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 22. EXAMINING BOARDS
PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD
CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.21

The Texas Appraiser Licensing and Certification Board (TALCB) proposes amendments to 22 TAC §153.21, Appraiser Trainees and Supervisory Appraisers.

The proposed amendments implement changes adopted by the Appraiser Qualifications Board (AQB) on November 1, 2019, which become effective on January 1, 2020. The proposed amendments change the eligibility criteria for supervisory appraisers under subsection (b)(1) of this section. Under the proposed amendments a certified appraiser must be in good standing and not have had, within the last three years, a certified appraiser credential canceled, surrendered in lieu of discipline, suspended, or revoked in any state for a substantive cause related to appraisal practice.

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

Ms. Worman has also determined that for each year of the first five years the proposed amendments and rules are in effect the public benefits anticipated as a result of enforcing the proposed amendments will be consistency with AQB requirements and federal law.

Growth Impact Statement:
For each year of the first five years the proposed amendments and rules are in effect the amendments and rules will not:
--create or eliminate a government program;
--require the creation of new employee positions or the elimination of existing employee positions;--require an increase or decrease in future legislative appropriations to the agency;
--require an increase or decrease in fees paid to the agency;
--create a new regulation;
--expand, limit or repeal an existing regulation; and
--increase the number of individuals subject to the rule's applicability.

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

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

The amendments are proposed under Occupations Code §1101.151, which authorizes TALCB to adopt rules related to certificates and licenses that are consistent with applicable federal law and guidelines adopted by the AQB.

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

(a) Supervision of appraiser trainees required.

(1) An appraiser trainee may perform appraisals or appraiser services only under the active, personal and diligent direction and supervision of a supervisory appraiser.

(2) An appraiser trainee may be supervised by more than one supervisory appraiser.

(3) Number of Appraiser Trainees Supervised.

(A) Supervisory appraisers may supervise no more than three appraiser trainees at one time unless the requirements in subsection (a)(3)(B) of this section, are met;

(B) Supervisory appraisers may supervise up to five appraiser trainees at one time if:

(i) the supervisory appraiser has been licensed as a certified appraiser for more than five years; and

(ii) all of the supervisory appraiser's appraiser trainees must submit requests for the Board to review the appraiser trainee's work product as specified in §153.22 of this title (relating to Voluntary Appraiser Trainee Experience Reviews), or satisfy the required progress monitoring as permitted in §153.16 of this title (relating to License Reinstatement).
(4) A supervisory appraiser may be added during the term of an appraiser trainee's license if:

(A) The supervisory appraiser and appraiser trainee have provided proof to the Board of completion of an approved Appraiser Trainee/Supervisory Appraiser course;

(B) an application to supervise has been received and approved by the Board; and

(C) the applicable fee has been paid.

(5) A licensed appraiser trainee who signs an appraisal report must include his or her license number and the word "Trainee" as part of the appraiser trainee's signature in the report.

(b) Eligibility requirements for appraiser trainee supervision.

(1) To be eligible to supervise an appraiser trainee, a certified appraiser must:

(A) be in good standing and not have had, [subject to any disciplinary action] within the last three years, an appraiser certification canceled, surrendered in lieu of discipline, suspended, or revoked in any state for a substantive cause related to appraisal practice [that affected the certified appraiser's eligibility to engage in appraisal practice];

(B) complete an approved Appraiser Trainee/Supervisory Appraiser course; and

(C) submit proof of course completion to the Board.

(2) Before supervising an appraiser trainee, the supervisory appraiser must notify the appraiser trainee in writing of any disciplinary action taken against the supervisory appraiser within the last three years that did not affect the supervisory appraiser's eligibility to engage in appraisal practice.

(3) An application to supervise must be received and approved by the Board before supervision begins.

(c) Maintaining eligibility to supervise appraiser trainees.

(1) A supervisory appraiser who wishes to continue to supervise appraiser trainees upon renewal of his/her license must complete an approved Appraiser Trainee/Supervisory Appraiser course within four years before the expiration date of the supervisory appraiser's current license and provide proof of completion to the Board.

(2) If a supervisory appraiser has not provided proof of course completion at the time of renewal, but has met all other requirements for renewing the license the supervisory appraiser will no longer be eligible to supervise appraiser trainees; and the Board will take the following actions:

(A) the supervisory appraiser's license will be renewed on active status; and

(B) the license of any appraiser trainees supervised solely by that supervisory appraiser will be placed on inactive status.

(3) A certified appraiser may restore eligibility to supervise appraiser trainees by:

(A) completing the course required by this section; and

(B) submitting proof of course completion to the Board.

(4) The supervisory appraiser's supervision of previously supervised appraiser trainees may be reinstated by:

(A) submitting the required form to the Board; and

(B) payment of any applicable fees.

(d) Maintaining eligibility to act as an appraiser trainee.

(1) Appraiser trainees must maintain an appraisal log and appraisal experience affidavits on forms approved by the Board, for the license period being renewed. It is the responsibility of both the appraiser trainee and the supervisory appraiser to ensure the appraisal log is accurate, complete and signed by both parties at least quarterly or upon change in supervisory appraiser. The appraiser trainee will promptly provide copies of the experience logs and affidavits to the Board upon request.

(2) An appraiser trainee must complete an approved Appraiser Trainee/Supervisory Appraiser course within four years before the expiration date of the appraiser trainee's current license and provide proof of completion to the Board.

(3) If an appraiser trainee has not provided proof of course completion at the time of renewal, but has met all other requirements for renewing the license:

(A) the Board will renew the appraiser trainee's license on inactive status;

(B) the appraiser trainee will no longer be eligible to perform appraisals or appraisal services; and

(C) the appraiser trainee's relationship with any supervisory appraiser will be terminated.

(4) An appraiser trainee may return the appraiser trainee's license to active status by:

(A) completing the course required by this section;

(B) submitting proof of course completion to the Board;

(C) submitting an application to return to active status, including an application to add a supervisory appraiser; and

(D) paying any required fees.

(e) Duties of the supervisory appraiser.

(1) Supervisory appraisers are responsible to the public and to the Board for the conduct of the appraiser trainee under the Act.

(2) The supervisory appraiser assumes all the duties, responsibilities, and obligations of a supervisory appraiser as specified in these rules and must diligently supervise the appraiser trainee. Diligent supervision includes, but is not limited to, the following:

(A) direct supervision and training as necessary;

(B) ongoing training and supervision as necessary after the supervisory appraiser determines that the appraiser trainee no longer requires direct supervision;

(C) communication with and accessibility to the appraiser trainee; and

(D) review and quality control of the appraiser trainee's work.

(3) Supervisory appraisers must approve and sign the appraiser trainee's appraisal log and experience affidavit at least quarterly and provide appraiser trainees with access to any appraisals and work files completed under the supervisory appraiser.

(4) After notice and hearing, the Board may reprimand a supervisory appraiser or may suspend or revoke a supervisory appraiser's license based on conduct by the appraiser trainee constituting a violation of the Act or Board rules.
(f) Termination of supervision.

(1) Supervision may be terminated by the supervisory appraiser or the appraiser trainee.

(2) If supervision is terminated, the terminating party must:
   (A) immediately notify the Board on a form approved by the Board; and
   (B) notify the non-terminating party in writing no later than the 10th day after the date of termination; and
   (C) pay any applicable fees no later than the 10th day after the date of termination.

(3) If an appraiser trainee is no longer under the supervision of a supervisory appraiser:
   (A) the appraiser trainee may no longer perform the duties of an appraiser trainee; and
   (B) is not eligible to perform those duties until:
      (i) an application to supervise the trainee has been filed;
      (ii) any required fees have been paid; and
      (iii) the Board has approved the application.

(g) Course approval.

(1) To obtain Board approval of an Appraiser Trainee/Supervisory Appraiser course, a course provider must:
   (A) submit form ATS-0, Appraiser Trainee/Supervisory Appraiser Course Approval, adopted herein by reference; and
   (B) satisfy the Board that all required content set out in form ATS-0 is adequately covered.

(2) Approval of an Appraiser Trainee/Supervisory Appraiser course shall expire two years from the date of Board approval.

(3) An Appraiser Trainee/Supervisory Appraiser course may be delivered through:
   (A) classroom delivery method; or
   (B) distance education delivery method. The delivery mechanism for distance education courses offered by a non-academic provider must be approved by an AQB-approved organization providing approval of course design and delivery.

(h) ACE credit.

(1) Supervisory appraisers who complete the Appraiser Trainee/Supervisory Appraiser course may receive ACE credit for the course.

(2) Appraiser Trainees may not receive qualifying or ACE credit for completing the Appraiser Trainee/Supervisory Appraiser course.

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, 2019.
TRD-201904354

Kristen Worman
General Counsel
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: January 5, 2020
For further information, please call: (512) 936-3652

22 TAC §153.40
The Texas Appraiser Licensing and Certification Board (TALCB) proposes amendments to 22 TAC §153.40, Approval of Continuing Education Providers and Courses.

The TALCB Executive Committee recommends the proposed amendments to allow continuing education providers to reschedule certain continuing education courses if a course must be cancelled due to circumstances beyond the provider's control, including severe weather or instructor illness. Under the proposed amendments, a provider may reschedule a course without incurring additional fees by providing notice of the new course date to TALCB and offering the course in the same manner originally approved by TALCB.

To remove barriers and provide greater clarity, the Executive Committee recommends proposed amendments to: (1) allow a unit of federal, state, or local government to offer continuing education courses without becoming an approved education provider; and (2) substitute the term "renewal" for the phrase "subsequent approval."

Kristen Worman, General Counsel, has determined that for the first five-year period the proposed amendments are in effect, there will be lower costs to the state or units of local government as a result of enforcing or administering the proposed amendments because no fees will be incurred by units of state or local government to become an approved education provider. Ms. Worman has determined there is no adverse economic impact anticipated for local or state employment, rural communities, small businesses, or micro businesses as a result of implementing the proposed amendments. There is no significant economic cost anticipated for persons who are required to comply with the proposed amendments. Accordingly, no Economic Impact statement or Regulatory Flexibility Analysis is required.

Ms. Worman has also determined that for each year of the first five years the proposed amendments and rules are in effect the public benefits anticipated as a result of enforcing the proposed amendments will be lower costs to education providers and units of federal, state, and local government, as well as increased transparency and better guidance and information for license holders and the public.

Growth Impact Statement:
For each year of the first five years the proposed amendments are in effect the amendments and rules will not:
--create or eliminate a government program;
--require the creation of new employee positions or the elimination of existing employee positions;
--require an increase or decrease in future legislative appropriations to the agency;
--require an increase in fees paid to the agency;
--create a new regulation;
--expand, limit or repeal an existing regulation; and
--increase the number of individuals subject to the rule's applicability.

For each year of the first five years the proposed amendments are in effect, there will be a decrease in fees paid to the agency because units of federal, state and local government will not be required to become an approved education provider to offer continuing education courses for appraisers.

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

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

The amendments are proposed under Occupations Code §1101.153, which allows TALCB to adopt rules relating to the requirements for approval of a provider or course of continuing education, and SB 624 to implement Texas Occupations Code §1103.214, which took effect on September 1, 2019, and allows TALCB to deny a license or renewal if an applicant is in violation of a Board order.

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

§153.40. Approval of Continuation Education Providers and Courses.

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

(1) Applicant--A person seeking accreditation or approval to be an appraiser continuing education (ACE) provider or instructor.

(2) ACE--Appraiser continuing education.

(3) ACE course--Any education course for which continuing education credit may be granted by the Board to a license holder.

(4) ACE provider--Any person approved by the Board; or specifically exempt by the Act; or Board rule; that offers a course for which continuing education credit may be granted by the Board to a license holder.

(5) Classroom course--A course in which the instructor and students interact face to face, in real time and in the same physical location.

(6) Distance education course--A course offered in accordance with AQB criteria in which the instructor and students are geographically separated.

(7) Severe weather--weather conditions, including but not limited to severe thunderstorms, tornados, hurricanes, snow and ice, that pose risks to life or property and require intervention by government authorities and office or school closures.

(b) Approval of ACE Providers.

(1) A person seeking to offer ACE courses must:

(A) file an application on the appropriate form approved by the Board, with all required documentation;

(B) pay the required fees under §153.5 of this title; and

(C) maintain a fixed office in the state of Texas or designate a resident of this state as attorney-in-fact to accept service of process and act as custodian of any records in Texas which the continuing education provider is required to maintain by this subchapter.

(2) The Board may:

(A) request additional information be provided to the Board relating to an application; and

(B) terminate an application without further notice if the applicant fails to provide the additional information within 60 days from the Board's request.

(3) Exempt Providers. A unit of federal, state or local government may submit ACE course approvals without becoming a approved ACE provider.

(4) Standards for approval. To be approved by the Board to offer ACE courses, an applicant must satisfy the Board as to the applicant's ability to administer courses with competency, honesty trustworthiness and integrity. If an applicant proposes to employ another person to manage the operation of the applicant, that person must meet this standard as if that person were the applicant.

(5) Approval notice. An applicant shall not act as or represent itself to be an approved ACE provider until the applicant has received written notice of the approval from the Board.

(6) Period of initial approval. The initial approval of a CE provider is valid for two years.

(7) Disapproval. (A) If the Board determines that an applicant does not meet the standards for approval, the Board will provide written notice of disapproval to the applicant.

(B) The disapproval notice, applicant's request for a hearing on the disapproval, and any hearing are governed by the Administrative Procedure Act, Chapter 2001, Government Code, and Chapter 157 of this title. Venue for any hearing conducted under this section shall be in Travis County.

(8) Renewal. (A) Not earlier than 90 days before the expiration of its current approval, an approved provider may apply for renewal for another two year period.

(B) Approval or disapproval of a renewal application shall be subject to the standards for initial applications for approval set out in this section.

(C) The Board may deny an application for renewal if the provider is in violation of a Board order.

(c) Application for approval of ACE courses. This subsection applies to appraiser education providers seeking to offer ACE courses.

(1) For each ACE course an applicant intends to offer, the applicant must:

(A) file an application on the appropriate form approved by the Board, with all required documentation; and
(B) pay the fees required by §153.5 of this title, including the:

(i) base fee; and
(ii) content review fee.

(2) An ACE provider may file a single application for an ACE course offered through multiple delivery methods.

(3) An ACE provider who seeks approval of a new delivery method for a currently approved ACE course must submit a new application and pay all required fees.

(4) The Board may:

(A) request additional information be provided to the Board relating to an application; and

(B) terminate an application without further notice if the applicant fails to provide the additional information within 60 days from the Board's request.

(5) Standards for ACE course approval.

(A) To be approved as an ACE course by the Board, the course must:

(i) cover subject matter appropriate for appraiser continuing education as defined by the AQB;

(ii) submit a statement describing the objective of the course and the acceptable AQB topics covered;

(iii) be current and accurate; and

(iv) be at least two hours long.

(B) The course must be presented in full hour units.

(C) The course must be delivered by one of the following delivery methods:

(i) classroom delivery; or

(ii) distance education.

(D) The course design and delivery mechanism for all distance education courses must be approved by an AQB approved organization.

(6) Approval notice.

(A) An ACE provider cannot offer an ACE course until the provider has received written notice of the approval from the Board.

(B) An ACE course expires two years from the date of approval. ACE providers must reapply and meet all current requirements of this section to offer the course for another two years.

(d) Approval of currently approved ACE course for a secondary provider.

(1) If an ACE provider wants to offer an ACE course currently approved for another provider, the secondary provider must:

(A) file an application on the appropriate form approved by the Board, with all required documentation;

(B) submit written authorization to the Board from the author or provider for whom the course was initially approved granting permission for the secondary provider to offer the course; and

(C) pay the fees required by §153.5 of this title, including:

(i) base fee; and

(ii) content review fee.

(2) If approved to offer the currently approved course, the secondary provider must:

(A) offer the course as originally approved;

(B) assume the original expiration date;

(C) include any approved revisions;

(D) use all materials required for the course; and

(E) meet the requirements of subsection (j) of this section.

(e) Approval of ACE courses currently approved by the AQB or another state appraiser regulatory agency.

(1) To obtain Board approval of an ACE course currently approved by the AQB or another state appraiser regulatory agency, an ACE provider must:

(A) be currently approved by the Board as an ACE provider;

(B) file an application on the appropriate form approved by the Board, with all required documentation; and

(C) pay the course approval fee required by §153.5 of this title.

(2) If approved to offer the ACE course, the ACE provider must offer the course as approved by the AQB or other state appraiser regulatory agency, using all materials required for the course.

(3) Any course approval issued under this subsection expires the earlier of two years from the date of Board approval or the remaining term of approval granted by the AQB or other state appraiser regulatory agency.

(f) Approval of ACE courses for a 2-hour in-person one-time offering.

(1) To obtain Board approval of a 2-hour ACE course for an in-person one-time offering, an ACE provider must:

(A) be currently approved by the Board as an ACE provider;

(B) file an application on the appropriate form approved by the Board, with all required documentation; and

(C) pay the one-time offering course approval fee required by §153.5 of this title.

(2) Any course approved under this subsection is limited to the scheduled presentation date stated on the written notice of course approval issued by the Board.

(3) If a course approved under this subsection must be rescheduled due to circumstances beyond the provider's control, including severe weather or instructor illness, the Board may approve the revised course date if the provider:

(A) submits a request for revised course date on a form acceptable to the Board; and

(B) offers the course on the revised date in the same manner as it was originally approved.

(g) Application for approval to offer a 7-Hour National USPAP Update course.

(1) To obtain approval to offer a 7-Hour National USPAP Update course, the provider must:

PROPOSED RULES  December 6, 2019  44 TexReg 7483
(A) be approved by the Board as an ACE provider;
(B) file an application on the appropriate form approved by the Board, with all required documentation;
(C) submit written documentation to the Board demonstrating that the course and instructor are currently approved by the AQB;
(D) pay the course approval fee required by §153.5 of this title;
(E) use the current version of the USPAP; and
(F) ensure each student has access to his or her own electronic or paper copy of the current version of USPAP.

(2) Approved ACE providers of the 7-Hour National USPAP Update course may include up to one additional classroom credit hour of supplemental Texas specific information. This may include topics such as the Act, Board rules, processes and procedures, enforcement issues or other topics deemed appropriate by the Board.

(h) Application for ACE course approval for a presentation by current Board members or staff. As authorized by law, current members of the Board and Board staff may teach or guest lecture as part of an approved ACE course. To obtain ACE course approval for a presentation by a Board member or staff, the provider must:

(1) file an application on the appropriate form approved by the Board, with all required documentation; and
(2) pay the fees required by §153.5 of this title.

(i) Responsibilities and Operations of ACE providers.

(1) ACE course examinations:

(A) are required for ACE distance education courses; and

(B) must comply with AQB requirements.

(2) Course evaluations. A provider shall provide each student enrolled in an ACE course a course evaluation form approved by the Board and a link to an online version of the evaluation form that a student may complete and submit to the provider after course completion.

(3) Course completion rosters.

