning date of a foreign taxable entity that overcomes the nexus presumption.

The comptroller reorganizes subsection (f) into two paragraphs. The comptroller moves the current language of subsection (f) to paragraph (1) and amends the reference to §3.591, concerning margin: apportionment, to more specifically reference the sourcing information provided in subsections (e) and (f) of that section. The comptroller adds paragraph (2) to include a definition of gross receipts, derived from Texas Tax Code §171.1121 (Gross Receipts For Margin).

The comptroller reorganizes and adds language to subsection (g) relating to the beginning date for nexus. Paragraph (1) adds language outlining the beginning date for nexus of a foreign taxable entity prior to January 1, 2019. The comptroller corrects the reference to the physical presence subsection from subsection (c) to (d). The comptroller amends paragraph (2) to provide more guidance relating to the beginning date of a foreign taxable entity on or after January 1, 2019. Paragraph (3) becomes the new subparagraph (C). In subparagraphs (A) - (C) a foreign taxable entity's beginning date is the earliest of: the date the foreign taxable entity has physical presence, the date when the foreign taxable entity obtains a Texas use tax permit, or the date the foreign taxable entity had gross receipts from business done in Texas of \$500,000 or more.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed amendments are in effect, the rules: 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 for each year of the first five years the rule is in effect, the proposed amended rule would benefit the public by updating the rule to more clearly state comptroller interpretation of statute. The proposed amendments would have no fiscal implication for the state government, units of local government, small businesses or individuals. There would be no significant anticipated economic cost to the public. The proposed amended rule would have no fiscal impact on small businesses or rural communities.

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

This amendment is proposed under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to prescribe adopt, and enforce rules relating to the administration and enforcement of the provision of Tax Code, Title 2.

This amendment implements the United States Supreme Court decision in *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018).

§3.586. *Margin: Nexus.*

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008, unless otherwise noted.

(b) Foreign taxable entity. A taxable entity that is not chartered or organized in Texas.

(c) Nexus. A taxable entity is subject to Texas franchise tax when it has sufficient contact with this state to be taxed without violating the United States Constitution. Nexus is determined on an individual taxable entity level.

(d) Physical presence. Some specific activities that subject a taxable entity to Texas franchise tax include, but are not limited to, the following:

(1) advertising: entering Texas to purchase, place, or display advertising when the advertising is for the benefit of another and in the ordinary course of business (e.g., the foreign taxable entity makes signs and brings them into Texas, sets them up, and maintains them);

(2) consignments: having consigned goods in Texas;

(3) contracting: performance of a contract in Texas regardless of whether the taxable entity brings its own employees into the state, hires local labor, or subcontracts with another;

(4) delivering: delivering into Texas items it has sold;

(5) employees or representatives: having employees or representatives in Texas doing the business of the taxable entity;

(6) federal enclaves: doing business in any area within Texas, even if the area is leased by, owned by, ceded to, or under the control of the federal government;

(7) franchisors: entering into one or more contracts with persons, corporations, or other business entities located in Texas, by which:

(A) the franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by the franchisor; and

(B) the operation of a franchisee's business pursuant to such plan is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate.

(8) holding companies: maintaining a place of business in Texas or managing, directing, and/or performing services in Texas for subsidiaries or investee entities;

(9) inventory: having an inventory in Texas or having spot inventory for the convenient delivery to customers, even if the bulk of orders are filled from out of state;

(10) leasing: leasing tangible personal property which is used in Texas;

(11) loan production activities: soliciting sales contracts or loans, gathering financial data, making credit checks, collecting ac-

counts, repossessing property or performing other financial activities in Texas through employees, independent contractors, or agents, regardless of whether they reside in Texas;

(12) partners:

(A) acting as a general partner in a general partnership that [which] is doing business in Texas;

(B) acting as a general partner in a limited partnership that [which] is doing business in Texas (a foreign taxable entity that [which] is a limited partner in a limited partnership does not have physical presence [is not doing business] in Texas, if that is the limited partner's only connection with Texas);

(13) place of business: maintaining a place of business in Texas;

(14) processing: assembling, processing, manufacturing, or storing goods in Texas;

(15) real estate: holding, acquiring, leasing, or disposing of any property located in Texas;

(16) services, including, but not limited to the following:

(A) providing any service in Texas, regardless of whether the employees, independent contractors, agents, or other representatives performing the services reside in Texas;

(B) maintaining or repairing property located in Texas whether under warranty or by separate contract;

(C) installing, erecting, or modifying property in Texas;

(D) conducting training classes, seminars or lectures in Texas;

(E) providing any kind of technical assistance in Texas, including, but not limited to, engineering services; or

(F) investigating, handling or otherwise assisting in resolving customer complaints in Texas.

(17) shipment: sending materials to Texas to be stored awaiting orders for their shipment;

(18) shows and performances: the staging of or participating in shows, theatrical performances, sporting events, or other events within Texas;

(19) solicitation: having employees, independent contractors, agents, or other representatives in Texas, regardless of whether they reside in Texas, to promote or induce sales of the foreign taxable entity's goods or services;

(20) telephone listing: having a telephone number that is answered in Texas; or

(21) transportation:

(A) carrying passengers or freight (any personal property including oil and gas transmitted by pipeline) from one point in Texas to another point within the state, if pickup and delivery, regardless of origination or ultimate destination, occurs within Texas; or

(B) having facilities and/or employees, independent contractors, agents, or other representatives in Texas, regardless of whether they reside in Texas:

(i) for storage, delivery, or shipment of goods;

(ii) for servicing, maintaining, or repair of vehicles, trailers, containers, and other equipment;

(iii) for coordinating and directing the transportation of passengers or freight; or

(iv) for doing any other business of the taxable entity.

(e) Texas use tax permit. A foreign taxable entity with a Texas use tax permit is presumed to have nexus in Texas and is subject to Texas franchise tax. If the entity has overcome this presumption, the beginning date is determined under subsection (g)(2)(A) or (C).

(f) Economic nexus.

(1) For each federal income tax accounting period ending in 2019 or later, a foreign taxable entity has nexus in Texas and is subject to Texas franchise tax, even if it has no physical presence in Texas, if during that federal income tax accounting period, it had gross receipts from business done in Texas of \$500,000 or more, as sourced [determined] under §3.591(e) and (f) of this title (relating to Margin: Apportionment).

(2) For purposes of this subsection, gross receipts means all revenue reportable by a taxable entity on its federal return, without deduction for the cost of property sold, materials used, labor performed, or other costs incurred.

(g) Beginning date. [A foreign taxable entity begins doing business in the state on the earliest of:]

(1) Prior to Jan. 1, 2019, a foreign taxable entity begins doing business in Texas on the date the entity has physical presence [nexus] as described in subsection (d) [(e)] of this section.[;]

(2) On or after Jan. 1, 2019, a foreign taxable entity begins doing business in Texas on the earliest of: [the date the entity obtains a Texas use tax permit; or]

(A) the date the entity has physical presence as described in subsection (d) of this section;

(B) the date the entity obtains a Texas use tax permit if obtained on or after Jan. 1, 2019 or Jan. 1, 2019, if the entity obtained a use tax permit prior to that date; or

(C) [(3)] the first day of the federal income tax accounting period ending in 2019 or later in which the entity had gross receipts from business done in Texas [in excess] of \$500,000 or more.

(h) Trade shows. See §3.583 of this title (relating to Margin: Exemptions) for information concerning exemption for certain trade show participants under Tax Code, §171.084.

(i) Public Law 86-272. Public Law 86-272 (15 United States Code §§381 - 384) does not apply to the Texas franchise tax.

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 20, 2020.