(A) Classroom courses. Upon successful completion of an ACE classroom course, a provider shall submit to the Board a course completion roster in a format approved by the Board no later than the 10th day after the date a course is completed. The roster shall include:

(i) the provider's name and license number;
(ii) the instructor's name;
(iii) the course title;
(iv) the course approval number;
(v) the number of credit hours;
(vi) the date of issuance;
(vii) the date the student started and completed the course; and
(viii) the signature of an authorized representative of the provider who was in attendance and for whom an authorized signature is on file with the Board.

(B) Distance education courses. A provider shall maintain a Distance Education Reporting Form and submit information contained in that form by electronic means acceptable to the Board for each student completing the course not earlier than the number of hours for course credit after a student starts the course and not later than the 10th day after the student completes the course.

(C) The Board will not accept unsigned course completion rosters.

(4) An ACE provider may withhold any official course completion documentation required by this subsection from a student until the student has fulfilled all financial obligations to the provider.

(5) Security and Maintenance of Records.

(A) An ACE provider shall maintain:

(i) adequate security against forgery for official completion documentation required by this subsection;

(ii) records of each student enrolled in a course for a minimum of four years following completion of the course, including course and instructor evaluations and student enrollment agreements; and

(iii) any comments made by the provider's management relevant to instructor or course evaluations with the provider's records.

(B) All records may be maintained electronically but must be in a common format that is legible and easily printed or viewed without additional manipulation or special software.

(C) Upon request, an ACE provider shall produce instructor and course evaluation forms for inspection by Board staff.

(6) Changes in Ownership or Operation of an approved ACE provider.

(A) An approved ACE provider shall obtain approval of the Board at least 30 days in advance of any material change in the operation of the provider, including but not limited to changes in:

(i) ownership;

(ii) management; and

(iii) the location of main office and any other locations where courses are offered.

(B) An approved provider requesting approval of a change in ownership shall provide a Principal Application Form for each proposed new owner who would hold at least a 10% interest in the provider to the Board.

(j) Non-compliance.

(1) If the Board determines that an ACE course or provider no longer complies with the requirements for approval, the Board may suspend or revoke approval for the ACE course or provider.

(2) Proceedings to suspend or revoke approval of an ACE course or provider shall be conducted in accordance with §153.41 of this title.

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, 2019.

TRD-201904349
Kristen Worman
General Counsel
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: January 5, 2020
For further information, please call: (512) 936-3652

22 TAC §153.41

The Texas Appraiser Licensing and Certification Board (TALCB) proposes amendments to 22 TAC §153.41, ACE Providers: Compliance and Enforcement.

The TALCB Executive Committee recommends the proposed amendments to provide more information to education providers and members of the public regarding the process for auditing continuing education providers and courses and the process for handling complaints when deficiencies are identified during an audit. Under the proposed amendments providers will receive a copy of the audit report and be given a reasonable opportunity to cure any deficiencies identified during an audit. The proposed amendments clarify when an audit report may be treated as a complaint and referred for enforcement. The proposed amendments also define a “reasonable opportunity to cure” and allow providers to request an extension of time to cure a deficiency if certain criteria are met.

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

Ms. Worman has also determined that for each year of the first five years the proposed amendments and rules are in effect the amendments and rules will not:

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

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

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

The amendments are proposed under Occupations Code §1101.153, which allows TALCB to adopt rules relating to the requirements for approval of a provider or course of continuing education.

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

§153.41. ACE Providers: Compliance and Enforcement.

(a) [This rule is effective September 1, 2019.]

(1) Audits.

(a) Board staff may:

(1) conduct on-site audits without prior notice to a provider; and

(2) enroll and attend a course without identifying themselves as employees of the Board for purposes of auditing a course.

(b) Audit reports.

(1) After conducting an audit, Board staff will prepare an audit report and send a copy of the report to the provider who is the subject of the audit.

(2) If staff identifies deficiencies in an audit report, the provider will be given a reasonable opportunity to cure the deficiencies.

(c) [This is treated as a written complaint against the provider if probable cause exists to believe the noncompliance involves:]

(1) gross negligence;

(2) knowledge or intent; or

(3) continued noncompliance after notice of the audit report and a reasonable opportunity to cure it voluntarily.

(d) Extensions of time. The Board may grant a request for an extension of time to cure deficiencies if the provider:

(1) submits the request in writing; and

(2) demonstrates progress towards curing the deficiencies.

(e) Complaints, investigations, and hearings.

(1) The Board will investigate complaints against providers or that allege violations of the AQB requirements, the Act, or Board Rules.

(2) Complaints must be in writing, and the Board may not initiate an investigation, or take action against a provider, based on an anonymous complaint.

(3) Board staff may initiate a complaint for any violation of AQB requirements, the Act, or Board Rules, including a complaint
against a provider, if a document submitted to the Board provides reasonable cause to believe a violation occurred.

(4) The Board shall provide a copy of the complaint the provider named in the complaint.

(5) Proceedings against a provider will be conducted in the manner required by the Act, the Administrative Procedure Act, Chapter 2001, Government Code, and Chapter 157 of this title. Venue for any hearing or proceeding conducted under this section will be in Travis County.

(f) Cooperation with audit or complaint investigation. A provider shall provide records in his or her possession for examination by the Board or provide such information requested by the Board not later than the 20th day after the date of receiving a request for examination of records or information.

(g) Grounds for disciplinary action against an approved provider.

1. The following acts committed by a provider are grounds for disciplinary action by the Board:

(A) procuring or attempting to procure approval for a provider or course by fraud, misrepresentation or deceit, or by making a material misrepresentation of fact in an application filed with the Board;

(B) making a false representation to the Board, either intentionally or negligently, that a person attended a course or a portion of a course for which credit was awarded, that a person completed an examination, or that a person completed any other requirement for course credit;

(C) aiding or abetting a person to circumvent the requirements for attendance established by the Board, the completion of any examination, or any other requirement for course credit;

(D) failing to provide, not later than the 20th day after the date of a request, information requested by the Board as a result of a complaint alleging a violation of AQB requirements, the Act, or Board Rules;

(E) making a materially false statement to the Board in response to a request from the Board for information relating to a complaint against the provider; or

(F) disregarding or violating an AQB requirement or provision of the Act or Board Rules.

2. The Board may initiate a complaint against a provider if the Board receives a complaint, or is presented with other evidence acceptable to the Board alleging that a provider has failed to:

(A) teach the curriculum standards required by the AQB or Board Rules; or

(B) meet the course delivery requirements required by the AQB or Board Rules.

3. If after an investigation the Board determines that a provider engaged in any of the acts listed in this subsection, or failed to follow the curriculum standards or course delivery requirements of the AQB or Board Rules, the Board may take one or more of the following disciplinary actions against a provider:

(A) reprimand;

(B) impose an administrative penalty; or

(C) suspend or revoke approval of a provider or an ACE course offered by the provider.

(h) Probation. The Board may probate an order of suspension or revocation issued under this section upon reasonable terms and conditions.

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, 2019.

TRD-201904350
Kristen Worman
General Counsel
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: January 5, 2020
For further information, please call: (512) 936-3652

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 9. TITLE INSURANCE

SUBCHAPTER C. TEXAS TITLE INSURANCE STATISTICAL PLAN

28 TAC §9.401

The Texas Department of Insurance proposes to amend 28 TAC §9.401, concerning the Texas Title Insurance Statistical Plan (Statistical Plan). This proposal will ensure the Statistical Plan is in harmony with Insurance Code §2703.153, which requires updating the Statistical Plan when necessary.

EXPLANATION. Based on changes made to title insurance rate rules on June 11, 2019, by Commissioner’s Order No. 2019-5980, TDI must amend the Statistical Plan to add codes. These new codes will enable title insurance agents and companies to accurately report data as a result of the new rate rules. This data is used by the Commissioner to set future title insurance rates. Insurance Code §2703.153(h) requires that any change to the Statistical Plan must be done by a rulemaking hearing under Subchapter B, Chapter 2001 of the Government Code.

Commissioner’s Order No. 2019-5980 amended Rate Rule R-5, Simultaneous Issuance of Owner’s and Loan Policies; and Rate Rule R-8, Mortgagee Policy, on a Loan to Take Up, Renew, Extend or Satisfy an Existing Lien(s). The change to Rate Rule R-5 allowed cash purchasers of property valued at $5 million or more to have up to 90 days to finance the property and not have to pay the full basic rate for the loan policy. Although a simultaneous rate credit existed before, it did not allow 90 days to obtain the credit.

The change to Rate Rule R-8 extends the number of years a discount is available to a consumer who renews a loan policy from seven to eight years after the original policy was issued. The Statistical Plan does not have codes to track these new aspects to the rate rules. New codes are needed for the Statistical Plan to meet data collection standards required by Insurance Code §2703.153.
FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Brian Ryder, senior actuary of the Property and Casualty Actuarial Office, 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, other than that imposed by the statute. This is because the proposed amendments do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed amendments.

Mr. Ryder 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. Ryder expects that administering the proposed amendments will have the public benefits of ensuring that TDI's rules conform to Insurance Code §2703.153 and that the data collection abilities give the Commissioner the most accurate available information for setting title insurance rates.

Mr. Ryder expects that the proposed amendment will not increase the cost of compliance with Insurance Code §2703.153. Insurance Code §2703.153 requires that title insurance agents and companies submit data to TDI related to loss experience, expenses, and other material matters so that the information can be used by TDI to set title insurance rates. After analyzing the issue, TDI staff determined that the industry can add the codes to their data reporting operations without increasing their current costs.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TDI has determined that the proposed amendment will not have an adverse economic effect or a disproportionate economic impact on small or micro businesses, or on rural communities. The existing information services contracts with vendors used by title insurance agents and companies will cover the costs of adding the new codes without additional expense. As a result, and in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. TDI has determined that this proposal does not impose a cost on regulated persons. This is based on research conducted by TDI that showed the scope of work to add these codes to the industry's systems would be handled without increasing costs with their information technology vendors.

GOVERNMENT GROWTH IMPACT STATEMENT. TDI has determined that for each year of the first five years that the proposed amendments are in effect the rule:

- will not create or eliminate a government program;
- will not require the creation of new employee positions or the elimination of existing employee positions;
- will not require an increase or decrease in future legislative appropriations to the agency;
- will not require an increase or decrease in fees paid to the agency;
- will not create a new regulation;
- will expand, limit, or repeal an existing regulation;
- will not increase or decrease the number of individuals subject to the rule's applicability; or

- will not positively or adversely affect the Texas economy.

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

REQUEST FOR PUBLIC COMMENT. TDI will consider any written comments on the proposal that are received by TDI no later than 5:00 p.m. Central time on January 6, 2020. Send your comments to ChiefClerk@tdi.texas.gov, or to the Office of the Chief Clerk, MC 112-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The Commissioner will also consider written and oral comments on the proposal in a public hearing under Docket No. 2818 at 10:30 a.m., central time, on December 19, 2019, in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street, Austin, Texas.

STATUTORY AUTHORITY. TDI proposes amendments to 28 TAC §9.401 under Insurance Code §2703.153 and §36.001.

Insurance Code §2703.153 requires title insurance companies and agents to submit data to TDI for use in fixing premium rates, and it provides that the Commissioner regularly evaluate the collected information to determine whether additional or different information is needed. The contents of the statistical report used to collect data, including amendments to the report, must be established in a rulemaking hearing under Government Code, Chapter 2001, Subchapter B.

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

CROSS-REFERENCE TO STATUTE. Section 9.401 implements Insurance Code §2703.153.


The Texas Department of Insurance adopts by reference the rules in the Texas Title Insurance Statistical Plan as amended effective January 1, 2020 [January 3, 2014]. This document is published by and is available from the Texas Department of Insurance, Mail Code 105-5D, P.O. Box 149014, Austin, Texas 78714-9104. This document is also available on the TDI website at www.tdi.texas.gov.

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, 2019.

TRD-201904381

James Person
General Counsel

Texas Department of Insurance

Earliest possible date of adoption: January 5, 2020

For further information, please call: (512) 676-6584

TITLE 31. NATURAL RESOURCES AND CONSERVATION
PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 53. FINANCE

SUBCHAPTER A. FEES

DIVISION 1. LICENSE, PERMIT, AND BOAT AND MOTOR FEES

31 TAC §53.5

The Texas Parks and Wildlife Department proposes an amendment to §53.5, concerning Recreational Hunting Licenses, Stamps, and Tags. The proposed amendment would establish fees for participation in the Managed Lands Deer Program (MLDP) administered by the department. The MLDP is an extremely popular program providing landowners and land managers with additional flexibility to manage deer populations, improve habitats, and provide greater hunting opportunities under the guidance of department biologists. Demand in MLDP participation has increased ten-fold since 2000, which has presented significant challenges for the department, primarily with respect to the allocation of workforce resources to meaningfully engage with MLDP participants, meet technical guidance requests, and administer the MLDP. In response, the Texas Legislature earlier this year enacted Senate Bill 733, which explicitly authorizes the commission to establish a fee for participation in the MLDP.

The proposed amendment would establish a $30 fee for each management unit within a property that is enrolled in the Harvest Option (HO), provided the property is not part of an aggregate acreage enrolled in the MLDP; a $30 fee for each aggregate acreage enrolled in the HO; $300 fee for the first management unit of each property enrolled in the Conservation Option (CO) plus a $30 fee for each additional management unit of a property enrolled in the CO; a $300 fee for each aggregate acreage enrolled in the CO; and a $30 fee for each management unit of a wildlife management association or co-operative enrolled the CO. The department has determined that fees for HO participation should be less than those for HO participation because administration of the HO places substantially less demand on agency resources than the CO, participation in which includes customized habitat and harvest recommendations from department staff as well as program benefits not available to HO participants. Similarly, because wildlife management associations and cooperatives for the most part desire assistance only with respect to the harvest of antlerless deer, the department has determined that fees for those types of entities should reflect that smaller footprint.

The fee amounts were selected by the department after soliciting and receiving input from department staff, stakeholder groups, and advisory committees regarding what would be a reasonable fee for participation in the MLDP considering the benefits received, the demands on department staff in administering the various options available to landowners under the MLDP, and which would not result in significant attrition from the MLDP by landowners. The intended purpose of the fees is to support additional biologist positions and maintenance of the department's online Land Management Assistance (LMA) system that is used to administer MLDP.

Clayton Wolf, Wildlife Division Director, has determined that for each of the first five years that the rule as proposed is in effect, there will be fiscal implications to the department as result of administering or enforcing the rule. The department estimates an increase in revenue of approximately $1,545,420.00 per year as a result of the imposition of fees for the various levels of MLDP participation.

There will be no fiscal implications for other units of state or local government.

Mr. Wolf also has determined that for each of the first five years that the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the proposed rule will be the continued ability of the agency to provide landowners and land managers with effective technical guidance for deer management that in return provides additional ecological benefits.

There will be no adverse economic effect on persons required to comply with the rule as proposed, as participation in the MLDP is not mandatory and resource management can still be attained by landowners and land managers under existing harvest rules.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses, micro-businesses, or rural communities. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small and microbusinesses and rural communities. Those guidelines state that an agency need only consider a proposed rule's direct adverse economic impacts to determine if any further analysis is required. The department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that because the proposed rule creates fees for voluntary participation in a resource management program administered by the department for the sole purpose of enhancing the enjoyment and use of public wildlife resources that by statute cannot be bought, sold, or harvested for profit in this state (i.e., that cannot be a commercial commodity), there is therefore no direct economic effect on any small businesses, micro-businesses, or rural community. Therefore, neither the economic impact statement nor the regulatory flexibility analysis described in Government Code, Chapter 2006, is required.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rule as proposed, if adopted, will: neither create nor eliminate a government program; not result in an increase or decrease in the number of full-time equivalent employee needs, as the need for additional
employees to administer the MLDP already exists; not result in a need for additional General Revenue funding; not affect the amount of any existing fee, but will create new fees; create a new regulation to impose fees for participation in the MLDP; expand an existing regulation (by providing for a fee for MLDP participation); potentially decrease the number of individuals subject to regulation, if current levels of participation in the MLDP decrease; and not positively or adversely affect the state’s economy.

Comments on the proposal may be submitted to Alan Cain (white-tailed deer program) at (830) 480-4038, e-mail: alan.cain@tpwd.texas.gov. Comments also may be submitted via the department’s website at http://www.tpwd.texas.gov/business/feedback/public_comment/.

The amendments are proposed under the authority of Parks and Wildlife Code, Chapter 43, Subchapter Y, which authorizes the establishment of a fee for participation in the MLDP.

The proposed amendment affects Parks and Wildlife Code, Chapter 43, Subchapter Y.

§53.5.  Recreational Hunting Licenses, Stamps, and Tags.
      (a) - (c)  (No change.)
      (d)  Managed Lands Deer Program (MLDP). The annual fees for participation in the Managed Lands Deer Program under §65.29 of this title are as follows and are nonrefundable:

(1)  Properties enrolled in the Harvest Option (HO),
         (A) for each management unit within a property that is not part of an aggregate acreage - $30; and
         (B) for each aggregate acreage - $30.
(2)  Properties enrolled in the Conservation Option (CO),
         (A) Enrollment by management unit:
              (i) for the first management unit within a property - $300;
              (ii) for each additional management unit within a property - $30; and
              (iii) for each management unit within a wildlife management association or cooperative - $30.
         (B) Enrollment by aggregate acreage - $300.

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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Todd George
Assistant General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 5, 2020
For further information, please call: (512) 389-4329

CHAPTER 65.  WILDLIFE
SUBCHAPTER A.  STATEWIDE HUNTING PROCLAMATION

DIVISION 1.  GENERAL PROVISIONS
31 TAC §65.29

The Texas Parks and Wildlife Department proposes an amendment to §65.29, concerning the Managed Lands Deer (MLD) Programs.

The proposed amendment would consist of several components. First, the proposed amendment would change the title of the section to reflect the fact that the Managed Lands Deer Program is a single program, and not multiple programs.

Next, the proposed amendment would add definitions for “aggregate acreage” and “management unit” to subsection (a), which is necessary to differentiate between the options available for enrollment of multiple portions of a tract of land or multiple tracts of land in the MLDP. “Aggregate acreage” would be defined as “contiguous tracts of land, to, from, and between which deer have complete and unrestricted access, combined by multiple landowners to create an area of land for the purpose of enrollment in the MLDP.” “Management unit” would be defined as “a specific portion of a tract of land enrolled in the MLDP for which the department shall specify a harvest quota and tag issuance.”

The proposed amendment also would update a definition. The department has determined that the term “Resource Management Unit” does not accurately describe the scale at which deer population data are utilized by the department under the MLDP and should be re-titled “Deer Management Unit.” The proposed change is made throughout the rule.

Next, the proposed amendment would alter subsection (b)(1), (9), and (10) to create a new deadline for decisions to decline participation in the MLDP program, stipulate that date as the deadline for fee payment for program participation, and provide for default harvest regulation in the event that a program participant does not remit the required fee by the deadline. The current rules stipulate September 15 as the deadline for declining program participation, which the proposed amendment would replace with “the Friday closest to September 30.” Since the proposed amendment also would require fee payment by no later than the Friday closest to September 30 in order for MLDP enrollment to be valid, the department has determined that instead of having two deadlines for essentially the same thing, it is prudent to have one deadline. The Friday closest to September 30 was selected because the period of validity for MLDP tags begins on the Saturday closest to September 30. Additionally, the proposed amendment would provide that failure to timely remit required fees will result in disqualification for program participation and automatic default to the harvest regulations established by §65.42, relating to Deer (i.e., the standard county seasons, bag limits, special provisions, etc.). Obviously, failure to remit required fees should not result in enjoyment of program benefits. The proposed amendment also corrects an internal reference that is missing from the current rule.