TRD-202004929

William Hamner

Special Counsel for Tax Administration

Comptroller of Public Accounts

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 475-2220

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 421. STANDARDS FOR CERTIFICATION

37 TAC §421.17

The Texas Commission on Fire Protection (commission) proposes amendments to 37 Texas Administrative Code Chapter 421, Standards For Certification, concerning §421.17, Requirement to Maintain Certification.

BACKGROUND AND PURPOSE

The purpose of the proposed amendments to rule §429.17(f) is to remove obsolete rule language that required all certificate holders to be subjected to the requirements in the repealed statute, Texas Education Code, §57.491 regarding license renewal and default on student loans.

FISCAL NOTE IMPACT ON STATE AND LOCAL GOVERNMENT

Michael Wisko, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no significant fiscal impact to state government or local governments as a result of enforcing or administering these amendments as proposed under Texas Government Code §2001.024(a)(4).

PUBLIC BENEFIT AND COST NOTE

Mr. Wisko has also determined under Texas Government Code §2001.024(a)(5) that for each year of the first five years the amendments are in effect the public benefit will be more accurate, clear, and concise rules regarding certification requirements.

LOCAL ECONOMY IMPACT STATEMENT

There is no anticipated effect on the local economy for the first five years that the proposed new section is in effect; therefore, no local employment impact statement is required under Texas Government Code §2001.022 and 2001.024(a)(6).

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

Mr. Wisko has determined there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments. Therefore, no economic impact statement or regulatory flexibility analysis, as provided by Texas Government Code §2006.002, is required.

GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined under Texas Government Code §2006.0221 that during the first five years the amendments are in effect:

- (1) the rules will not create or eliminate a government program;
- (2) the rules will not create or eliminate any existing employee positions;
- (3) the rules will not require an increase or decrease in future legislative appropriation;

(4) the rules will not result in a decrease in fees paid to the agency;

(5) the rules will not create a new regulation;

(6) the rules will not expand a regulation;

(7) the rules will not increase the number of individuals subject to the rule; and

(8) the rules are not anticipated to have an adverse impact on the state's economy.

TAKINGS IMPACT ASSESSMENT

The commission has determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Texas Government Code §2007.043.

COSTS TO REGULATED PERSONS

The proposed amendments do not impose a cost on regulated persons, including another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code §2001.0045.

ENVIRONMENTAL IMPACT STATEMENT

The commission has determined that the proposed amendments do not require an environmental impact analysis because the amendments are not major environmental rules under Texas Government Code §2001.0225.

REQUEST FOR PUBLIC COMMENT

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register*, to Michael Wisko, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to deborah.cowan@tcfp.texas.gov.

STATUTORY AUTHORITY

The amended rule is proposed under Texas Government Code, §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission. The rule is also proposed under Texas Government Code §419.032, which authorizes the commission to adopt rules establishing the qualifications of fire protection personnel.

CROSS REFERENCE TO STATUTE

No other statutes, articles, or codes are affected by these amendments.

§421.17. Requirement to Maintain Certification.

(a) All full-time or part-time employees of a fire department or local government assigned duties identified as fire protection personnel duties must maintain certification by the commission in the discipline(s) to which they are assigned for the duration of their assignment.

(b) In order to maintain the certification required by this section, the certificate(s) of the employees must be renewed annually by complying with §437.5 of this title (relating to Renewal Fees) and Chapter 441 of this title (relating to Continuing Education) of the commission standards manual.

(c) Except for subsection (d) of this section, an individual whose certificate has been expired for one year or longer may not renew the certificate previously held. To obtain a new certification,

an individual must meet the requirements in Chapter 439 of this title (relating to Examinations for Certification).

(d) A military service member whose certificate has been expired for three years or longer may not renew the certificate previously held. To obtain a new certification, the person must meet the requirements in Chapter 439 of this title (relating to Examinations for Certification). In order to qualify for this provision, the individual must have been a military service member at the time the certificate expired and continued in that status for the duration of the three-year [three year] period.