The proposed amendment would also alter subsection (c)(1) and (2) to provide that the department shall issue a harvest quota for each management unit of a tract of land enrolled in the HO or CO. The department has determined that on a single tract of land it is necessary to provide a harvest quota and tag issuance for unique management units within the tract of land (i.e., the property is divided into multiple “high-fenced” pastures) or that landowners may desire to have a harvest quota and tag issuance for unique management units with the tract of land (i.e., separate pastures are leased to different groups of hunters).
The proposed amendment would also amend subsection (c)(2) to expressly provide for the use of MLDP tags on any tract of land within an aggregate acreage enrolled under the CO. The current rule allows participants in the HO to use tags on any property within an aggregate acreage. The department has determined there is no reason not to allow this practice on aggregate acreages under the CO as well.

Finally, the proposed amendment would make non-substantive modification to provisions regarding the enrollment of aggregate acreages in the HO and CO in order to utilize consistent language and rule structure and avoid confusion.

Clayton Wolf, Wildlife Division Director, has determined that for each of the first five years that the rule as proposed is in effect, there will be fiscal implications to the department as result of administering or enforcing the rule. The department estimates an increase in revenue of approximately $1,545,420.00 per year as a result of the imposition of fees.

Mr. Wolf also has determined that for each of the first five years that the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the proposed rules will be the continued ability of the agency to provide landowners and land managers with effective technical guidance for deer management that in return provides additional ecological benefits.

There will be no adverse economic effect on persons required to comply with the rule as proposed, as participation in the MLDP is not mandatory and resource management can still be attained by landowners and land managers under existing harvest rules.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses, micro-businesses, or rural communities. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule’s potential adverse economic impact on small and microbusinesses and rural communities. Those guidelines state that an agency need only consider a proposed rule’s direct adverse economic impacts to determine if any further analysis is required. The department considers “direct economic impact” to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that because the proposed rule creates fees for voluntary participation in a resource management program administered by the department for the sole purpose of enhancing the enjoyment and use public wildlife resources that by statute cannot be bought, sold, or harvested for profit in this state (i.e., that cannot be a commercial commodity), there is therefore no direct economic effect on any small businesses, micro-businesses, or rural community. Therefore, neither the economic impact statement nor the regulatory flexibility analysis described in Government Code, Chapter 2006, is required.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rules.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rule as proposed, if adopted, will neither create nor eliminate a governmental program; not result in an increase in the number of full-time equivalent employee needs, as the need for additional employees to administer the MLDP already exists; not result in a need for additional General Revenue funding; not affect the amount of any existing fee, but will create new fees; create a new regulation requiring fees for participation in the MLDP; expand an existing regulation (by providing for a fee for MLDP participation); potentially decrease the number of individuals subject to regulation, if current levels of participation in the MLDP decrease; and not positively or adversely affect the state’s economy.

Comments on the proposal may be submitted to Alan Cain (white-tailed deer program) at (830) 480-4038, e-mail: alan.cain@tpwd.texas.gov. Comments also may be submitted via the department’s website at http://www.tpwd.texas.gov/business/feedback/public_comment/.

The amendments are proposed under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; Chapter 42, which authorizes the commission to modify or eliminate the tagging, carcass, final destination, or final processing requirements or provisions of Section 42.001, 42.018, 42.0185, 42.019, or 42.020, or other similar requirements or provisions of that chapter; and Chapter 43, Subchapter Y, which authorizes the commission to impose a fee by rule for participation in the MLDP.

The proposed amendments affect Parks and Wildlife Code, Chapters 61, 42, and 43.

§65.29. Managed Lands Deer Program (MLDP) [(MLD) Programs].

(a) Definitions. The following words and terms shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms in this section shall have the meanings assigned in the Texas Parks and Wildlife Code.

(1) Aggregate acreage--Contiguous tracts of land, to, from, and between which deer have complete and unrestricted access, combined by multiple landowners to create an area of land for the purpose of enrollment in the MLDP.

(2) Landowner--Any person who has an ownership interest in a tract of land.

(3) Management unit--A tract of land or a specific portion of a tract of land enrolled in the MLDP for which the department shall specify a harvest quota and tag issuance.

(4) MLDP--The Managed Lands Deer Program established by this subchapter, which consists of:

(A) the Harvest Option (HO) set forth in subsection (c)(1) of this section; and
(B) the Conservation Option (CO) set forth in subsections (c)(2) and (d) of this section.

(5) [§3] MLDP--A tag issued by the department to a participant in any option under this section.

(6) [§4] Program participant--A landowner or a landowner's authorized agent who is enrolled in the MLDP.

(7) [§5] Deer [Resource] management unit (DMU) [(RMU)]--An area of the state designated by the department on the basis of shared characteristics such as soil types, vegetation types, precipitation, land use practices, and deer densities.

(8) [§6] Unbranched antlered deer--A buck deer having at least one antler with no more than one antler point.

(9) [§7] Wildlife Management Plan (WMP)--A written document on a form furnished or approved by the department that addresses habitat and population and management recommendations, associated data, and data collection methodologies.

(10) [§8] Wildlife Management Associations and Cooperatives--A group of landowners who have mutually agreed in writing to act collectively to improve wildlife habitat and populations on their tracts of land.

(b) General Provisions.

(1) A landowner and the landowner's tract(s) of land are enrolled:

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

(C) An enrollment is not valid unless the applicant has remitted the fees prescribed by §53.5 of this title (relating to Recreational Hunting Licenses, Stamps, and Tags) to the department on or before the Friday closest to September 30 of the year for which program participation is sought.

(2) - (8) (No change.)

(9) If an applicant does not wish to engage in program participation, the applicant must affirmatively decline program participation by the Friday closest to September 30 [September 15] via the department's online web application. On an enrolled tract of land for which a program participant has not timely declined participation as provided in this paragraph, the provisions of this section continue to apply to the harvest of deer until the last day of tag validity in the year following application.

(10) The provisions of this section cease effect and the provisions of §65.42 of this title (relating to Deer) apply on any tract of land for which:

(A) On a tract of land for which an applicant has timely declined participation under the provisions of paragraph (9) of this subsection; or

(B) the fees required by §53.5 of this title have not been remitted in accordance with subsection (b)(1)(C) of this section; the provisions of §65.42 of this title (relating to Deer) apply.

(11) (No change.)

(c) MLDP--White-tailed Deer. The provisions of this subsection shall govern the authorization and conduct of MLDP participation with respect to white-tailed deer.

(1) Harvest Option (HO).

(A) (No change.)

(B) An aggregate acreage may be enrolled in the HO, provided:

(i) the application contains the name, address, and express consent of the landowner of each tract of land comprising the aggregate acreage for which enrollment is sought; and

(ii) a single program participant is designated to receive MLDP tags for the aggregate acreage.

[§B] Multiple landowners may combine contiguous tracts of land to create an aggregate acreage for program enrollment.

(iii) A landowner or authorized agent participating in the MLDP under the provisions of this subparagraph must designate a single program participant to receive MLDP tags.

(iv) MLDP tags issued under the provisions of this paragraph may be utilized on any tract of land within the aggregate acreage enrolled in the MLDP.

(C) The department shall specify a harvest quota establishing the maximum number of buck, unbranched antlered, or antlerless deer to be harvested on each management unit within a tract of land or aggregate acreage enrolled in the HO. The harvest quota shall be based on:

(i) department-derived survey data for the DMU [RMU] in which the tract of land is located;

(ii) - (iv) (No change.)

(D) - (E) (No change.)

(2) Conservation Option (CO).

(A) - (D) (No change.)

(E) On each management unit within a tract of land enrolled under this subsection:

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

(F) - (G) (No change.)

(H) Special Provisions

(i) (No change)

(ii) An aggregate acreage may be enrolled in the CO [Other Aggregate Acreages]. Multiple landowners may combine contiguous tracts of land to create an aggregate acreage for program enrollment, provided:

(I) the application contains the name, address, and express consent of the landowner of each tract of land comprising the aggregate acreage for which enrollment is sought; and

(II) a single WMP that addresses all tracts of land within the aggregate acreage is submitted and approved by the department; and

(III) [the program participants designate] a single program participant is designated to receive MLDP tags for the aggregate acreage.

(IV) MLDP tags issued under the provisions of this paragraph may be utilized on any tract of land within the aggregate acreage enrolled in the MLDP.

(I) (No change.)

(d) - (f) (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 21, 2019.

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Todd George
Assistant General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4329

TITLE 34. PUBLIC FINANCE
PART 1. COMPTROLLER OF PUBLIC ACCOUNTS
CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER JI. CIGARETTE, E-CIGARETTE, AND TOBACCO PRODUCTS REGULATION
34 TAC §3.1201

The Comptroller of Public Accounts proposes amendments to §3.1201, concerning fee for outdoor advertising of cigarettes or tobacco products. The comptroller proposes amendments to replace statutory references with definitions, to incorporate statutory changes made by House Bill 3475, 86th Legislature, 2019, and to remove outdated requirements and expired effective date language. The comptroller also proposes amendments to include a title for penalties and address when a penalty is applicable for remit tax when a report is due.

The comptroller amends subsection (a)(1) and (5) to replace statutory citations with the actual definition of cigarettes and the revised definition of tobacco products from House Bill 3475. See Tax Code, §154.001 and §155.001.

The comptroller amends subsection (c) to rename the title to reflect "Due date and reporting period". The comptroller removes paragraph (2) regarding outdated reporting requirements for cigarettes and tobacco products. Additionally, the comptroller restructures subsection (c) to remove the graphic and incorporate the graphic's language relating to reporting requirements and the due dates in paragraphs (1) through (4).

The comptroller amends subsection (g)(1) to add the title "Penalty" to address a penalty is applicable when a purchaser fails to timely remit tax when due. Paragraph (2) removes existing language referencing the Tax Code and amends the language to include interest provisions related to delinquent reports.

The comptroller amends subsection (h) to remove the word "the" before all statutory references throughout this subsection.

The comptroller deletes subsection (j) to remove outdated language regarding the effective date of the fee imposed on cigarette and tobacco product outdoor advertising, which is no longer necessary to administer current law.

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

Mr. Currah also has determined that for each year of the first five years the rule is in effect, proposed amendment would benefit the public by conforming the rule to current statutory language. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. The proposed amendment would have no significant fiscal impact on the state government, units of local government, or individuals. There would be no anticipated significant economic costs to the public.

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

The section is proposed under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture) and §111.0022 (Application to Other Laws Administered by Comptroller) which provide the comptroller the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement provisions of Tax Code, Title 2 (State Taxation), and taxes, fees, or other charges which the comptroller administers under other law.


§3.1201. Fee for Outdoor Advertising of Cigarettes or Tobacco Products.

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

(1) Cigarettes--A roll for smoking that is: [This term has the meaning assigned by Tax Code, §154.001.]

(A) not a cigar; and

(B) that is made of tobacco or tobacco mixed with another ingredient and wrapped or covered with a material other than tobacco.

(2) Gross sales price--The sum of:

(A) production costs, including the cost of layout, paper, materials, printing, distribution, and sign installation, but not the cost of design and artwork;

(B) media costs, including the cost for leasing billboards, or any other outdoor space where a message or sign is displayed; and

(C) cost of sales or commissions paid to an agency or broker.

(3) Outdoor advertising--A medium, including a structure, display, light device, figure, painting, drawing, message, plaque, poster, sign, or billboard, that:

(A) is used to advertise or to inform;
(B) is visible from the main-traveled way of a street or highway; and

(C) does not include:

(i) a medium displayed inside a building, even if the medium is visible from outside the building; or

(ii) a medium that displays the name of the business, unless that medium also contains a cigarette or tobacco product trademark, brand or trade name, or logo type.

(4) Purchase--A transaction, including:

(A) an installment and credit purchase;

(B) an exchange of service for service or money;

(C) a signed contract between a purchaser and a seller; and

(D) any other transaction that is the functional equivalent of a purchase.

(5) Tobacco product--[This term has the meaning assigned by the Tax Code, §155.001]

(A) A cigar;

(B) smoking tobacco, including granulated, plug-cut, crimp-cut, ready-rubbed, and any form of tobacco suitable for smoking in a pipe or as a cigarette;

(C) chewing tobacco, including Cavendish, Twist, plug, scrap, and any kind of tobacco suitable for chewing;

(D) snuff or other preparations of pulverized tobacco; or

(E) an article or product that is made of tobacco or a tobacco substitute and that is not a cigarette or an e-cigarette as defined by Health and Safety Code, §161.081 (Definitions).

(b) Fee imposed. A fee is imposed on each purchaser of outdoor advertising in an amount that is equal to 10% of the gross sales price of any outdoor advertising of cigarettes or tobacco products in this state.

(c) Due date and reporting [Reporting] period. A purchaser of outdoor advertising for cigarettes or tobacco products shall file a report on or before the 20th day of the month following the end of the calendar quarter in which the advertising was purchased. The due dates and corresponding reporting periods are:

(1) April 20 for the period covering January 1 through March 31; [Except as provided in paragraph (2) of this subsection, the calendar quarter due date and the corresponding reporting period are:

[24 TAC §3.1201(e)(1)]]

(2) July 20 for the period covering April 1 through June 30; [The first report due will cover the period of September 1, 1997, through December 31, 1997. The due date for the report due October 20, 1997, is extended to January 20, 1998.]

(3) October 20 for the period covering July 1 through September 30; and

(4) January 20 for the period covering the previous October 1 through December 31.

(d) Report forms. Each purchaser must report the outdoor advertising fee on the Texas cigarettes or tobacco products outdoor advertising fee report as prescribed by the comptroller. The fact that a purchaser does not receive the form or does not receive the correct form from the comptroller for the filing of the report does not relieve the purchaser of the responsibility of filing a report and paying the required fee.

(e) Payment of the fee. On or before the 20th day of the month following each reporting period, every purchaser shall remit the total fee amount due.

(f) Records required.

(1) Invoices, purchase contracts, installment or credit agreements, or any other records relating to the outdoor advertising purchase must be kept by the purchaser for at least four years after the date each report is filed with the comptroller.

(2) Any records or equipment of any person liable for the fee must be made available to the comptroller or the comptroller's representative for examination to verify the accuracy of any report made or to determine the fee liability in the event no report is filed.

(3) Each purchaser must maintain records showing:

(A) the location at which outdoor advertising is displayed in this state;

(B) the date on which the advertising was purchased;

(C) the gross sales price paid for outdoor advertising displayed in this state; and

(D) if outdoor advertising is purchased for display in more than one state, information to support an allocation to Texas of the appropriate portion of the total amount paid.

(g) Penalty and interest.

(1) Penalty. A purchaser who does not timely remit the fee due [file a report] as provided by subsection (e) [(e)] of this section, shall pay a penalty of 5.0% of the amount of the fee due and payable. If the purchaser does not [file the report and] pay the fee before the 30th day after the date on which the fee [or report] is due, the person shall pay a penalty of an additional 5.0% of the amount of the fee due and payable.

(2) Interest. Interest accrues on the unpaid tax due beginning 60 days after the due date and ends the day on which the tax is paid [The provisions of the Tax Code, Chapter 101 and Chapters 111 through 113, apply to the administration, payment, collection, and enforcement of fees imposed under this section, in the same manner as those chapters and sections apply to the administration, payment, collection, and enforcement of taxes imposed under the Tax Code, Title 2].

(h) Administrative remedies.

(1) A purchaser of outdoor advertising who violates any part of the Health and Safety Code, §161.123, or a rule adopted under that section, will be subject to an administrative penalty and will be notified by certified mail of the reasons for the penalty. The recourse for a purchaser who does not agree with the imposed administrative penalty will be governed by the provisions of the Tax Code, Chapter 111, the Government Code, Chapter 2001, and §§1.1-1.42 of this title (relating to Practice and Procedure).

(2) The administrative penalty for a violation may be in an amount not to exceed $5,000. Each day a violation continues or occurs is a separate violation for the purpose of imposing a penalty.

(3) The following factors shall be taken into consideration when an administrative penalty is imposed:

(A) the amount of fees due and owing;
(B) the attempted concealment of misconduct by the person who committed the violation;

(C) premeditated misconduct by the person who committed the violation;

(D) intentional misconduct by the person who committed the violation;

(E) the motive of the person who committed the violation;

(F) prior misconduct of a similar or related nature by the person who committed the violation;

(G) prior written warnings from any government agency or official regarding statutes or regulations pertaining to the misconduct;

(H) violation by the person who committed the violation of an order of the comptroller;

(I) lack of rehabilitative potential or likelihood for future misconduct of a similar nature;

(J) relevant circumstances increasing the seriousness of the misconduct; and

(K) any other matter justice may require.

(4) If the comptroller finds that a violation has occurred and imposes an administrative penalty, the comptroller shall give notice of the violation by certified mail to the permit holder within 15 days of the finding of a violation. The notice must include a statement of the rights of the permit holder to judicial review.

(5) If the permit holder does not respond to the written notice of violation within 15 calendar days, an order finding that a violation has occurred may be entered and the maximum penalty may be imposed. If the permit holder requests an administrative hearing, a hearing will be set. The notice of the setting of the hearing shall be governed by §§1.1-1.42 of this title. The permit holder will have 15 days in which to respond to the setting of the hearing.

(6) If the comptroller finds that a purchaser of outdoor advertising violates this section or Health and Safety Code, Subchapter K, §161.123, or a rule made pursuant to these sections, the comptroller may impose an administrative fine and/or suspend or revoke a permit pursuant to [the] Tax Code, §154.1142.

(7) An administrative hearing will be held at the office of the Comptroller of Public Accounts in Austin, Texas. The recourse for a permit holder who does not agree with the administrative decision will be governed by the provisions of [the] Tax Code, Chapter 111; Government Code, Chapter 2001; and §§1.1-1.42 of this title.

(8) The burden of proof in an administrative hearing pursuant to this rule is by a preponderance of the evidence unless otherwise provided by statute.

(9) A penalty collected under this section shall be deposited in the general revenue fund.

(i) If the purchaser of outdoor advertising does not pay the amount of the administrative penalty, the comptroller may refer the matter to the attorney general for collection of the amount of the penalty.

Note: Effective date. The fee is imposed on all outdoor advertising of cigarettes or tobacco products purchased after August 31, 1997.

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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TRD-201904416
William Hamner
Special Counsel for Tax Administration
Comptroller of Public Accounts
Earliest possible date of adoption: January 5, 2020
For further information, please call: (512) 475-0387

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 9. INTELLECTUAL DISABILITY SERVICES--MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES

As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, the Executive Commissioner of HHSC proposes amendments to §§9.153, 9.171, 9.186, and 9.188; new §§9.181, 9.182, and 9.183; and the repeal of §9.185 in Subchapter D, Home and Community-based Services (HCS) Program and Community First Choice (CFC); and amendments to §§9.553, 9.575, and 9.576; new §§9.581, 9.586, and 9.587; and the repeal of §9.577 in Subchapter N, Texas Home Living (TxHmL) Program and Community First Choice (CFC), Title 40, Part 1, Chapter 9, Intellectual Disability Services--Medicaid State Operating Agency Responsibilities.

BACKGROUND AND PURPOSE

The purpose of the proposed rules is to implement Texas Human Resources Code §§161.089, 161.0891, and 161.0892, added by House Bill 2590, 85th Legislature, Regular Session, 2017. Section 161.089 allows HHSC to assess and collect an administrative penalty against a Home and Community-based Services (HCS) program provider or a Texas Home Living (TxHmL) program provider for a violation of a law or rule relating to the program. Section 161.0891 allows HHSC to permit a program provider to use any portion of the amount of an administrative penalty to ameliorate the violation or improve services in the HCS or TxHmL Program. Section 161.0892 requires HHSC to establish an informal dispute resolution process for HCS and
The proposed rules use the terms "follow-up survey," "initial certification survey," "intermittent survey," "recertification survey," and "survey" instead of "review" to be more consistent with the terminology used for other programs and services regulated by HHSC.

The proposed rules align with current practice by allowing HHSC to evaluate the health and safety of an individual at any time and if a concern from the evaluation is identified, to conduct an intermittent survey. The proposed rules remove the provision that HHSC does not certify an HCS or TxHmL program provider if, at the time of a certification review that occurs after the initial certification review, the program provider is not providing HCS, TxHmL, or CFC services; or did not provide one of those services for 60 consecutive days during the period specified in the rule. The removal of this provision is made because it does not align with current practice. The proposed rules align with current practice by allowing HHSC to choose not to conduct an annual certification survey of a program provider that has a standard contract if the program provider is not the program provider for one or more individuals for at least 60 consecutive calendar days during the period beginning the first day of the certification period to be surveyed through the 121st calendar day before the end of the certification period.

The proposed rules require HHSC to send a final survey report to a program provider within 14 calendar days (instead of 21 calendar days) after a survey exit conference to allow the program provider earlier notice of violations that need to be corrected and timely notice of any corresponding administrative penalties that been imposed. The proposed rules remove the provisions allowing a program provider to request an informal review of a finding in a preliminary review report because of the requirement in Human Resources Code §161.0892, which allows a program provider the opportunity to request an informal dispute resolution if the program provider disagrees with a violation in a final survey report.

The proposed rules require a program provider to submit a plan of correction for critical violations, in addition to violations that are not critical. This change was made so that HHSC can review a provider's plan of correction for critical violations and notify the provider if the plan is not acceptable, thereby allowing the provider to work with HHSC to correct the violations within the timeframes required by the rules and minimize the impact of an administrative penalty.

To make the surveying process more efficient, the proposed rules allow HHSC to request that a program provider submit evidence of correction to HHSC to determine if the provider has completed its corrective action; and allow HHSC to, at the request of a program provider, conduct a survey earlier than the times prescribed for a post-45 day follow-up survey or a follow-up survey conducted after a critical violation is identified by HHSC.

The proposed rules state that HHSC conducts a survey no earlier than 30 calendar days after the effective date of a vendor hold, to reflect HHSC's current practice.

SECTION-BY-SECTION SUMMARY

The proposed amendments change "DADS" to "HHSC" throughout Chapter 9 to reflect that DADS was abolished effective September 1, 2017, and functions have transferred to HHSC.

§9.153, Definitions

The proposed amendment of §9.153, Definitions, adds definitions for "actual harm," "critical violation," "immediate threat," "isolated," "pattern," "plan of correction," "plan of removal," "post-45 day follow-up survey," "repeated violation," "violation," widespread," and "willfully interfering," because those terms are related to the imposition of an administrative penalty. The proposed amendment adds definitions for "follow-up survey," "initial certification survey," "intermittent survey," "recertification survey," and "survey" to explain the types of surveys that are conducted by HHSC. The proposed amendment removes the terms "condition of a serious nature" and "hazard to health or safety." The proposed amendment renumbers and alphabetizes the definitions to account for the changes.

§9.171, DADS Review of a Program Provider and Residential Visit

The proposed amendment of §9.171, DADS Review of a Program Provider and Residential Visit, lists the types of surveys conducted by HHSC and uses the term "recertification survey" instead of "annual certification survey" because this type of survey may not always occur annually. The proposed amendment allows HHSC to conduct an intermittent survey at any time during a certification period and conduct a combination of two or more different types of surveys at the same time. The proposed amendment allows HHSC to choose whether to conduct a recertification survey of a program provider that has a standard contract if the program provider is not the program provider for one or more individuals for at least 60 consecutive calendar days during the period beginning the first day of the certification period to be surveyed through the 121st calendar day before the end of the certification period.

The proposed amendment allows HHSC to determine if a program provider has implemented an approved plan of amelioration as described in §9.182. The proposed amendment requires HHSC, at the exit conference of a survey, to inform a program provider of preliminary findings, including findings that may result in a critical violation. Currently, HHSC gives the program provider a written preliminary review report at the exit conference.

The proposed amendment also requires HHSC to hold a new exit conference with a program provider if HHSC identifies a finding that may be a critical violation not discussed during an exit conference, which is consistent with HHSC's current practice of holding a new exit conference to discuss survey findings not discussed during the previous exit conference. The proposed amendment deletes the process for a program provider to request an informal review of a finding from a preliminary survey report. Instead, proposed new §9.183 gives a program provider the opportunity to request an informal dispute resolution if the program provider disagrees with a violation in a final survey report.

To clarify the intent of Texas Human Resources Code §161.076, the proposed amendment requires that HHSC conduct unannounced visits in residences in which residential support or supervised living is provided and allows HHSC to conduct an unannounced visit of each residence in which host home/companion care is provided. The proposed amendment, for accuracy, requires HHSC to verify that the residence provides a safe and comfortable environment that complies with the certification principles instead of verifying compliance with the Waiver Survey and Certification Checklist. The proposed amendment also al-
lows HHSC to require the program provider to submit, before a residential visit ends, a written plan describing how the safety of the individuals will be protected until corrective action is completed. The proposed amendment also requires that, based on a survey, HHSC takes action as described in §9.183. The proposed amendment allows HHSC to evaluate the health and safety of an individual at any time and to conduct an intermittent survey if a concern from the evaluation is identified. The proposed amendment uses the terms "survey," "initial certification survey," "recertification survey," or "intermittent survey," as appropriate, instead of the terms "review," "on-site reviews," and "on-site certification reviews." The proposed amendment also reorganizes some provisions, makes minor editorial changes, and retitles the section.

§9.181, Administrative Penalties
Proposed new §9.181, Administrative Penalties, allows HHSC to impose and collect an administrative penalty against an HCS program provider for a violation of a certification principle and for any of the actions listed in subsection (a)(2) of the rule. The proposed rule contains a figure that sets forth the ranges of an administrative penalty imposed for a violation of a certification principle based on the severity and scope of the violation and whether the violation is repeated non-compliance. The proposed rule also describes the factors HHSC considers in determining the amount of the administrative penalty to impose for the violation within the range. The proposed rule requires HHSC to give the program provider one opportunity to correct a violation that is not a critical violation to avoid the imposition of an administrative penalty. The proposed rule does not allow HHSC to give a program provider an opportunity to correct a critical violation before HHSC imposes an administrative penalty. The proposed rule describes when an administrative penalty, if imposed, begins accruing and when it stops accruing. The proposed rule requires that, if a program provider complete corrective action the same day an administrative penalty begins accruing, the administrative penalty is for one day. The proposed rule establishes a $1000 administrative penalty for each action described in subsection (a)(2) of the rule. The proposed rule disallows HHSC from imposing the penalty no more than once per survey and does not allow a program provider an opportunity to correct the action before imposing the administrative penalty. If HHSC imposes an administrative penalty for a violation or action described in subsection (a), the proposed rule prohibits HHSC from imposing a vendor hold or otherwise withholding contract payments from the program provider at the same time for the same violation, action, or failure to act.

§9.182, Amelioration
Proposed new §9.182, Amelioration, allows HHSC to give a program provider the opportunity for amelioration in lieu of requiring payment for an administrative penalty imposed against a program provider in accordance with §9.181. The proposed rule describes certain circumstances under which a program provider is not allowed the opportunity for amelioration. The proposed rule requires HHSC to give a program provider the opportunity for amelioration of a violation in the notice required by §49.535(c). The proposed rule requires a program provider to notify HHSC, within the required period described in the notice, that the program provider chooses amelioration. The proposed rule provides that, if the program provider does not make the required notification, the program provider’s opportunity to choose amelioration be forfeited and that HHSC requires the program provider to pay the administrative penalty in accordance with §49.535(f).

The proposed rule requires a program provider that chooses amelioration to submit a written plan for amelioration to HHSC within a specified period and describes the required contents of the plan of amelioration. The proposed rule provides that, if a program provider does not submit a plan for amelioration within 45 calendar days after the date of the notice required by §49.535(c), HHSC requires the program provider to pay the administrative penalty in accordance with §49.535(d)(1). The proposed rule requires the program provider to incur the cost of the proposed changes after HHSC approves the plan for amelioration. The proposed rule allows HHSC to require a plan for amelioration to propose changes that result in conditions exceeding the requirements of the subchapter. The proposed rule requires HHSC to notify a program provider of its decision to approve or deny a plan for amelioration within 45 calendar days after the date HHSC receives the plan. The proposed rule also allows HHSC to give the program provider an opportunity to revise the plan.

The proposed rule provides that, if HHSC approves a plan of amelioration, HHSC requires the program provider to pay the amount of the difference between the cost of the proposed changes and the administrative penalty, if the cost of the proposed changes is less than the amount of the administrative penalty and to determine if the program provider has implemented the plan. The proposed rule provides that, if HHSC denies a plan, HHSC requires the program provider to pay the amount of the administrative penalty in accordance with §49.535(d)(2) and allows the program provider to appeal the administrative penalty in accordance with §49.541. The proposed rule provides that HHSC requires the program provider to pay the amount of the administrative penalty in accordance with §49.535(d)(3), if HHSC determines that a program provider did not implement an approved plan for amelioration. The proposed rule allows the program provider to appeal the sole issue of whether the plan for amelioration was implemented.

§9.183, Program Provider Compliance and Corrective Action
Proposed new §9.183, Program Provider Compliance and Corrective Action, requires HHSC, if it determines from a survey that a program provider is in compliance with the certification principles (1) to send the program provider a final survey report stating that the program provider is in compliance with the certification principles; (2) to not require any action by the program provider; and (3) if the survey is an initial or recertification survey, to certify the program provider. The proposed rule requires HHSC to, if HHSC determines from a survey that the program provider is not in compliance with a certification principle and the violation is an immediate threat, notify the program provider of the determination. The proposed rule requires the program provider to immediately provide HHSC with a plan of removal. The program provider must specify in a plan of removal the time by which the program provider will remove the immediate threat.

The proposed rule requires HHSC to approve or disapprove the plan of removal and monitor to ensure the immediate threat is removed. The proposed rule requires HHSC, if the program provider does not provide a plan of removal, HHSC does not approve the plan of removal, or the program provider does not implement an approved plan of removal, to: (1) deny or terminate certification of the program provider; and (2) coordinate with the local intellectual and developmental disability authorities the immediate provision of alternative services for the individuals.
If HHSC determines from a survey that a program provider is not in compliance with a certification principle, the proposed rule requires HHSC to send the program provider a final survey report with a list of violations, a letter notifying the program provider that the program provider may request an informal dispute resolution to dispute a violation in the final survey report and, if HHSC imposes an administrative penalty, a written notice of the administrative penalty. If HHSC determines from an initial certification survey, recertification survey, or intermittent survey that a program provider is not in compliance with the certification principles, the proposed rule requires a program provider to submit to HHSC, within 14 calendar days after the date the program provider receives the final survey report, a plan of correction for each violation identified by HHSC in the report, even if the program provider disagrees with a violation or requests an informal dispute resolution.

The proposed rule requires a program provider’s plan of correction to specify a date by which corrective action will be completed for each violation and that such date (1) be no later than 30 calendar days after the date of the survey exit conference for a critical violation; and (2) be no later than 45 calendar days after the date of the survey exit conference for a violation that is not a critical violation. The proposed rule requires HHSC to notify the program provider of whether the plan of correction is approved or not approved. If HHSC does not approve a plan of correction, the proposed rule requires the program provider to submit a revised plan of correction within five business days after the date of HHSC’s notice that the plan of correction was not approved. The proposed rule requires HHSC to notify the program provider whether the revised plan is approved or not approved.

The proposed rule requires HHSC, if the program provider does not submit a plan of correction or revised plan of correction, or HHSC does not approve the revised plan of correction: (1) impose a vendor hold until the program provider submits a plan of correction approved by HHSC; or (2) deny or terminate certification of the program provider. The proposed rule requires HHSC, if a plan of correction is approved, to determine if a program provider has completed its corrective action by (1) requesting that the program provider submit evidence of correction to HHSC; and (2) conducting a follow-up survey for a critical violation after the date specified in the plan of correction but within 45 calendar days after the survey exit conference, or a post 45-day follow-up survey for a violation that is not critical, unless HHSC conducts an earlier follow-up survey at the request of the program provider.

The proposed rule allows HHSC, at the request of a program provider, to conduct a follow-up survey earlier than the periods described in subsection (k)(2). The proposed rule requires a program provider, if HHSC determines from an earlier follow-up survey that corrective action has been completed and the program provider has not yet submitted a plan of correction to HHSC, to include the corrective action taken on the plan of correction submitted by the program provider. If it is determined from the earlier follow-up survey that corrective action has not been completed for a violation that is not critical, the proposed rule requires HHSC to conduct the post 45-day follow-up survey.

The proposed rule describes the action that HHSC takes if it determines from a follow-up survey described in subsection (k)(2)(A) or from an earlier follow-up survey that the program provider has completed the corrective action for a critical violation and the action that HHSC takes if it determines that the program provider has not completed the corrective action for a critical violation. The proposed rule describes the action that HHSC takes if it determines from a post 45-day follow-up survey that the program provider has completed the corrective action for a violation that is not critical and the action that HHSC takes if it determines that the program provider has not completed the corrective action for a violation that is not critical.

The proposed rule also describes when an administrative penalty for a critical violation and an administrative penalty for a violation that is not critical stops accruing. The proposed rule describes the actions HHSC may take if HHSC determines that a program provider committed any of the actions described in §9.181(a)(2). The proposed rule requires HHSC, if a vendor hold is imposed on a program provider with a provisional contract, to initiate termination of the program provider’s contract.

The proposed rule requires HHSC, if a vendor hold is imposed on a program provider with a standard contract, to conduct a survey at least 31 calendar days after the effective date of the vendor hold to determine if the program provider completed the corrective action required to release the vendor hold and, that if the program provider has not completed the corrective action, to deny or terminate certification. The proposed rule describes the corrective action HHSC may require of the program provider if HHSC determines that a program provider is out of compliance with §9.177(o) or (p), relating to the minimum wage that must be paid to a service provider of supported living or community first choice personal assistance services/habilitation. The proposed rule prohibits HHSC from citing a program provider for violation of a certification principle based solely on the action or inaction of a person who is not a service provider or a staff member and allows HHSC to cite a program provider for violation of a certification principle based on the program provider’s response to the action or inaction of such a person.

§9.185, Program Provider Compliance and Corrective Action

The proposed repeal of §9.185, Program Provider Compliance and Corrective Action, deletes the current requirements for compliance and corrective action by a program provider. New requirements addressing this issue are included in proposed new §9.183.

§9.186, Program Provider’s Right to Administrative Hearing

The proposed amendment of §9.186, Program Provider’s Right to Administrative Hearing, allows a program provider to request an administrative hearing in accordance with 1 TAC §357.484. The proposed amendment deletes the list of sanctions for which a provider may request an administrative hearing and instead references §49.531(a), which lists the sanctions, including an administrative penalty. The proposed amendment makes minor editorial changes and renumbers the paragraphs to account for the deletion of provisions.

§9.188, DADS Approval of Residences

The proposed amendment of §9.188, DADS Approval of Residences, changes the rule title to “HHSC Approval of Residences.” The proposed amendment also makes minor editorial changes and corrects a rule reference.

§9.553, Definitions

The proposed amendment of §9.553, Definitions, adds definitions for “actual harm,” “critical violation,” “immediate threat,” “isolated,” “pattern,” “plan of correction,” “plan of removal,” “post 45-day follow-up survey,” “repeated violation,” “violation,” “widespread,” and "willfully interfering," because those terms are re-
lated to the imposition of an administrative penalty. The proposed amendment adds definitions for "follow-up survey," "initial certification survey," "intermittent survey," "recertification survey," and "survey" to explain the types of surveys that are conducted by HHSC. The proposed amendment removes the terms "condition of a serious nature" and "hazard to health or safety." The proposed amendment renumbers the paragraphs and alphabetizes the definitions to account for the changes.

§9.575, Program Provider's Right to Administrative Hearing

The proposed amendment of §9.575, Program Provider's Right to Administrative Hearing, allows a program provider to request an administrative hearing in accordance with 1 TAC §357.484. The proposed amendment deletes the specific sanctions for which a provider may request an administrative hearing and instead references §49.531(a), which lists the sanctions, including an administrative penalty. The proposed amendment requires a program provider to request a reconsideration of a denial of level of need assignment in accordance with §9.568 to receive an administrative hearing on the denial. This requirement is included to be consistent with the requirement for HCS program providers in §9.186(b).

§9.576, DADS Review of a Program Provider

The proposed amendment of §9.576, DADS Review of a Program Provider, lists the types of surveys conducted by HHSC and uses the term "recertification survey" instead of "annual certification survey" because this type of survey may not always occur annually. The proposed amendment allows HHSC to conduct an intermittent survey at any time during a certification period and conduct a combination of two or more different types of surveys at the same time. The proposed amendment allows HHSC to choose whether to conduct a recertification survey of a program provider that has a standard contract if the program provider is not the program provider for one or more individuals for at least 60 consecutive calendar days during the period beginning the first day of the certification period to be surveyed through the 121st calendar day before the end of the certification period. The proposed amendment allows HHSC to determine if a program provider has implemented an approved plan of amelioration as described in §9.586.

The proposed amendment requires HHSC, at the exit conference of a survey, to inform a program provider of preliminary findings, including findings that may result in a critical violation. Currently, HHSC gives the program provider a written preliminary review report at the exit conference. The proposed amendment also requires HHSC to hold a new exit conference with a program provider if HHSC identifies a finding that may be a critical violation not discussed during an exit conference, which is consistent with HHSC’s current practice of holding a new exit conference to discuss survey findings not discussed during the previous exit conference. The proposed amendment deletes the process for a program provider to request an informal review of a finding from a preliminary survey report. Instead, proposed new §9.587 gives a program provider the opportunity to request an informal dispute resolution if the program provider disagrees with a violation in a final survey report. The proposed amendment also requires that, based on a survey, HHSC takes action as described in §9.587. The proposed amendment allows HHSC to evaluate the health and safety of an individual at any time and to conduct an intermittent survey if a concern from the evaluation is identified.