(e) The commission will provide proof of current certification to individuals whose certification has been renewed.

~~{(f) All certificate holders are subject to the requirements of §57.491 of the Texas Education Code regarding license renewal and default on student loans.}~~

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 18, 2020.

TRD-202004856

Michael Wisko

Executive Director

Texas Commission on Fire Protection

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 936-3812



CHAPTER 429. FIRE INSPECTOR AND PLAN EXAMINER

SUBCHAPTER B. MINIMUM STANDARDS FOR PLAN EXAMINER

37 TAC §429.201

The Texas Commission on Fire Protection (commission) proposes amendments to 37 Texas Administrative Code Chapter 429, Fire Inspector and Plan Examiner, Subchapter B, Minimum Standards For Plan Examiner, concerning §429.201, Minimum Standards for Plan Examiner Personnel.

BACKGROUND AND PURPOSE

The purpose of the proposed amendments to rule §429.201 is to remove the "grandfathering" provision from rule language for Fire Inspector and Plan Examiner that expired on September 1, 2020. Without the Special Temporary Provision in this rule, all individuals seeking a Plan Examiner certification will be required to comply with the minimum standards for Plan Examiner I certification in this subchapter.

FISCAL NOTE IMPACT ON STATE AND LOCAL GOVERNMENT

Michael Wisko, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no significant fiscal impact to state government or local governments as a result of enforcing or administering these amendments as proposed under Texas Government Code §2001.024(a)(4) because this certification is a voluntary certification.

PUBLIC BENEFIT AND COST NOTE

Mr. Wisko has also determined under Texas Government Code §2001.024(a)(5) that for each year of the first five years the amendments are in effect the public benefit will be more accurate, clear and concise rules regarding obtaining Plan Examiner certification.

LOCAL ECONOMY IMPACT STATEMENT

There is no anticipated effect on the local economy for the first five years that the proposed amendments are in effect because this is a voluntary certification; therefore, no local employment impact statement is required under Texas Government Code §2001.022 and 2001.024(a)(6).

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

Mr. Wisko has determined there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments because this is a voluntary certification therefore, no economic impact statement or regulatory flexibility analysis, as provided by Texas Government Code §2006.002 is required.

GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined under Texas Government Code §2006.0221 that during the first five years the amendments are in effect:

- (1) the rules will not create or eliminate a government program;
- (2) the rules will not create or eliminate any existing employee positions;
- (3) the rules will not require an increase or decrease in future legislative appropriation;
- (4) the rules will not result in a decrease in fees paid to the agency;
- (5) the rules will not create a new regulation;
- (6) the rules will not expand a regulation;
- (7) the rules will not increase the number of individuals subject to the rule; and
- (8) the rules are not anticipated to have an adverse impact on the state's economy.

TAKINGS IMPACT ASSESSMENT

The commission has determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Texas Government Code §2007.043.

COSTS TO REGULATED PERSONS

The proposed amendments do not impose a cost on regulated persons, including another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code §2001.0045.

ENVIRONMENTAL IMPACT STATEMENT

The commission has determined that the proposed amendments do not require an environmental impact analysis because

the amendments are not major environmental rules under Texas Government Code §2001.0225.

REQUEST FOR PUBLIC COMMENT

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register*, to Michael Wisko, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to deborah.cowan@tcfp.texas.gov.

STATUTORY AUTHORITY

The amended rule is proposed under Texas Government Code §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission. The rule is also proposed under Texas Government Code §419.032, which authorizes the commission to adopt rules establishing the qualifications of fire protection personnel.

CROSS REFERENCE TO STATUTE

No other statutes, articles, or codes are affected by these amendments.

§429.201. *Minimum Standards for Plan Examiner Personnel.*

[(a)] Plan examiner duties are defined as the review of building or other structure plans for the purpose of determining compliance with adopted fire codes and standards.