The proposed amendment uses the terms "survey," "initial certification survey," "recertification survey," or "intermittent survey," as appropriate, instead of the terms "review," "on-site reviews," and "on-site certification reviews." The proposed amendment removes the terms "condition of a serious nature" and "hazard to health or safety." The proposed amendment also reorganizes some provisions, makes minor editorial changes, and retitles the section.

§9.577, Program Provider Compliance and Corrective Action

The proposed repeal of §9.577, Program Provider Compliance and Corrective Action, deletes the current requirements for compliance and corrective action by a program provider. New requirements addressing this issue are included in proposed new §9.587.

§9.581, Administrative Penalties

Proposed new §9.581, Administrative Penalties, allows HHSC to impose and collect an administrative penalty against a TxHmL program provider for a violation of a certification principle and for any of the actions listed in subsection (a)(2) of the rule. The proposed new rule contains a figure that sets forth the ranges of an administrative penalty imposed for a violation of a certification principle based on the severity and scope of the violation and whether the violation is repeated non-compliance. The proposed new rule also describes the factors HHSC considers in determining the amount of the administrative penalty to impose for the violation within the range. The proposed rule requires HHSC to give the program provider one opportunity to correct a violation that is not a critical violation to avoid the imposition of an administrative penalty. The proposed rule does not allow HHSC to give a program provider an opportunity to correct a critical violation before HHSC imposes an administrative penalty. The proposed rule describes when an administrative penalty, if imposed, begins accruing and when it stops accruing. The proposed rule requires that, if a program provider completes corrective action the same day an administrative penalty begins accruing, the administrative penalty is for one day. The proposed rule establishes a $1000 administrative penalty for each action described in subsection (a)(2) of the rule. The rule disallows HHSC from imposing the penalty no more than once per survey and does not allow a program provider an opportunity to correct the action before imposing the administrative penalty. If HHSC imposes an administrative penalty for a violation or action described in subsection (a), the proposed rule prohibits HHSC from imposing a vendor hold or otherwise withholding contract payments from the program provider at the same time for the same violation, action, or failure to act.

§9.586, Amelioration

Proposed new §9.586, Amelioration, allows HHSC to give a program provider the opportunity for amelioration, in lieu of requiring payment for an administrative penalty imposed against a program provider for a violation in accordance with §9.581. The proposed rule describes certain circumstances under which a program provider is not allowed the opportunity for amelioration. The proposed rule requires HHSC to give a program provider the opportunity for amelioration of a violation in the notice required by §49.535(c). The proposed rule requires a program provider to notify HHSC, within the required period described in the notice, that the program provider chooses amelioration. The proposed rule provides that, if the program provider does not make the required notification, the program provider’s opportunity to choose amelioration be forfeited and that HHSC require the pro-
gram provider to pay the administrative penalty in accordance with §49.535(f). The proposed rule requires a program provider that chooses amelioration to submit a written plan for amelioration to HHSC within a specified period and describes the required contents of the plan of amelioration.

The proposed rule provides that, if a program provider does not submit a plan for amelioration within 45 calendar days after the date of the notice required by §49.535(c), HHSC requires the program provider to pay the administrative penalty in accordance with §49.535(d)(1). The proposed rule requires the program provider to incur the cost of the proposed changes after HHSC approves the plan for amelioration. The proposed rule allows HHSC to require a plan for amelioration to propose changes that result in conditions exceeding the requirements of the subchapter. The proposed rule requires HHSC to notify a program provider of its decision to approve or deny a plan for amelioration within 45 calendar days after the date HHSC receives the plan. The proposed rule also allows HHSC to give the program provider an opportunity to revise the plan.

The proposed rule provides that, if HHSC approves a plan of amelioration, HHSC requires the program provider to pay the amount of the difference between the cost of the proposed changes and the administrative penalty, if the cost of the proposed changes is less than the amount of the administrative penalty, and to determine if the program provider has implemented the plan. The proposed rule provides that, if HHSC denies a plan, HHSC requires the program provider to pay the amount of the administrative penalty in accordance with §49.535(d)(2) and allows the program provider to appeal the administrative penalty in accordance with §49.541. The proposed rule provides that HHSC requires the program provider to pay the amount of the administrative penalty in accordance with §49.535(d)(3), if HHSC determines that a program provider did not implement an approved plan for amelioration. The proposed rule allows the program provider to appeal the sole issue of whether the plan for amelioration was implemented.

§9.587, Program Provider Compliance and Corrective Action

Proposed new §9.587, Program Provider Compliance and Corrective Action, requires HHSC, if it determines from a survey that a program provider is in compliance with the certification principles, (1) to send the program provider a final survey report stating that the program provider is in compliance with the certification principles; (2) to not require any action by the program provider; and (3) if the survey is an initial or recertification survey, to certify the program provider. The proposed rule requires HHSC to, if HHSC determines from a survey that the program provider is not in compliance with a certification principle and the violation is an immediate threat, notify the program provider of the determination.

The proposed rule requires the program provider to immediately provide HHSC with a plan of removal. The program provider must specify in a plan of removal the time by which the program provider will remove the immediate threat. The proposed rule requires HHSC to approve or disapprove the plan of removal and monitor to ensure the immediate threat is removed. The proposed rule requires HHSC, if the program provider does not provide a plan of removal, HHSC does not approve the plan of removal, or the program provider does not implement an approved plan of removal, to: (1) deny or terminate certification of the program provider; and (2) coordinate with the local intellectual and developmental disability authorities the immediate provision of alternative services for the individuals. If HHSC determines from a survey that a program provider is not in compliance with a certification principle, the proposed rule requires HHSC to send the program provider a final survey report with a list of violations, a letter notifying the program provider that the program provider may request an informal dispute resolution to dispute a violation in the final survey report and, if HHSC imposes an administrative penalty, a written notice of the administrative penalty.

If HHSC determines from an initial certification survey, recertification survey, or intermittent survey that a program provider is not in compliance with the certification principles, the proposed rule requires a program provider to submit to HHSC, within 14 calendar days after the date the program provider receives the final survey report, a plan of correction for each violation identified by HHSC in the report, even if the program provider disagrees with a violation or requests an informal dispute resolution. The proposed rule requires a program provider’s plan of correction to specify a date by which corrective action will be completed for each violation and that such date (1) be no later than 30 calendar days after the date of the survey exit conference for a critical violation; and (2) be no later than 45 calendar days after the date of the survey exit conference for a violation that is not a critical violation. The proposed rule requires HHSC to notify the program provider of whether the plan of correction is approved or not approved. If HHSC does not approve a plan of correction, the proposed rule requires the program provider to submit a revised plan of correction within five business days after the date of HHSC’s notice that the plan of correction was not approved.

The proposed rule requires HHSC to notify the program provider whether the revised plan is approved or not approved. The proposed rule requires HHSC, if the program provider does not submit a plan of correction or revised plan of correction, or HHSC does not approve the revised plan of correction to: (1) impose a vendor hold until the program provider submits a plan of correction approved by HHSC; or (2) deny or terminate certification of the program provider. The proposed rule requires HHSC, if a plan of correction is approved, to determine if a program provider has completed its corrective action by (1) requesting that the program provider submit evidence of correction to HHSC; and (2) conducting a follow-up survey for a critical violation after the date specified in the plan of correction but within 45 calendar days after the survey exit conference, or a post-45-day follow-up survey for a violation that is not critical, unless HHSC conducts an earlier follow-up survey at the request of the program provider.

The proposed rule allows HHSC, at the request of a program provider, to conduct a follow-up survey earlier than the periods described in subsection (k)(2). The proposed rule requires a program provider, if HHSC determines from an earlier follow-up survey that corrective action has been completed and the program provider has not yet submitted a plan of correction to HHSC, to include the corrective action taken on the plan of correction submitted by the program provider. If it is determined from the earlier follow-up survey that corrective action has not been completed for a violation that is not critical, the proposed rule requires HHSC to conduct a post-45-day follow-up survey.

The proposed rule describes the action that HHSC takes if it determines from a follow-up survey described in subsection (k)(2)(A) or from an earlier follow-up survey that the program provider has completed the corrective action for a critical violation and the action that HHSC takes if it determines that the program provider has not completed the corrective action for a critical violation. The proposed rule describes the action that HHSC takes if it determines from a post-45-day follow-up survey...
that the program provider has completed the corrective action for a violation that is not critical and the action that HHSC takes if it determines that the program provider has not completed the corrective action for a violation that is not critical. The proposed rule also describes when an administrative penalty for a critical violation and an administrative penalty for a violation that is not critical stops accruing.

The proposed rule describes the actions HHSC may take if HHSC determines that a program provider committed any of the actions described in §9.581(a)(2). The proposed rule requires HHSC, if a vendor hold is imposed on a program provider with a provisional contract, to initiate termination of the program provider’s contract. The proposed rule requires HHSC, if a vendor hold is imposed on a program provider with a standard contract, to conduct a survey at least 31 calendar days after the effective date of the vendor hold to determine if the program provider completed the corrective action required to release the vendor hold and, that if the program provider has not completed the corrective action, to deny or terminate certification. The proposed rule describes the corrective action HHSC may require of the program provider if HHSC determines that a program provider is out of compliance with §9.579(s) or (l), relating to the minimum wage that must be paid to a service provider of supported home living or community first choice personal assistance services/habilitation. The proposed rule prohibits HHSC from citing a program provider for violation of a certification principle based solely on the action or inaction of a person who is not a service provider or a staff member and allows HHSC to cite a program provider for violation of a certification principle based on the program provider’s response to the action or inaction of such a person.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, there will be an estimated additional cost and an increase in revenue to state government as a result of enforcing and administering the rules as proposed. Enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of local government.

The effect on state government for each year of the first five years the proposed rules are in effect is an estimated cost of $276,082 General Revenue (GR) ($453,745 All Funds (AF)) in State Fiscal Year (SFY) 2020, $177,850 GR ($257,281 AF) SFY 2021, $177,850 GR ($257,281 AF) in SFY 2022, $166,033 GR ($233,647 AF) in SFY 2023, and $166,033 GR ($233,647 AF) in SFY 2024.

There are also foreseeable implications relating to revenues of state government because any administrative penalties collected from program providers will increase revenue. However, HHSC lacks sufficient data to estimate any additional revenues because it is unknown how many administrative penalties will be imposed or the amount of those administrative penalties.

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

(2) implementation of the proposed rules will create new HHSC employee positions;

(3) implementation of the proposed rules will require an increase in future legislative appropriations;

(4) the proposed rules will require an increase in fees paid to HHSC;

(5) the proposed rules will create a new rule;

(6) the proposed rules will expand existing rules;

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

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

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

Trey Wood has also determined that there will be an adverse economic effect on small businesses or micro-businesses. There will not be an adverse economic effect on rural communities because no rural communities are HCS or TxHmL program providers.

The proposed rules allow HHSC to impose an administrative penalty on HCS and TxHmL program providers, some of which may be small businesses or micro-businesses.

HHSC lacks sufficient data to estimate the number of small businesses and micro-businesses subject to the proposed rules and cannot determine the projected economic impact for a small business or micro-business.

To minimize the adverse impact on small businesses or micro-businesses, HHSC considered a penalty schedule with graduated penalty amounts based on the size of a program provider. HHSC determined that the work involved in establishing such a system would have additional administrative costs associated with it that outweigh the benefits of such a system. In addition, Texas Human Resources Code §161.089 requires the rules to establish a schedule of progressive administrative penalties in accordance with the relative type, frequency, and seriousness of a violation, not the size of the program provider. HHSC also considered setting the highest penalty amount at less than the maximum allowed by statute, which is $5000. However, HHSC determined that imposition of lower amounts may not be effective in encouraging compliance with the certification principles or helping to ensure the health, safety, and welfare of the individuals served.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

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

PUBLIC BENEFIT AND COSTS

David Kostroun, Deputy Executive Commissioner for Regulatory Services, has determined that for each year of the first five years the rules are in effect, the public benefit expected is that individuals enrolled in the HCS and TxHmL Programs will benefit from an additional sanction that HHSC may take against a provider that does not comply with a certification principle. This will help ensure the quality of services and the health and safety of individuals enrolled in the HCS and TxHmL Programs.
Trey Wood, Chief Financial Officer, has also determined that for the first five years the rules are in effect, persons who are required to comply with the proposed rules may incur economic costs because program providers may be assessed an administrative penalty if they are out of compliance with the program rules. HHSC lacks sufficient information to estimate program provider administrative penalties. As a result, the cost to persons required to comply cannot be determined at this time.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Tahoe Fintel at (512) 438-3161 in HHSC Regulatory Services Division.

Written comments on the proposal may be submitted by mail to Tahoe Fintel, Senior Policy Specialist, P.O. Box 149030, Austin, Texas 78714-9030; or by e-mail to HHSRulesCoordinationOffice@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be: (1) postmarked or before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or e-mailed before midnight on the following business day to be accepted. When e-mailing comments, please indicate "Comments on Proposed Rule 40R069" in the subject line.

SUBCHAPTER D. HOME AND COMMUNITY-BASED SERVICES (HCS) PROGRAM AND COMMUNITY FIRST CHOICE (CFC)


STATUTORY AUTHORITY

The amendments and new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; Texas Human Resources Code §§161.089, which allows HHSC to assess and collect an administrative penalty against an HCS program provider, Texas Human Resources Code §161.0891, which permits an HCS or TxHmL program provider to use any portion of the amount of an administrative penalty to ameliorate the violation or improve services in the HCS or TxHmL Program, Texas Human Resources Code §161.0892, which establishes an informal dispute resolution process for an HCS or TxHmL program provider to adjudicate disputes related to a proposed enforcement action or related proceeding by HHSC; and Texas Government Code, Chapter 531, Subchapter A-1, which transfers functions of DADS to HHSC.


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

(1) Abuse--
   (A) physical abuse;
   (B) sexual abuse; or
   (C) verbal or emotional abuse.

(2) Actively involved--Significant, ongoing, and supportive involvement with an applicant or individual by a person, as determined by the applicant's or individual's service planning team or program provider, based on the person's:
   (A) interactions with the applicant or individual;
   (B) availability to the applicant or individual for assistance or support when needed; and
   (C) knowledge of, sensitivity to, and advocacy for the applicant's or individual's needs, preferences, values, and beliefs.

(3) Actual Harm--A negative outcome that compromises an individual's physical, mental, or emotional well-being but does not constitute an immediate threat.

(4) [Ω] ADLs--Activities of daily living. Basic personal everyday activities, including tasks such as eating, toileting, grooming, dressing, bathing, and transferring.

(5) [Ω] Alarm call--A signal transmitted from an individual's CFC ERS equipment to the CFC ERS response center indicating that the individual needs immediate assistance.

(6) [Ω] Alleged perpetrator--A person alleged to have committed an act of abuse, neglect, or exploitation of an individual.

(7) [Ω] Applicant--A Texas resident seeking services in the HCS Program.

(8) [Ω] Behavioral emergency--A situation in which an individual's severely aggressive, destructive, violent, or self-injurious behavior:
   (A) poses a substantial risk of imminent probable death of, or substantial bodily harm to, the individual or others;
   (B) has not abated in response to attempted preventive de-escalatory or redirection techniques;
   (C) is not addressed in a written behavior support plan; and
   (D) does not occur during a medical or dental procedure.

(9) [Ω] Business day--Any day except a Saturday, Sunday, or national or state holiday listed in Texas Government Code §662.003(a) or (b).

(10) [Ω] Calendar day--Any day, including weekends and holidays.

(11) [Ω] CDS option--Consumer directed services option. A service delivery option as defined in §41.103 of this title (relating to Definitions).

(12) [Ω] CFC--Community First Choice.
(13) CFC ERS--CFC emergency response services. Backup systems and supports used to ensure continuity of services and supports. CFC ERS includes electronic devices and an array of available technology, personal emergency response systems, and other mobile communication devices.

(14) CFC ERS provider--The entity directly providing CFC ERS to an individual, which may be the program provider or a contractor of the program provider.

(15) CFC FMS--The term used for FMS on the IPC of an applicant or individual if the applicant or individual receives only CFC PAS/HAB through the CDS option.

(16) CFC PAS/HAB--CFC personal assistance services/habilitation. A service that:

(A) consists of:

(i) personal assistance services that provide assistance to an individual in performing ADLs and IADLs based on the individual's person-centered service plan, including:

(I) non-skilled assistance with the performance of the ADLs and IADLs;

(II) household chores necessary to maintain the home in a clean, sanitary, and safe environment;

(III) escort services, which consist of accompanying and assisting an individual to access services or activities in the community, but do not include transporting an individual; and

(IV) assistance with health-related tasks; and

(ii) habilitation that provides assistance to an individual in acquiring, retaining, and improving self-help, socialization, and daily living skills and training the individual on ADLs, IADLs, and health-related tasks, such as:

(I) self-care;

(II) personal hygiene;

(III) household tasks;

(IV) mobility;

(V) money management;

(VI) community integration, including how to get around in the community;

(VII) use of adaptive equipment;

(VIII) personal decision making;

(IX) reduction of challenging behaviors to allow individuals to accomplish ADLs, IADLs, and health-related tasks; and

(X) self-administration of medication; and

(B) does not include transporting the individual, which means driving the individual from one location to another.

(17) CFC support consultation--The term used for support consultation on the IPC of an applicant or individual if the applicant or individual receives only CFC PAS/HAB through the CDS option.

(18) CFC support management--Training regarding how to select, manage, and dismiss an unlicensed service provider of CFC PAS/HAB, as described in the HCS Handbook.

(19) Chemical restraint--A medication used to control an individual's behavior or to restrict the individual's freedom of movement that is not a standard treatment for the individual's medical or psychological condition.

(20) CMS--Centers for Medicare & Medicaid Services. The federal agency within the United States Department of Health and Human Services that administers the Medicare and Medicaid programs.

(21) Cognitive rehabilitation therapy--A service that:

(A) assists an individual in learning or relearning cognitive skills that have been lost or altered as a result of damage to brain cells or brain chemistry in order to enable the individual to compensate for lost cognitive functions; and

(B) includes reinforcing, strengthening, or reestablishing previously learned patterns of behavior, or establishing new patterns of cognitive activity or compensatory mechanisms for impaired neurological systems.

(22) Competitive employment--Employment that pays an individual at least minimum wage if the individual is not self-employed.

(23) Contract--A provisional contract or a standard contract.

(24) Controlling person--A person who:

(A) has an ownership interest in a program provider;

(B) is an officer or director of a corporation that is a program provider;

(C) is a partner in a partnership that is a program provider;

(D) is a member or manager in a limited liability company that is a program provider;

(E) is a trustee or trust manager of a trust that is a program provider;

(F) because of a personal, familial, or other relationship with a program provider, is in a position of actual control or authority with respect to the program provider, regardless of the person's title.

(25) CRCG--Community resource coordination group. A local interagency group, composed of public and private agencies that develops service plans for individuals whose needs can be met only through interagency coordination and cooperation. The group's role and responsibilities are described in the Memorandum of Understanding on Coordinated Services to Persons Needing Services from More Than One Agency, available on the HHSC website.


(27) Critical violation--A violation for which HHSC may assess an administrative penalty before giving a program provider an opportunity to correct the violation. A critical violation:

(A) is an immediate threat;

(B) has resulted in actual harm and is widespread;

(C) has resulted in actual harm and is a pattern; or
(D) has the potential to result in actual harm and is widespread.

(28) [422] DADS--HHSC.

(29) [423] DARS--The Texas Workforce Commission.

(30) [429] DFPS--The Department of Family and Protective Services.

(31) [430] Emergency--An unexpected situation in which the absence of an immediate response could reasonably be expected to result in risk to the health and safety of an individual or another person.

(32) [431] Emergency situation--An unexpected situation involving an individual's health, safety, or welfare, of which a person of ordinary prudence would determine that the LAR should be informed, such as:

(A) an individual needing emergency medical care;
(B) an individual being removed from his residence by law enforcement;
(C) an individual leaving his residence without notifying a staff member or service provider and not being located; and
(D) an individual being moved from his residence to protect the individual (for example, because of a hurricane, fire, or flood).

(33) [432] Exploitation--The illegal or improper act or process of using, or attempting to use, an individual or the resources of an individual for monetary or personal benefit, profit, or gain.

(34) [433] Family-based alternative--A family setting in which the family provider or providers are specially trained to provide support and in-home care for children with disabilities or children who are medically fragile.

(35) [434] FMS--Financial management services. A service, as defined in §41.103 of this title, that is provided to an individual participating in the CDS option.

(36) [435] FMSA--Financial management services agency. As defined in §41.103 of this title, an entity that provides financial management services to an individual participating in the CDS option.

(37) Follow-up survey--A review by HHSC of a program provider to determine if the program provider has completed corrective action.

(38) [446] Former military member--A person who served in the United States Army, Navy, Air Force, Marine Corps, or Coast Guard:

(A) who declared and maintained Texas as the person's state of legal residence in the manner provided by the applicable military branch while on active duty; and
(B) who was killed in action or died while in service, or whose active duty otherwise ended.

(39) [437] Four-person residence--A residence:

(A) that a program provider leases or owns;
(B) in which at least one person but no more than four persons receive:

(i) residential support;
(ii) supervised living;
(iii) a non-HCS Program service similar to residential support or supervised living (for example, services funded by DFPS or by a person's own resources); or
(iv) respite;

(C) that, if it is the residence of four persons, at least one of those persons receives residential support;

(D) that is not the residence of any persons other than a service provider, the service provider's spouse or person with whom the service provider has a spousal relationship, or a person described in subparagraph (B) of this paragraph; and

(E) that is not a dwelling described in §9.155(a)(5)(H) of this subchapter (relating to Eligibility Criteria and Suspension of HCS Program Services and of CFC Services).

(40) [438] Good cause--As used in §19.174(i) of this subchapter (relating to Certification Principles: Service Delivery), a reason outside the control of the CFC ERS provider, as determined by HHSC.

(41) [439] GRO--General residential operation. The term has the meaning set forth in Texas Human Resources Code, §42.002.

(42) [442] HCS Program--The Home and Community-based Services Program operated by HHSC as authorized by CMS in accordance with §1915(c) of the Social Security Act.

(43) [443] Health-related tasks--Specific tasks related to the needs of an individual, which can be delegated or assigned by licensed health care professionals under state law to be performed by a service provider of CFC PAS/HAB. These include tasks delegated by an RN; health maintenance activities as defined in 22 TAC §225.4 (relating to Definitions), that may not require delegation; and activities assigned to a service provider of CFC PAS/HAB by a licensed physical therapist, occupational therapist, or speech-language pathologist.

(44) [443] HHSC--The Texas Health and Human Services Commission.

(45) [444] IADLS--Instrumental activities of daily living. Activities related to living independently in the community, including meal planning and preparation; managing finances; shopping for food, clothing, and other essential items; performing essential household chores; communicating by phone or other media; and traveling around and participating in the community.

(46) [445] ICAP--Inventory for Client and Agency Planning.

(47) [446] ICF/IID--Intermediate care facility for individuals with an intellectual disability or related conditions. An ICF/IID is a facility in which ICF/IID Program services are provided and that is:

(A) licensed in accordance with THSC, Chapter 252; or
(B) certified by HHSC, including a state supported living center.

(48) [447] ICF/IID Program--The Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions Program, which provides Medicaid-funded residential services to individuals with an intellectual disability or related conditions.

(49) [448] ID/RC Assessment--Intellectual Disability/Related Conditions Assessment. A form used by HHSC for LOC determination and LON assignment.
(50) Immediately threatened--A situation that causes, or is likely to cause, serious injury, harm, or impairment to or the death of an individual.

(51) [[499]] Implementation plan--A written document developed by the program provider that, for each HCS Program service, except for the transportation provided as a supported home living activity, and CFC service, except for CFC support management, on the individual's IPC to be provided by the program provider, includes:

(A) a list of outcomes identified in the PDP that will be addressed using HCS Program services and CFC services;

(B) specific objectives to address the outcomes required by subparagraph (A) of this paragraph that are:

(i) observable, measurable, and outcome-oriented; and

(ii) derived from assessments of the individual's strengths, personal goals, and needs;

(C) a target date for completion of each objective;

(D) the number of units of HCS Program services and CFC services needed to complete each objective;

(E) the frequency and duration of HCS Program services and CFC services needed to complete each objective; and

(F) the signature and date of the individual, LAR, and the program provider.

(52) [[500]] Individual--A person enrolled in the HCS Program.

(53) Initial certification survey--A review by HHSC of a program provider with a provisional contract to determine if the program provider is in compliance with the certification principles.

(54) [[501]] Initial IPC--The first IPC for an individual developed before the individual’s enrollment into the HCS Program.

(55) [[502]] Intellectual disability--Significant sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

(56) Intermittent survey--A review by HHSC of a program provider that is not an initial certification survey, a recertification survey, or a follow-up survey, to determine if the program provider is in compliance with the certification principles.

(57) [[503]] IPC--Individual plan of care. A written plan that:

(A) states:

(i) the type and amount of each HCS Program service and each CFC service, except for CFC support management, to be provided to the individual during an IPC year;

(ii) the services and supports to be provided to the individual through resources other than HCS Program services or CFC services, including natural supports, medical services, and educational services; and

(iii) if an individual will receive CFC support management; and

(B) is authorized by HHSC.

(58) [[504]] IPC cost--Estimated annual cost of HCS Program services included on an IPC.

(59) [[505]] IPC year--A 12-month period of time starting on the date an initial or renewal IPC begins. A revised IPC does not change the begin or end date of an IPC year.

(60) Isolated--The scope of a violation that has affected a very limited number of individuals or that has occurred only occasionally.

(61) [[506]] LAR--Legally authorized representative. A person authorized by law to act on behalf of a person with regard to a matter described in this subchapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(62) [[507]] LIDDA--Local intellectual and developmental disability authority. An entity designated by the executive commissioner of HHSC, in accordance with THSC, §533A.035.

(63) LOC--Level of care. A determination given to an individual as part of the eligibility determination process based on data submitted on the ID/RC Assessment.

(64) [[508]] LON--Level of need. An assignment given by HHSC to an individual upon which reimbursement for host home/companion care, supervised living, residential support, and day habilitation is based.

(65) [[509]] LVN--Licensed vocational nurse. A person licensed to practice vocational nursing in accordance with Texas Occupations Code, Chapter 301.

(66) [[510]] Managed care organization--This term has the meaning set forth in Texas Government Code, §536.001.

(67) [[511]] MAO Medicaid--Medical Assistance Only Medicaid. A type of Medicaid by which an applicant or individual qualifies financially for Medicaid assistance but does not receive SSI benefits.

(68) [[512]] Mechanical restraint--A mechanical device, material, or equipment used to control an individual's behavior by restricting the ability of the individual to freely move part or all of the individual’s body.

(69) [[513]] Microboard--A program provider:

(A) that is a non-profit corporation;

(i) that is created and operated by no more than 10 persons, including an individual;

(ii) the purpose of which is to address the needs of the individual and directly manage the provision of HCS Program services or CFC services; and

(iii) in which each person operating the corporation participates in addressing the needs of the individual and directly managing the provision of HCS Program services or CFC services; and

(B) that has a service capacity designated in the HHSC data system of no more than three individuals.

(70) [[514]] Military family member--A person who is the spouse or child (regardless of age) of:

(A) a military member; or

(B) a former military member.

(71) [[515]] Military member--A member of the United States military serving in the Army, Navy, Air Force, Marine Corps, or Coast Guard on active duty who has declared and maintains Texas as the member's state of legal residence in the manner provided by the applicable military branch.
Natural supports--Unpaid persons, including family members, volunteers, neighbors, and friends, who assist and sustain an individual.

Neglect--A negligent act or omission that caused physical or emotional injury or death to an individual or placed an individual at risk of physical or emotional injury or death.

Nursing facility--A facility licensed in accordance with THSC, Chapter 242.

Pattern--The scope of a violation that is not widespread but represents repeated failures by the program provider to comply with certification principles and the failures:

(A) are found throughout the services provided by the program provider; or

(B) involve or affect the same individuals, service providers, or volunteers.

PDP--Person-directed plan. A written plan, based on person-directed planning and developed with an applicant or individual in accordance with the HHSC Person-Directed Plan form and discovery tool found on the HHSC website, that describes the supports and services necessary to achieve the desired outcomes identified by the applicant or individual (and LAR on the applicant's or individual's behalf) and ensure the applicant's or individual's health and safety.

Performance contract--A written agreement between HHSC and a LIDDA for the performance of delegated functions, including those described in THSC, §533A.035.

Permanency planning--A philosophy and planning process that focuses on the outcome of family support for an applicant or individual under 22 years of age by facilitating a permanent living arrangement in which the primary feature is an enduring and nurturing parental relationship.

Permanency Planning Review Screen--A screen in the HHSC data system, completed by a LIDDA, that identifies community supports needed to achieve an applicant's or individual's permanency planning outcomes and provides information necessary for approval to provide supervised living or residential support to the applicant or individual.

Person-directed planning--An ongoing process that empowers the applicant or individual (and the LAR on the applicant's or individual's behalf) to direct the development of a PDP. The process:

(A) identifies supports and services necessary to achieve the applicant's or individual's outcomes;

(B) identifies existing supports, including natural supports and other supports available to the applicant or individual and negotiates needed services system supports;

(C) occurs with the support of a group of people chosen by the applicant or individual (and the LAR on the applicant's or individual's behalf); and

(D) accommodates the applicant's or individual's style of interaction and preferences.

Physical abuse--Any of the following:

(A) an act or failure to act performed knowingly, recklessly, or intentionally, including incitement to act, that caused physical injury or death to an individual or placed an individual at risk of physical injury or death;

(B) an act of inappropriate or excessive force or corporal punishment, regardless of whether the act results in a physical injury to an individual;

(C) the use of a restraint on an individual not in compliance with federal and state laws, rules, and regulations; or

(D) seclusion.

Physical restraint--Any manual method used to control an individual's behavior, except for physical guidance or prompting of brief duration that an individual does not resist, that restricts:

(A) the free movement or normal functioning of all or a part of the individual's body; or

(B) normal access by an individual to a portion of the individual's body.

Plan of correction--A plan documented on the HHSC Plan of Correction form that includes the corrective action that a program provider will take for each violation identified on a final survey report.

Plan of removal--A written plan that describes the action a program provider will take to remove an immediate threat that HHSC identifies.

Post 45-day follow-up survey--A follow-up survey conducted at least 46 calendar days after the exit conference of the survey in which the violation requiring corrective action was identified.

Post-move monitoring visit--As described in §17.503 of this title, (relating to Transition Planning for a Designated Resident), a visit conducted by the service coordinator in the individual's residence and other locations, as determined by the service planning team, for an individual who enrolled in the HCS Program from a nursing facility or enrolled in the HCS Program as a diversion from admission to a nursing facility. The purpose of the visit is to review the individual's residence and other locations to:

(A) assess whether essential supports identified in the transition plan are in place;

(B) identify gaps in care; and

(C) address such gaps, if any, to reduce the risk of crisis, re-admission to a nursing facility, or other negative outcome.

Pre-enrollment minor home modifications--Minor home modifications, as described in the HCS Program Billing Guidelines, completed before an applicant is discharged from a nursing facility, an ICF/IID, or a GRO and before the effective date of the applicant's enrollment in the HCS Program.

Pre-enrollment minor home modifications assessment--An assessment performed by a licensed professional as required by the HCS Program Billing Guidelines to determine the need for pre-enrollment minor home modifications.

Pre-move site review--As described in §17.503 of this title, a review conducted by the service coordinator in the planned residence and other locations, as determined by the service planning team, for an applicant transitioning from a nursing facility to the HCS Program. The purpose of the review is to ensure that essential services and supports described in the applicant's transition plan are in place before the applicant moves to the residence or receives services in the other locations.
(90) [hidden] Program provider--A person, as defined in §49.102 of this title (relating to Definitions), that has a contract with HHSC to provide HCS Program services, excluding an FMSA.

(91) [hidden] Provisional contract--An initial contract that HHSC enters into with a program provider in accordance with §49.208 of this title (relating to Provisional Contract Application Approval) that has a stated expiration date.

(92) [hidden] Public emergency personnel--Personnel of a sheriff’s department, police department, emergency medical service, or fire department.

(93) Recertification survey--A review by HHSC of a program provider with a standard contract to determine if the program provider is in compliance with the certification principles and will be certified for a new certification period.

(94) [hidden] Related condition--A severe and chronic disability that:

(A) is attributed to:
   (i) cerebral palsy or epilepsy; or
   (ii) any other condition, other than mental illness, found to be closely related to an intellectual disability because the condition results in impairment of general intellectual functioning or adaptive behavior similar to that of individuals with an intellectual disability, and requires treatment or services similar to those required for individuals with an intellectual disability;

(B) is manifested before the individual reaches age 22;

(C) is likely to continue indefinitely; and

(D) results in substantial functional limitation in at least three of the following areas of major life activity:
   (i) self-care;
   (ii) understanding and use of language;
   (iii) learning;
   (iv) mobility;
   (v) self-direction; and
   (vi) capacity for independent living.

(95) [hidden] Relative--A person related to another person within the fourth degree of consanguinity or within the second degree of affinity. A more detailed explanation of this term is included in the HCS Program Billing Guidelines.

(96) [hidden] Renewal IPC--An IPC developed for an individual in accordance with §9.166(a) of this subchapter (relating to Renewal and Revision of an IPC).

(97) Repeated violation--A violation that is based on the same certification principle and involves the same HCS Program service or CFC service as a previous violation.

(98) [hidden] Responder--A person designated to respond to an alarm call activated by an individual.

(99) [hidden] Restraint--Any of the following:

(A) a physical restraint;

(B) a mechanical restraint; or

(C) a chemical restraint.

(100) [hidden] Revised IPC--An initial IPC or a renewal IPC that is revised during an IPC year in accordance with §9.166(b) or (d) of this subchapter to add a new HCS Program service or CFC service or change the amount of an existing service.

(101) [hidden] RN--Registered nurse. A person licensed to practice professional nursing in accordance with Texas Occupations Code, Chapter 301.

(102) [hidden] Seclusion--The involuntary placement of an individual alone in an area from which the individual is prevented from leaving.

(103) [hidden] Service backup plan--A plan that ensures continuity of critical program services if service delivery is interrupted.

(104) [hidden] Service coordination--A service as defined in Chapter 2, Subchapter L of this title (relating to Service Coordination for Individuals with an Intellectual Disability).

(105) [hidden] Service coordinator--An employee of a LIDDA who provides service coordination to an individual.

(106) [hidden] Service planning team--One of the following:

(A) for an applicant or individual other than one described in subparagraphs (B) or (C) of this paragraph, a planning team consisting of:
   (i) an applicant or individual and LAR;
   (ii) service coordinator; and
   (iii) other persons chosen by the applicant or individual or LAR, for example, a staff member of the program provider, a family member, a friend, or a teacher;

(B) for an applicant 21 years of age or older who is residing in a nursing facility and enrolling in the HCS Program, a planning team consisting of:
   (i) the applicant and LAR;
   (ii) service coordinator;
   (iii) a staff member of the program provider;
   (iv) providers of specialized services;
   (v) a nursing facility staff person who is familiar with the applicant’s needs;

(vi) other persons chosen by the applicant or LAR, for example, a family member, a friend, or a teacher; and

(vii) at the discretion of the LIDDA, other persons who are directly involved in the delivery of services to persons with an intellectual or developmental disability; or

(C) for an individual 21 years of age or older who has enrolled in the HCS Program from a nursing facility or has enrolled in the HCS Program as a diversion from admission to a nursing facility, for 365 calendar days after enrollment, a planning team consisting of:
   (i) the individual and LAR;
   (ii) service coordinator;
   (iii) a staff member of the program provider;
   (iv) other persons chosen by the individual or LAR, for example, a family member, a friend, or a teacher; and

(v) with the approval of the individual or LAR, other persons who are directly involved in the delivery of services to persons with an intellectual or developmental disability.
(107) [4061] Service provider--A person, who may be a staff member, who directly provides an HCS Program service or CFC service to an individual.

(108) [4072] Sexual abuse--Any of the following:

(A) sexual exploitation of an individual;

(B) non-consensual or unwelcomed sexual activity with an individual; or

(C) consensual sexual activity between an individual and a service provider, staff member, volunteer, or controlling person, unless a consensual sexual relationship with an adult individual existed before the service provider, staff member, volunteer, or controlling person became a service provider, staff member, volunteer, or controlling person.

(109) [4083] Sexual activity--An activity that is sexual in nature, including kissing, hugging, stroking, or fondling with sexual intent.

(110) [4094] Sexual exploitation--A pattern, practice, or scheme of conduct against an individual that can reasonably be construed as being for the purposes of sexual arousal or gratification of any person:

(A) which may include sexual contact; and

(B) does not include obtaining information about an individual's sexual history within standard accepted clinical practice.

(111) [40000] Specialized services--As defined in §17.102 of this title (relating to Definitions).

(112) [4011] SSI--Supplemental Security Income.

(113) [4023] Staff member--An employee or contractor of an HCS Program provider.

(114) [4033] Standard contract--A contract that HHSC enters into with a program provider in accordance with §49.209 of this title (relating to Standard Contract) that does not have a stated expiration date.

(115) [4043] State Medicaid claims administrator--The entity contracting with the state as the Medicaid claims administrator and fiscal agent.

(116) [4053] State supported living center--A state-supported and structured residential facility operated by HHSC to provide to persons with an intellectual disability a variety of services, including medical treatment, specialized therapy, and training in the acquisition of personal, social, and vocational skills, but does not include a community-based facility owned by HHSC.

(117) [4063] Support consultation--A service, as defined in §41.103 of this title, that is provided to an individual participating in the CDS option at the request of the individual or LAR.

(118) Survey--An initial certification survey, a recertification survey, a follow-up survey, and an intermittent survey.

(119) [4073] System check--A test of the CFC ERS equipment to determine if:

(A) the individual can successfully activate an alarm call; and

(B) the equipment is working properly.

(120) [4089] TANF--Temporary Assistance for Needy Families.