[(b)] *Special temporary provision.* Individuals are eligible to apply for Plan Examiner certification if they hold an active Fire Inspector certification and any of the following criteria is met:}]

[(1) the individual passed the Plan Examiner section of a Fire Inspector exam at any time; or]

[(2) the individual is or has been assigned to plan review duties with a local jurisdiction. Verification of plan review duties must be in the form of a letter from the head of the plan review program for the jurisdiction; or]

[(3) the individual is or has served as an instructor for a Fire Inspector training program approved by the commission for Fire Inspector certification. Verification of instructor duties must be in the form of a letter from the head of the department if the training program is part of a suppression or prevention department, or the chief training officer if the program is not a part of a suppression or prevention department.}]

[(4) This subsection will expire on September 1, 2020.}]

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 18, 2020.

TRD-202004857

Michael Wisko

Executive Director

Texas Commission on Fire Protection

Earliest possible date of adoption: January 3, 2021

For further information, please call: (512) 936-3812



CHAPTER 435. FIRE FIGHTER SAFETY

37 TAC §435.1

The Texas Commission on Fire Protection (commission) proposes amendments to 37 Texas Administrative Code, Chapter 435, Fire Fighter Safety, concerning §435.1, Protective Clothing.

BACKGROUND AND PURPOSE

The purpose of the proposed amendments to rule §435.1 is to remove the requirement for fire departments to submit their Standard Operating Procedures (SOP) annually to the commission. Because the SOPs are reviewed during inspections and investigations by agency compliance officers, they only need to be provided upon request. This amendment will remove an unnecessary administrative burden from regulated entities.

FISCAL NOTE IMPACT ON STATE AND LOCAL GOVERNMENT

Michael Wisko, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no significant fiscal impact to state government or local governments as a result of enforcing or administering these amendments as proposed under Texas Government Code §2001.024(a)(4).

PUBLIC BENEFIT AND COST NOTE

Mr. Wisko has also determined under Texas Government Code §2001.024(a)(5) that for each year of the first five years the amendments are in effect the public benefit will be more accurate, clear, and concise rules regarding protective clothing requirements.

LOCAL ECONOMY IMPACT STATEMENT

There is no anticipated effect on the local economy for the first five years that the proposed amendments are in effect; therefore, no local employment impact statement is required under Texas Government Code §2001.022 and 2001.024(a)(6).

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

Mr. Wisko has determined there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments; therefore, no economic impact statement or regulatory flexibility analysis, as provided by Texas Government Code §2006.002 is required.

GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined under Texas Government Code §2006.0221 that during the first five years the amendments are in effect:

- (1) the rules will not create or eliminate a government program;
- (2) the rules will not create or eliminate any existing employee positions;
- (3) the rules will not require an increase or decrease in future legislative appropriation;
- (4) the rules will not result in a decrease in fees paid to the agency;
- (5) the rules will not create a new regulation;
- (6) the rules will not expand a regulation;
- (7) the rules will not increase the number of individuals subject to the rule; and

(8) the rules are not anticipated to have an adverse impact on the state's economy.

TAKINGS IMPACT ASSESSMENT

The commission has determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Texas Government Code §2007.043.

COSTS TO REGULATED PERSONS

The proposed amendments do not impose a cost on regulated persons, including another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code §2001.0045.

ENVIRONMENTAL IMPACT STATEMENT

The commission has determined that the proposed amendments do not require an environmental impact analysis because the amendments are not major environmental rules under Texas Government Code §2001.0225.

REQUEST FOR PUBLIC COMMENT

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register*, to Michael Wisko, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to deborah.cowan@tcfp.texas.gov.

STATUTORY AUTHORITY

The amended rule is proposed under Texas Government Code §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission. The rule is also proposed under Texas Government Code §419.032 which authorizes the commission to adopt rules establishing the qualifications of fire protection personnel.

CROSS REFERENCE TO STATUTE

No other statutes, articles, or codes are affected by these amendments.

§435.1. Protective Clothing.

(a) A regulated fire department shall:

(1) purchase, provide, and maintain a complete set of protective clothing for all fire protection personnel who would be exposed to hazardous conditions from fire or other emergencies or where the potential for such exposure exists. A complete set of protective clothing shall consist of garments including bunker coats, bunker pants, boots, gloves, helmets, and protective hoods, worn by fire protection personnel in the course of performing fire-fighting operations;

(2) ensure that all protective clothing which are used by fire protection personnel assigned to fire suppression duties comply with the minimum standards of the National Fire Protection Association suitable for the tasks the individual is expected to perform. The National Fire Protection Association standard applicable to protective clothing is the standard in effect at the time the entity contracts for new, rebuilt, or used protective clothing; and

(3) maintain, provide to the commission [annually and/or] upon request, and comply with a departmental standard operating procedure regarding the use, selection, care, and maintenance of protective clothing which complies with NFPA 1851, Standard on Selection,

Care, and Maintenance of Structural Fire Fighting Protective Ensembles.

(b) [(4)] To ensure that protective clothing for fire protection personnel continues to be suitable for assigned tasks, risk assessments conducted in accordance with NFPA 1851 shall be reviewed and revised as needed, but in any case, not more than five years following the date of the last risk assessment.

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 18, 2020.

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Michael Wisko

Executive Director

Texas Commission on Fire Protection

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For further information, please call: (512) 936-3812



CHAPTER 445. ADMINISTRATIVE INSPECTIONS AND PENALTIES

37 TAC §§445.7, 445.9, 445.11, 445.13, 445.15

The Texas Commission on Fire Protection (commission) proposes amendments to 37 Texas Administrative Code Chapter 445, Administrative Inspections and Penalties, concerning §445.7, Procedures; §445.9, Procedure for Violation; §445.11, Minor Violations; §445.13, Disciplinary Hearings; and §445.15, Judicial Enforcement.

BACKGROUND AND PURPOSE

The purpose of the proposed amendments to Chapter 445, §§445.7, 445.9, 445.11, 445.13 and 445.15, is to clarify the minor and major penalties for non-compliance with commission rules by fire departments when an inspection is conducted. The amendments and new sections will also bring the agency into compliance with Texas Government Code §419.906 as well as the 2009 Sunset Recommendations.

FISCAL NOTE IMPACT ON STATE AND LOCAL GOVERNMENT

Michael Wisko, Executive Director, has determined that for each year of the first five-year period the proposed amendments and new sections are in effect, there will be no significant fiscal impact to state government or local governments as a result of enforcing or administering these amendments and new sections as proposed under Texas Government Code §2001.024(a)(4).

PUBLIC BENEFIT AND COST NOTE

Mr. Wisko has also determined under Texas Government Code §2001.024(a)(5) that for each year of the first five years the amendments and new sections are in effect the public benefit will be more accurate, clear, and concise rules regarding penalties for violations found during an inspection of fire departments.

LOCAL ECONOMY IMPACT STATEMENT

There is no anticipated effect on the local economy for the first five years that the proposed amendments and new sections are in effect; therefore, no local employment impact statement

is required under Texas Government Code §2001.022 and 2001.024(a)(6).

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

Mr. Wisko has determined there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments and new sections, therefore, no economic impact statement or regulatory flexibility analysis, as provided by Texas Government Code §2006.002, is required.

GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined under Texas Government Code §2006.0221 that during the first five years the amendments and new sections are in effect:

- (1) the rules will not create or eliminate a government program;
- (2) the rules will not create or eliminate any existing employee positions;
- (3) the rules will not require an increase or decrease in future legislative appropriation;
- (4) the rules will not result in a decrease in fees paid to the agency;
- (5) the rules will not create a new regulation;
- (6) the rules will not expand a regulation;
- (7) the rules will not increase the number of individuals subject to the rule; and
- (8) the rules are not anticipated to have an adverse impact on the state's economy.