(121) [4099] TAS--Transition assistance services. Services provided to assist an applicant in setting up a household in the community before being discharged from a nursing facility, an ICF/IID, or a GRO and before enrolling in the HCS Program. TAS consists of:

(A) for an applicant whose proposed initial IPC does not include residential support, supervised living, or host home/companion care:

(i) paying security deposits required to lease a home, including an apartment, or to establish utility services for a home;

(ii) purchasing essential furnishings for a home, including a table, a bed, chairs, window blinds, eating utensils, and food preparation items;

(iii) paying for expenses required to move personal items, including furniture and clothing, into a home;

(iv) paying for services to ensure the health and safety of the applicant in a home, including pest eradication, allergen control, or a one-time cleaning before occupancy; and

(v) purchasing essential supplies for a home, including toilet paper, towels, and bed linens; and

(B) for an applicant whose initial proposed IPC includes residential support, supervised living, or host home/companion care:

(i) purchasing bedroom furniture;

(ii) purchasing personal linens for the bedroom and bathroom; and

(iii) paying for allergen control.

(122) [4100] Three-person residence--A residence:

(A) that a program provider leases or owns;

(B) in which at least one person but no more than three persons receive:

(i) residential support;

(ii) supervised living;

(iii) a non-HCS Program service similar to residential support or supervised living (for example, services funded by DFPS or by a person's own resources); or

(iv) respite;

(C) that is not the residence of any person other than a service provider, the service provider's spouse or person with whom the service provider has a spousal relationship, or a person described in subparagraph (B) of this paragraph; and

(D) that is not a dwelling described in §9.155(a)(5)(H) of this subchapter.

(123) [4111] THSC--Texas Health and Safety Code. Texas statutes relating to health and safety.

(124) [4121] Transition plan--As described in §17.503 of this title, a written plan developed by the service planning team for an applicant who is residing in a nursing facility and enrolling in the HCS Program. A transition plan includes the essential and nonessential services and supports the applicant needs to transition from a nursing facility to a community setting.

(125) [4131] Transportation plan--A written plan, based on person-directed planning and developed with an applicant or individ-
ual using the HHSC Individual Transportation Plan form found on the HHSC website. A transportation plan is used to document how transportation as a supported home living activity will be delivered to support an individual's desired outcomes and purposes for transportation as identified in the PDP.

126] Vendor hold--A temporary suspension of payments that are due to a program provider under a contract.

127] Verbal or emotional abuse--Any act or use of verbal or other communication, including gestures:

128] Violation--A finding by HHSC that a program provider is not or has not been in compliance with a certification principle.

129] Volunteer--A person who works for a program provider without compensation, other than reimbursement for actual expenses.

130] Widespread--The scope of a violation that:

131] Willfully interfering--Acting or not acting to intentionally prevent, interfere with, or impede, or to attempt to intentionally prevent, interfere with, or impede.

§9.171. HHSC Surveys [DADS Review of a Program Provider] and Residential Visits of a Program Provider [Visit].

(a) A program provider must be in continuous compliance with the [HCS Program] certification principles contained in this subchapter that apply to program providers [§§9.122 - 9.124 and §§9.172 - 9.180 of this subchapter (relating to Certification Principles: Mission, Development, and Philosophy of Program Operations; Certification Principles: Rights of Individuals; Certification Principles: Service Delivery; Certification Principles: Staff Member and Service Provider Requirements; Certification Principles: Quality Assurance; Certification Principles: Restraint; and Certification Principles: Prohibitions)].

(b) HHSC conducts the following surveys:

1. an initial certification survey;
2. a recertification survey;
3. a follow-up survey; and
4. an intermittent survey.

[b] DADS conducts on-site certification reviews of the program provider, at least annually, to evaluate evidence of the program provider's compliance with certification principles. Based on a review, DADS takes action as described in §9.185 of this subchapter (relating to Program Provider Compliance and Corrective Action).

c) HHSC conducts an initial certification survey [After a program provider has obtained a provisional contract, DADS conducts an initial on-site certification review] within 120 calendar days after the date HHSC [DADS] approves the enrollment or transfer of the first individual to receive HCS Program services from the program provider [under the provisional contract].

d) HHSC may conduct an intermittent survey at any time during a certification period.

e) HHSC may conduct a combination of two or more different types of surveys at the same time.

(f) [d] If HHSC [DADS] certifies a program provider after completion of an initial or a recertification survey [annual certification review], the certification period is for no more than 365 calendar days.

g) HHSC may choose not to conduct a recertification survey of a program provider that has a standard contract if the program provider is not the program provider for one or more individuals for at least 60 consecutive calendar days during the period beginning the first day of the certification period to be surveyed through the 121st calendar day before the end of the certification period.

(h) [d] During a survey, HHSC [any review, DADS] may:

1. review the HCS Program services or CFC services provided to any individual to determine if a [the] program provider is in compliance with the certification principles; and
2. determine if a program provider has implemented an approved plan for amelioration as described in §9.182 of this subchapter (relating to Amelioration).

(i) [e] HHSC [DADS] conducts an exit conference at the end of a survey [all on-site reviews], at a time and location determined by HHSC. At the exit conference, HHSC informs a program provider of preliminary findings, including findings that may result in a critical violation [DADS, and at the exit conference gives the program provider a written preliminary review report].

1. [b] If HHSC identifies a finding that may be a critical violation not discussed during an exit conference, HHSC holds a new exit conference with a program provider to discuss the finding [in a program provider disagrees with any of the findings in a preliminary review report, the program provider may request that DADS conduct an informal review of those findings].

1. [A] To request an informal review of any of the findings in the preliminary review report, the program provider must:

[A] complete DADS Form 3610 "Informal Review Request" as instructed on the form; and

[B] mail or fax the completed DADS Form 3610 to the address or fax number listed on the form.

[C] DADS must receive the completed form within seven calendar days after the date of the review exit conference.

[D] If DADS receives a timely request for an informal review, DADS:

[A] notifies the program provider in writing of the results of the informal review within 10 calendar days of receipt of the request; and
(B) sends the program provider a final review report within 21 calendar days after the date of the review exit conference."

(c) If a program provider does not request an informal review as described in subsection (b) of this section, DADS sends the program provider a final review report within 21 calendar days after the date of the review exit conference.

(k) In addition to the surveys [on-site certification reviews] described in [subsection (b) of this section], HHSC [DADS] conducts, at least annually, a visit [unannounced visits] of each residence in which host home/companion care, residential support, or supervised living is provided to determine if [verify that] the residence provides a safe and comfortable [environment that complies with the certification principles [DADS Waiver Survey and Certification Residential Checklist, which is found at www.dads.state.tx.us]].

(1) HHSC conducts an unannounced visit of each residence in which residential support or supervised living is provided.

(2) HHSC may conduct an unannounced visit of each residence in which host home/companion care is provided.

(l) Based on the information obtained from a visit described in subsection (k) of this section, HHSC [DADS] may:

(1) require the program provider to complete corrective action before the residential visit ends;

(2) require the program provider to submit, before the residential visit ends, a written plan describing how the safety of the individuals will be protected until corrective action is completed;

(3) require the program provider to submit evidence of corrective action within a time period determined by HHSC [DADS]; or

(4) conduct an intermittent survey [a review] of the program provider [in accordance with this section].

(m) Based on a survey, HHSC takes action as described in §9.183 of this subchapter (relating to Program Provider Compliance and Corrective Action).

(n) HHSC may evaluate the health and safety of an individual at any time. If HHSC identifies a concern from the evaluation, HHSC may conduct an intermittent survey.

§9.181. Administrative Penalties

(a) HHSC may impose and collect an administrative penalty against a program provider for:

(1) a violation of a certification principle that applies to a program provider; and

(2) any of the following:

(A) willfully interfering with the work of a representative of HHSC or the enforcement of this subchapter, which may include:

(i) making a false statement of material fact that the program provider knows or should know is false with respect to a matter under investigation by HHSC; and

(ii) falsifying documentation, including documenting the provision of a service before the service has been provided; or

(B) failing to pay an administrative penalty within 10 calendar days after the date the assessment of the penalty becomes final.

(b) The range of the administrative penalty that may be imposed against a program provider each day for a violation described in subsection (a)(1) of this section is based on the scope and severity of the violation and whether it is an initial or repeated violation, as set forth in the following figure:

Figure 40 TAC 9.181(b)

(c) In determining the amount of an administrative penalty within a range, HHSC considers:

(1) the seriousness of the violation, including:

(A) the nature, circumstances, extent, and gravity of the violation; and

(B) the hazard to the health or safety of individuals resulting from the violation;

(2) the program provider’s history of previous violations;

(3) whether the program provider:

(A) had prior knowledge of the violation, including whether the program provider identified the violation through the program provider’s internal quality assurance process; and

(B) made any efforts to mitigate or correct the identified violation;

(4) the penalty amount necessary to deter future violations; and

(5) any other matter that justice may require.

(d) If HHSC determines that a violation is not a critical violation, HHSC allows a program provider one opportunity to correct the violation to avoid the imposition of an administrative penalty. If HHSC determines that a violation is a critical violation, HHSC does not allow a program provider an opportunity to correct the violation before HHSC imposes an administrative penalty.

(e) If HHSC imposes an administrative penalty for a violation described in subsection (a)(1) of this section, the administrative penalty begins accruing:

(1) for a critical violation, on the date HHSC identifies the violation; or

(2) for a violation that is not critical, on the date of the exit conference of the post 45-day follow-up survey.

(f) An administrative penalty accrues each day until the earliest of the following:

(1) the program provider completes corrective action for that violation, as determined by HHSC;

(2) HHS imposes a vendor hold for that violation; or

(3) HHSC withholds payments as the result of a proposed contract termination.

(g) If the program provider demonstrates that corrective action is complete on the same day an administrative penalty begins accruing, HHSC imposes an administrative penalty for one day.

(h) For an administrative penalty imposed in accordance with subsection (a)(2) of this section:

(1) HHSC imposes the penalty no more than once per survey;

(2) HHSC does not allow a program provider an opportunity to correct the action before imposing the penalty; and

(3) the amount of the penalty is $1000.

(i) If HHSC imposes an administrative penalty against a program provider in accordance with subsection (a) of this section, HHSC
does not, at the same time, impose a vendor hold or otherwise withhold contract payments from the program provider for the same violation, action, or failure to act.


(a) In lieu of requiring payment for an administrative penalty imposed against a program provider in accordance with §9.181 of this subchapter (relating to Administrative Penalties), HHSC may give the program provider the opportunity for amelioration in accordance with this subsection.

(b) HHSC does not give a program provider the opportunity for amelioration:

(1) more than three times in a two-year period;

(2) more than one time in a two-year period for the same or similar violation;

(3) for a critical violation that is an immediate threat; or

(4) for the actions or failures to act described in §9.181(a)(2) of this subchapter.

(c) HHSC gives a program provider the opportunity for amelioration in the notice required by §49.535(c) of this title (relating to Administrative Penalties in the HCS and TxHmL Programs). If the program provider does not notify HHSC that the program provider chooses amelioration within the required period described in the notice, the program provider forfeits the opportunity to choose amelioration and HHSC requires the program provider to pay the administrative penalty in accordance with §49.535(f).

(d) If a program provider chooses amelioration in accordance with the notice required by §49.535(c) of this title, the program provider must submit a written plan for amelioration to HHSC within 45 calendar days after the date of the notice required by §49.535(c) of this title. If a program provider does not submit a plan for amelioration within 45 calendar days, HHSC requires the program provider to pay the administrative penalty in accordance with §49.535(d)(1).

(e) A plan for amelioration must include:

(1) proposed changes to the management or operation of the program provider that will improve services or the quality of care for the individuals;

(2) the ways in which and the extent to which the proposed changes will improve services or quality of care for the individuals through measurable outcomes;

(3) clear goals to be achieved through the proposed changes;

(4) a timeline for implementing the proposed changes;

(5) specific actions necessary to implement the proposed changes;

(6) the cost of the proposed changes; and

(7) an agreement to waive the program provider's right to appeal the imposition of the administrative penalty if HHSC approves the plan for amelioration.

(f) The cost of the proposed changes must be incurred by the program provider after HHSC approves the plan for amelioration. If HHSC approves the plan and the cost of the proposed changes is less than the amount of the administrative penalty, HHSC requires the program provider to pay the difference between the cost of the proposed changes and the administrative penalty.

(g) HHSC may require a plan for amelioration to propose changes that result in conditions exceeding the requirements of this subchapter.

(h) HHSC notifies a program provider of its decision to approve or deny a plan for amelioration within 45 calendar days after the date HHSC receives the plan. During the 45-day period, HHSC may allow the program provider an opportunity to revise the plan.

(1) If HHSC approves the plan:

(A) the program provider must implement the plan; and

(B) HHSC:

(i) requires the program provider to pay the amount of the difference between the cost of the proposed changes and the administrative penalty, if any; and

(ii) determines in one or more surveys conducted in accordance with §9.171 of this subchapter (relating to HHSC Surveys and Residential Visits) if the program provider has implemented the plan.

(2) If HHSC denies the plan, HHSC requires the program provider to pay the amount of the administrative penalty in accordance with §49.535(d)(2). The program provider may appeal the administrative penalty in accordance with §49.541 of this title (relating to Contractor's Right to Appeal).

(i) If HHSC determines that a program provider did not implement an approved plan for amelioration, HHSC requires the program provider to pay the amount of the administrative penalty in accordance with §49.535(d)(3) of this title. The program provider may appeal the sole issue of whether the plan for amelioration was implemented.

§9.183 Program Provider Compliance and Corrective Action.

(a) If HHSC determines from a survey that a program provider is in compliance with the certification principles, HHSC:

(1) sends the program provider a final survey report stating that the program provider is in compliance with the certification principles;

(2) does not require any action by the program provider; and

(3) if the survey is an initial or a recertification survey, certifies the program provider as described in §9.171(f) of this subchapter (relating to HHSC Surveys and Residential Visits of a Program Provider).

(b) If HHSC determines from a survey that a program provider is not in compliance with a certification principle and the violation is an immediate threat, HHSC notifies the program provider of the determination. The program provider must immediately provide HHSC with a plan of removal.

(c) In a plan of removal provided in accordance with subsection (b) of this section, a program provider must specify the time by which the program provider will remove the immediate threat. HHSC approves or disapproves the plan of removal and monitors to ensure the immediate threat is removed.

(d) If a program provider that is required to provide a plan of removal does not provide a plan of removal, HHSC does not approve the program provider's plan of removal, or the program provider does not implement the plan of removal approved by HHSC, HHSC:

(1) denies or terminates certification of the program provider; and
(2) coordinates with the LIDDA's the immediate provision of alternative services for the individuals.

(e) If HHSC determines from a survey that a program provider is not in compliance with a certification principle, HHSC sends to the program provider, within 14 calendar days after the date of the exit conference:

(1) a final survey report with a list of violations;

(2) a letter notifying the program provider that the program provider may request an informal dispute resolution to dispute a violation in the final survey report; and

(3) if HHSC imposes an administrative penalty in accordance with §9.181 of this subchapter (relating to Administrative Penalties), a written notice of the administrative penalty as described in §49.535(b) of this title (relating to Administrative Penalties in the HCS and TxHmL Programs).

(f) If HHSC determines from an initial certification survey, recertification survey, or intermittent survey that a program provider is not in compliance with the certification principles, the program provider must submit to HHSC, within 14 calendar days after the date the program provider receives the final survey report, a plan of correction for each violation identified by HHSC in the final survey report. The program provider must submit a plan of correction in accordance with this subsection even if the program provider disagrees with the violation or requests an informal dispute resolution.

(g) In a plan of correction submitted in accordance with subsection (f) of this section, a program provider must specify a date by which the program provider will complete corrective action for each violation and such date must:

(1) for a critical violation, be no later than 30 calendar days after the date of the survey exit conference; and

(2) for a violation that is not a critical violation, be no later than 45 calendar days after the date of the survey exit conference.

(h) After HHSC receives the plan of correction required by subsection (f) of this section, HHSC notifies the program provider whether the plan is approved or not approved.

(i) If HHSC does not approve a plan of correction required by subsection (f) of this section, the program provider must submit a revised plan of correction within five business days after the date of HHSC's notice that the plan of correction was not approved. After HHSC receives the revised plan of correction, HHSC notifies the program provider whether the revised plan is approved or not approved.

(j) If the program provider does not submit a plan of correction required by subsection (f) of this section or a revised plan of correction required by subsection (i) of this section, or if HHSC notifies the program provider that a revised plan of correction is not approved, HHSC:

(1) imposes a vendor hold against the program provider until HHSC approves a plan of correction submitted by the program provider; or

(2) denies or terminates certification of the program provider.

(k) If HHSC approves a plan of correction, HHSC takes the following actions to determine if a program provider has completed its corrective action:

(1) requests that the program provider submit evidence of correction to HHSC; and

(2) conducts:

(A) for a critical violation, a follow-up survey after the date specified in the plan of correction for correcting the violation but within 45 calendar days after the survey exit conference, unless HHSC conducts an earlier follow-up survey as described in subsection (l) of this section; or

(B) for a violation that is not critical, a post 45-day follow-up survey, unless HHSC conducts an earlier follow-up survey as described in subsection (l) of this section.

(l) At the request of a program provider, HHSC may conduct a follow-up survey earlier than the timeframes described in subsection (k)(2) of this section.

(1) If HHSC determines from the earlier follow-up survey that corrective action has been completed and the program provider has not yet submitted a plan of correction to HHSC in accordance with subsection (f) of this section, the program provider must include the corrective action taken on the plan of correction that is submitted.

(2) If HHSC determines from the earlier follow-up survey that corrective action has not been completed for a violation that is not critical, HHSC conducts the post 45-day follow-up survey.

(m) If HHSC determines from a follow-up survey described in subsection (k)(2)(A) or (1) of this section that the program provider has completed corrective action for a critical violation, the administrative penalty stops accruing on the date corrective action was completed, as determined by HHSC. HHSC sends the program provider a written notice as described in §49.535(c) of this title.

(n) If HHSC determines from a follow-up survey described in subsection (k)(2)(A) or (1) of this section that the program provider has not completed the corrective action for a critical violation, HHSC:

(1) continues the administrative penalty and conducts another follow-up survey to determine if the program provider completed the corrective action;

(2) imposes a vendor hold against the program provider; or

(3) denies or terminates certification of the program provider.

(o) HHSC takes the actions described in this subsection regarding a follow-up survey described in subsection (n)(1) of this section.

(1) If HHSC determines from the survey that the program provider has completed the corrective action, the administrative penalty stops accruing on the date corrective action was completed, as determined by HHSC. HHSC sends the program provider a written notice as described in §49.535(c) of this title.

(2) If HHSC determines from the survey that the program provider has not completed the corrective action, the administrative penalty stops accruing and HHSC:

(A) imposes a vendor hold against the program provider; or

(B) denies or terminates certification of the program provider.

(p) If HHSC determines from a post 45-day follow-up survey or an earlier survey described in subsection (l) of this section that a program provider has completed corrective action for a non-critical violation, HHSC does not impose an administrative penalty for the non-critical violation.
(q) If HHSC determines from a post 45-day follow-up survey that a program provider has not completed corrective action for a non-critical violation, HHSC:

(1) imposes an administrative penalty for the non-critical violation in accordance with §9.181 of this subchapter;
(2) notifies the program provider of the administrative penalty, as described in §49.535(b) of this title; and
(3) conducts a survey:
    (A) at least 31 calendar days after the date of the post 45-day exit conference of the follow-up survey; or
    (B) earlier than 31 calendar days after the date of the exit conference of the post 45-day follow-up survey if the program provider has submitted evidence of corrective action to HHSC during the 30-day period.