TAKINGS IMPACT ASSESSMENT

The commission has determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Texas Government Code §2007.043.

COSTS TO REGULATED PERSONS

The proposed amendments and new sections do not impose a cost on regulated persons, including another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code §2001.0045.

ENVIRONMENTAL IMPACT STATEMENT

The commission has determined that the proposed amendments and new sections do not require an environmental impact analysis because the amendments are not major environmental rules under Texas Government Code §2001.0225.

REQUEST FOR PUBLIC COMMENT

Comments regarding the proposed amendments and new sections may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register*, to Michael Wisko, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to deborah.cowan@tcfp.texas.gov.

STATUTORY AUTHORITY

The amended rules and new sections are proposed under Texas Government Code §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission. The rules are also proposed under Texas Government Code §419.047 which authorizes the commission to adopt rules to enforce §§419.040, 419.041, 419.042, 419.043, 419.044, 419.045 and 419.046.

CROSS REFERENCE TO STATUTE

No other statutes, articles, or codes are affected by these amendments and new sections.

§445.7. *Procedures.*

(a) The inspector shall, if possible, notify the current or acting, on duty and available, department head of the inspector's presence at the department and his intention to conduct a departmental inspection.

(b) During the course of the inspection, any noncompliance with state law or commission rule shall be noted. Violations shall be determined to be either minor or major violations based upon the following guidelines.

(1) Minor violations shall be defined as those violations which the inspector determines do not pose a serious threat to personnel safety due to lack of personnel protection equipment or training, are not widespread, or are not repeat violations of the same nature for which the entity was cited within the previous five years.

(2) Major violations shall be defined as those violations which in the inspector's opinion constitute higher potential [an immediate] threat to personnel safety, flagrant or repeated violations in the same or similar areas, fraud, or obvious attempts to circumvent state law or commission rule. [A major violation may be as follows but not limited to a deficiency or safety issue involving protective clothing, a self-contained breathing apparatus, personal alert safety systems, breathing air, or other matter that in the inspector's judgment presents an immediate and significant risk of injury.]

(c) In order to determine compliance with commission requirements pertaining to a particular item, the inspector may examine as many items of protective clothing and equipment deemed necessary by the inspector.

§445.9. *Minor [Procedure for] Violations.*

[(a) Findings of only minor violations.] If during the course of a departmental inspection the inspector determines the department has committed [only] minor violations, the following procedures shall apply[procedure applies].

(1) The inspector shall issue a notice of minor violations identifying [an inspectors report which will identify] the findings from the compliance inspection. [The inspector's report is a written summary of an inspector's findings that is given to an inspected entity after an inspection. In cases of minor violations, the inspector's report may identify deficiencies and prescribe corrective action within specific timeframes.]

(2) The department then has 30 calendar days from the date the notice of alleged violations [inspector's report] is received to provide the commission with an acceptable corrective action plan [a written schedule of actions] that will be taken to correct the minor violations. The schedule of actions in the plan will allow necessary amounts of time for such things as obtaining items through city requisitions and bid processes, when necessary. Lack of funds is not an acceptable reason for delay.

(3) If the department fails to [timely] provide an acceptable plan for obtaining compliance or does not request a hearing, the department may be:[written schedule of actions for obtaining compliance;

the inspector or compliance officer may issue a notice of alleged violation. The notice of alleged violation is a written document that briefly summarizes the alleged violation(s), and requires the person to correct the violation(s). The notice may also prescribe a specific time period to rectify the matter and achieve compliance, and assess an administrative penalty. If an administrative penalty is assessed, the notice shall state the amount of the penalty. The notice shall also inform the person of the person's right to an informal staff conference and that if the person fails to timely correct the alleged violation or fails to request a preliminary staff conference before the 61st day after receipt of the notice, the commission may issue a default order. In addition, the notice of alleged violation may:]

(A) allowed[allow] extra time to come into compliance;

(B) assessed appropriate penalties[assess administrative penalties], which may be probated or prorated and may include suspension of certificates, administrative penalties, hearing costs, and attorney fees[prorated];

(C) required to furnish proof of compliance.[suspend or revoke licenses or certificates; and]

{(D) require proof of compliance.}

{(b) Findings of major violations. If during the course of a departmental inspection the inspector determines the department has committed a major violation; the following procedure applies.}

{(1) The inspector or compliance officer shall issue a notice of alleged violation. The notice shall identify the violations and require the department or provider to correct the violation. In addition; the notice of alleged violation may:}

{(A) specify a time period to achieve compliance;}

{(B) assess administrative penalties;}

{(C) suspend or revoke licenses or certificates; and}

{(D) require proof of compliance.}

{(2) In addition to any of the above, the commission may also temporarily suspend a person's or regulated entity's certificate on a determination by a panel of the commission that continued activity by the person or entity would present an immediate threat to the public, regulated personnel, or fire service trainees; and seek an injunction in a district court in Travis County along with civil penalties, court costs, and attorney's fees. See Tex. Gov't Code §419.906(a); (d).}

{(c) If a fire department or training provider fails to correct the alleged violation in a timely manner or fails to request a preliminary staff conference (information settlement conference) before the 61st day after the date it receives a notice of alleged violation; the commission through its executive director may issue a default order.}

{(d) When determining administrative penalties for a notice of alleged violation or default order the following factors shall be considered:}

{(1) compliance history;}

{(2) seriousness of the violation;}

{(3) the safety threat to the public or fire personnel;}

{(4) any mitigating factors; and}

{(5) any other factors the commission considers appropriate.}

{(e) If the fire department or training provider timely requests a preliminary staff conference (informal settlement conference), the procedures in Chapter 401, Subchapter E apply, and if the preliminary

staff conference does not result in approval of a consent order the matter shall be referred for a contested case hearing.}

§445.11. Major Violations.

If during the course of a departmental inspection the inspector determines the department has committed major violations involving protective clothing, self-contained breathing apparatus, personal alert safety systems or breathing air, the following procedures shall apply:

(1) The inspector shall issue a notice of alleged violations identifying the violations and the corrective measures to be taken by the department to correct the listed violations.

(2) The department has 30 calendar days from the date of receipt of the formal notice of noncompliance to correct the violations, and to provide the commission with proof of compliance or submit written notice of appeal.

(3) If the department fails to come into compliance in the required time frame an administrative penalty of up to \$500 per day may be assessed from the first day of formal notice of violation for each violation. If it is determined that the department was assessed administrative penalties for the same or similar violations within the previous five years, the administrative penalty of up to \$1,000 per violation may be assessed.

(4) The department then has 30 calendar days from formal notice of administrative penalties assessed to pay the administrative penalty or submit written notice of appeal.

(5) Upon receipt of a written appeal concerning administrative action or penalty a hearing will be scheduled. Chapter 154 of the Texas Civil Practice and Remedies Code shall be used as a procedural guide.

§445.13. Disciplinary Hearings.

A complaint case shall be opened no later than the 30th day after formal notice to the fire department, training provider or individual, concerning unresolved major violations found during an inspection. A hearing will be scheduled with the fire department, training provider or individual to determine administrative actions or penalties. The commission shall consider the following factors when determining administrative penalties:

(1) compliance history;

(2) seriousness of the violation;

(3) the safety threat to the public or fire personnel;

(4) any mitigating factors; and

(5) any other factors the commission considers appropriate.

§445.15. Judicial Enforcement.

The commission may enter a default order if a fire department or training provider fails to take action to correct a violation found during an inspection conducted under this chapter, or to request an informal settlement conference before the 61st day after the date the commission provides to the department or provider notice requiring the department or provider to correct the 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 18, 2020.

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Michael Wisko
Executive Director
Texas Commission on Fire Protection
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