(r) HHSC takes the actions described in this subsection regarding a survey described in subsection (q)(3) of this section:

(1) If HHSC determines from the survey that the program provider has completed corrective action, the administrative penalty stops accruing on the date corrective action was completed, as determined by HHSC. HHSC sends the program provider a written notice as described in §49.535(c) of this title;

(2) If HHSC determines from the survey that the program provider has not completed the corrective action, the administrative penalty stops accruing and HHSC:
    (A) imposes a vendor hold against the program provider; or
    (B) denies or terminates certification of the program provider.

(s) If HHSC determines that a program provider committed any of the actions described in §9.181(a)(2) of this subchapter, HHSC takes one of the following actions:

(1) imposes an administrative penalty against the program provider as described in §9.181 of this subchapter;
(2) imposes a vendor hold against the program provider; or
(3) denies or terminates certification of the program provider.

(t) If HHSC imposes a vendor hold in accordance with this section:

(1) for a program provider with a provisional contract, HHSC initiates termination of the program provider’s contract in accordance with §49.534 of this title (relating to Termination of Contract by HHSC); or
(2) for a program provider with a standard contract, HHSC conducts a survey at least 31 calendar days after the effective date of the vendor hold to determine if the program provider completed the corrective action required to release the vendor hold and:
    (A) if the program provider completed the corrective action, HHSC releases the vendor hold; or
    (B) if the program provider has not completed the corrective action, HHSC denies or terminates certification.

(u) If HHSC determines that a program provider is out of compliance with §9.177(o) or (p) of this subchapter (relating to Certification Principles: Staff Member and Service Provider Requirements), corrective action required by HHSC may include the program provider paying or ensuring payment to a service provider of supported home living or CFC PAS/HAB who was not paid the wages required by §9.177(o) of this subchapter, the difference between the amount required and the amount paid to the service provider.

(v) HHSC does not cite a program provider for violation of a certification principle based solely on the action or inaction of a person who is not a service provider or a staff member. HHSC may cite a program provider for violation of a certification principle based on the program provider’s response to the action or inaction of such a person.


(a) A program provider may request an administrative hearing in accordance with 1 TAC §357.484 (relating to Request for a Hearing) if HHSC has taken or proposes to take the following action:

(1) proposes or imposes a sanction described in §49.531(a) of this title (relating to Sanction by HHSC); or [vendor hold];
    (2) contract termination;
    (3) repayment of payments made to the program provider; or
    (4) denies denial of a program provider's claim for payment, including denial of a retroactive LOC and denial of a recommended LON.

(b) If the basis of an administrative hearing requested in accordance with subsection (a)(2) of this section is a dispute regarding an LON assignment, the program provider may receive an administrative hearing only if reconsideration was requested by the program provider in accordance with §9.165 of this subchapter (relating to Reconsideration of LON Assignment).

§9.188. HHSC [DADS] Approval of Residences.

(a) A program provider must obtain [DADS] written approval from HHSC in accordance with subsection (b) of this section before providing residential support in a four-person residence.

(b) To obtain approval of a four-person residence, the program provider must submit the following written documentation to HHSC [DADS]:

(1) the address and county of the residence;
(2) certification from the program provider that the program provider intends to provide residential support to one or more individuals who will live in the residence;
(3) one of the certifications required by §9.178(c)(1)(A) of this subchapter (relating to Certification Principles: Quality Assurance); and
(4) written certification from the program provider that the residence to be approved is not the residence of any person other than [except] a person permitted to live in a “four-person residence,” as defined [described] in §9.153(32)(D) of this subchapter (relating to Definitions).

(c) HHSC [DADS] notifies the program provider in writing of its approval or disapproval of the four-person residence within 14 calendar days after HHSC [DADS] receives the documentation specified in subsection (b) of this section.

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

Filed with the Office of the Secretary of State on November 21, 2019.
40 TAC §9.185
STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; Texas Human Resources Code §161.089, which allows HHSC to assess and collect an administrative penalty against an HCS or TxHmL program provider, Texas Human Resources Code §161.0891, which permits an HCS or TxHmL program provider to use any portion of the amount of an administrative penalty to ameliorate the violation or improve services in the HCS or TxHmL Program, Texas Human Resources Code §161.0892, which establishes an informal dispute resolution process for an HCS or TxHmL program provider to adjudicate disputes related to a proposed enforcement action or related proceeding by HHSC; and Texas Government Code, Chapter 531, Subchapter A-1, which transfers functions of DADS to HHSC.


§9.185. Program Provider Compliance and Corrective Action.
The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency’s legal authority to adopt.

Filed with the Office of the Secretary of State on November 21, 2019.

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Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: January 5, 2020
For further information, please call: (512) 438-3161

SUBCHAPTER N. TEXAS HOME LIVING (TXHML) PROGRAM AND COMMUNITY FIRST CHOICE (CFC)


STATUTORY AUTHORITY

The amendments and new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; Texas Human Resources Code §161.089, which allows HHSC to assess and collect an administrative penalty against an HCS or TxHmL program provider, Texas Human Resources Code §161.0891, which permits an HCS or TxHmL program provider to use any portion of the amount of an administrative penalty to ameliorate the violation or improve services in the HCS or TxHmL Program, Texas Human Resources Code §161.0892, which establishes an informal dispute resolution process for an HCS or TxHmL program provider to adjudicate disputes related to a proposed enforcement action or related proceeding by HHSC; and Texas Government Code, Chapter 531, Subchapter A-1, which transfers functions of DADS to HHSC.


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

(1) Abuse--
(A) physical abuse;
(B) sexual abuse; or
(C) verbal or emotional abuse.

(2) Actual Harm--A negative outcome that compromises an individual's physical, mental, or emotional well-being but does not constitute immediate threat.

(3) ADLs--Activities of daily living. Basic personal everyday activities including tasks such as eating, toileting, grooming, dressing, bathing, and transferring.

(4) Alarm call--A signal transmitted from an individual's CFC ERS equipment to the CFC ERS response center indicating that the individual needs immediate assistance.

(5) Alleged perpetrator--A person alleged to have committed an act of abuse, neglect, or exploitation of an individual.

(6) Applicant--A Texas resident seeking services in the TXHmL Program.

(7) Business day--Any day except a Saturday, a Sunday, or a national or state holiday listed in Texas Government Code §662.003(a) or (b).

(8) Calendar day--Any day, including weekends and holidays.

(9) CDS option--Consumer directed services option. A service delivery option as defined in §41.103 of this title (relating to Definitions).

(10) CFC--Community First Choice.

(11) CFC ERS--CFC emergency response services. Backup systems and supports used to ensure continuity of services and supports. CFC ERS includes electronic devices and an array of avail-
able technology, personal emergency response systems, and other mobile communication devices.

(12) CFC ERS provider--The entity directly providing CFC ERS to an individual, which may be the program provider or a contractor of the program provider.

(13) CFC FMS--The term used for FMS on the IPC of an applicant or individual if the applicant or individual receives only CFC PAS/HAB through the CDS option.

(14) CFC PAS/HAB--CFC personal assistance services/habilitation. A service that:

(A) consists of:

(i) personal assistance services that provide assistance to an individual in performing ADLs and IADLs based on the individual's person-centered service plan, including:

(I) non-skilled assistance with the performance of the ADLs and IADLs;

(II) household chores necessary to maintain the home in a clean, sanitary, and safe environment;

(III) escort services, which consist of accompanying and assisting an individual to access services or activities in the community, but do not include transporting an individual; and

(IV) assistance with health-related tasks; and

(ii) habilitation that provides assistance to an individual in acquiring, retaining, and improving self-help, socialization, and daily living skills and training the individual on ADLs, IADLs, and health-related tasks, such as:

(I) self-care;

(II) personal hygiene;

(III) household tasks;

(IV) mobility;

(V) money management;

(VI) community integration, including how to get around in the community;

(VII) use of adaptive equipment;

(VIII) personal decision making;

(IX) reduction of challenging behaviors to allow individuals to accomplish ADLs, IADLs, and health-related tasks; and

(X) self-administration of medication; and

(B) does not include transporting the individual, which means driving the individual from one location to another.

(15) CFC support consultation--The term used for support consultation on the IPC of an applicant or individual if the applicant or individual receives only CFC PAS/HAB through the CDS option.

(16) CFC support management--Training regarding how to select, manage, and dismiss an unlicensed service provider of CFC PAS/HAB as described in the HCS Handbook.

(17) Chemical restraint--A medication used to control an individual's behavior or to restrict the individual's freedom of movement that is not a standard treatment for the individual's medical or psychological condition.

(18) CMS--Centers for Medicare & Medicaid Services. The federal agency within the United States Department of Health and Human Services that administers the Medicare and Medicaid programs.

(19) Competitive employment--Employment that pays an individual at least minimum wage if the individual is not self-employed.

(20) Contract--A provisional contract or a standard contract.

(21) Controlling person--A person who:

(A) has an ownership interest in a program provider;

(B) is an officer or director of a corporation that is a program provider;

(C) is a partner in a partnership that is a program provider;

(D) is a member or manager in a limited liability company that is a program provider;

(E) is a trustee or trust manager of a trust that is a program provider; or

(F) because of a personal, familial, or other relationship with a program provider, is in a position of actual control or authority with respect to the program provider, regardless of the person's title.

(22) Critical incident--An event listed in the TxHmL Provider User Guide found at www.hhsc.state.tx.us [http://www2.mhmr.state.tx.us/655/cis/training/txhmlGuide.html].

(23) Critical violation--A violation for which HHSC may assess an administrative penalty before giving a program provider an opportunity to correct the violation and that:

(A) is an immediate threat;

(B) has resulted in actual harm and is widespread;

(C) has resulted in actual harm and is a pattern; or

(D) has the potential to result in actual harm and is widespread.

(24) DADS--HHSC.

(25) Department of Assistive and Rehabilitative Services--The Texas Workforce Commission.

(26) DFPS--The Department of Family and Protective Services.

(27) Exploitation--The illegal or improper act or process of using, or attempting to use, an individual or the resources of an individual for monetary or personal benefit, profit, or gain.

(28) FMS--Financial management services. A service, as defined in §41.103 of this title, that is provided to an individual participating in the CDS option.

(29) FMSA--Financial management services agency. As defined in §41.103 of this title, an entity that provides financial management services to an individual participating in the CDS option.
(30) Follow-up survey--A review by HHSC of a program provider to determine if the program provider has completed corrective action.

(31) [§9.578] Former military member--A person who served in the United States Army, Navy, Air Force, Marine Corps, or Coast Guard:

(A) who declared and maintained Texas as the person's state of legal residence in the manner provided by the applicable military branch while on active duty; and

(B) who was killed in action or died while in service, or whose active duty otherwise ended.

(32) [§225.44] Good cause--As used in §9.578 of this subchapter, (relating to Program Provider Certification Principles: Service Delivery), a reason outside the control of the CFC ERS provider, as determined by HHSC.

(33) [§225.44] Hazard to health or safety--A condition in which serious injury or death of an individual or other person is imminent because of a program provider's noncompliance with a certification principle.

(34) [§225.44] HCS Program--The Home and Community-based Services Program operated by HHSC as authorized by CMS in accordance with §1915(c) of the Social Security Act.

(35) [§225.44] HHSC--The Texas Health and Human Services Commission.

(36) [§225.44] IADLs--Instrumental activities of daily living. Activities related to living independently in the community, including meal planning and preparation; managing finances; shopping for food, clothing, and other essential items; performing essential household chores; communicating by phone or other media; and traveling around and participating in the community.

(37) [§225.44] ICAP--Inventory for Client and Agency Planning.

(38) [§225.44] ICF/IID--Intermediate care facility for individuals with an intellectual disability or related conditions. An ICF/IID is a facility in which ICF/IID Program services are provided and that is:

(A) licensed in accordance with THSC, Chapter 252; or

(B) certified by HHSC, including a state supported living center.

(39) [§225.44] ICF/IID Program--The Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions Program, which provides Medicaid-funded residential services to individuals with an intellectual disability or related conditions.

(40) [§225.44] ID/RC Assessment--A form used by HHSC for LOC determination and LON assignment.

(41) Immediate threat--A situation that caused, or is likely to cause, serious physical harm or serious emotional harm to an individual, or the death of an individual.

(42) [§225.44] Implementation plan--A written document developed by a program provider for an individual that, for each TxHmL Program service, except for transportation provided as a community support activity, and CFC service, except for CFC support management, on the individual's IPC to be provided by the program provider, includes:

(A) a list of outcomes identified in the PDP that will be addressed using TxHmL Program services and CFC services;

(B) specific objectives to address the outcomes required by subparagraph (A) of this paragraph that are:

(i) observable, measurable, and outcome-oriented; and

(ii) derived from assessments of the individual's strengths, personal goals, and needs;

(C) a target date for completion of each objective;

(D) the number of units of TxHmL Program services and CFC services needed to complete each objective;

(E) the frequency and duration of TxHmL Program services and CFC services needed to complete each objective; and

(F) the signature and date of the individual, LAR, and the program provider.

(43) [§225.44] Individual--A person enrolled in the TxHmL Program.

(44) [§225.44] Initial certification survey--A review by HHSC of a program provider with a provisional contract to determine if the program provider is in compliance with the certification principles.

(45) [§225.44] Intellectual disability--Significant sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

(46) [§225.44] Intermittent survey--A review by HHSC of a program provider that is not an initial certification survey, a recertification survey, or a follow-up survey, to determine if the program provider is in compliance with the certification principles.

(47) [§225.44] IPC--Individual plan of care. A written plan that:

(A) states:

(i) the type and amount of each TxHmL Program service and each CFC service, except for CFC support management, to be provided to an individual during an IPC year;

(ii) the services and supports to be provided to the individual through resources other than TxHmL Program services or CFC services, including natural supports, medical services, and educational services; and

(iii) if an individual will receive CFC support management; and

(B) is authorized by HHSC.

(48) [§225.44] IPC cost--Estimated annual cost of program services included on an IPC.

(49) [§225.44] IPC year--A 12-month period of time starting on the date an authorized initial or renewal IPC begins.

(50) Isolated--The scope of a violation that has affected a very limited number of individuals or that has occurred only occasionally.

(51) [§225.44] LAR--Legally authorized representative. A person authorized by law to act on behalf of a person with regard
to a matter described in this subchapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(52) [(47f)] LIDDA--Local intellectual and developmental disability authority. An entity designated by the executive commissioner of HHSC, in accordance with THSC §533A.035.

(53) [(48g)] LOC--Level of care. A determination made by HHSC about an applicant or individual as part of the TxHmL Program eligibility determination process based on data electronically transmitted on the ID/RC Assessment.

(54) [(49j)] LON--Level of need. An assignment given by HHSC for an applicant or individual that is derived from the service level score obtained from the administration of the ICAP to the individual and from selected items on the ID/RC Assessment.

(55) [(50l)] LVN--Licensed vocational nurse. A person licensed to practice vocational nursing in accordance with Texas Occupations Code, Chapter 301.

(56) [(51j)] Managed care organization--This term has the meaning set forth in Texas Government Code, §536.001.

(57) [(52k)] MAO Medicaid--Medical Assistance Only Medicaid. A type of Medicaid by which an applicant or individual qualifies financially for Medicaid assistance but does not receive Supplemental Security Income (SSI) benefits.

(58) [(53m)] Mechanical restraint--A mechanical device, material, or equipment used to control an individual's behavior by restricting the ability of the individual to freely move part or all of the individual's body.

(59) [(54n)] Microboard--A program provider:

(A) that is a non-profit corporation;

(i) that is created and operated by no more than 10 persons, including an individual;

(ii) the purpose of which is to address the needs of the individual and directly manage the provision of the TxHmL Program services or CFC services; and

(iii) in which each person operating the corporation participates in addressing the needs of the individual and directly managing the provision of TxHmL Program services or CFC services; and

(B) that has a service capacity designated in the HHSC data system of no more than three individuals.

(60) [(55p)] Military family member--A person who is the spouse or child (regardless of age) of:

(A) a military member; or

(B) a former military member.

(61) [(56q)] Military member--A member of the United States military serving in the Army, Navy, Air Force, Marine Corps, or Coast Guard on active duty who has declared and maintains Texas as the member's state of legal residence in the manner provided by the applicable military branch.

(62) [(57r)] Natural supports--Unpaid persons, including family members, volunteers, neighbors, and friends, who assist and sustain an individual.

(63) [(58s)] Neglect--A negligent act or omission that caused physical or emotional injury or death to an individual or placed an individual at risk of physical or emotional injury or death.

(64) [(59t)] Nursing facility--A facility licensed in accordance with THSC, Chapter 242.

(65) [(60u)] Own home or family home--A residence that is not:

(A) an ICF/IID;

(B) a nursing facility;

(C) an assisted living facility licensed or subject to being licensed in accordance with THSC, Chapter 247;

(D) a residential child-care operation licensed or subject to being licensed by DFPS unless it is a foster family home or a foster group home;

(E) a facility licensed or subject to being licensed by the Department of State Health Services;

(F) a residential facility operated by the Texas Workforce Commission;

(G) a residential facility operated by the Texas Juvenile Justice Department, a jail, or a prison; or

(H) a setting in which two or more dwellings, including units in a duplex or apartment complex, single family homes, or facilities listed in subparagraphs (A) - (G) of this paragraph, but excluding supportive housing under Section 811 of the National Affordable Housing Act of 1990, meet all of the following criteria:

(i) the dwellings create a residential area distinguishable from other areas primarily occupied by persons who do not require routine support services because of a disability;

(ii) most of the residents of the dwellings are persons with an intellectual disability; and

(iii) the residents of the dwellings are provided routine support services through personnel, equipment, or service facilities shared with the residents of the other dwellings.

(66) Pattern--The scope of a violation that is not widespread but represents repeated failures by the program provider to comply with certification principles, and the failures:

(A) are found throughout the services provided by the program provider; or

(B) involve or affect the same individuals, service providers, or volunteers.

(67) [(61v)] PDP--Person-directed plan. A written plan, based on person-directed planning and developed with an applicant or individual in accordance with the HHSC Person-Directed Plan form and discovery tool found on the HHSC website, that describes the supports and services necessary to achieve the desired outcomes identified by the applicant, individual, or LAR and ensure the applicant's or individual's health and safety.

(68) [(62w)] Performance contract--A written agreement between HHSC and a LIDDA for the performance of delegated functions, including those described in THSC, §533A.035.

(69) [(63x)] Physical abuse--Any of the following:

(A) an act or failure to act performed knowingly, recklessly, or intentionally, including incitement to act, that caused physical injury or death to an individual or placed an individual at risk of physical injury or death;
(B) an act of inappropriate or excessive force or corporal punishment, regardless of whether the act results in a physical injury to an individual;

(C) the use of a restraint on an individual not in compliance with federal and state laws, rules, and regulations; or

(D) seclusion.

(20) [641] Physical restraint--Any manual method used to control an individual's behavior, except for physical guidance or prompting of brief duration that an individual does not resist, that restricts:

(A) the free movement or normal functioning of all or a part of the individual's body; or

(B) normal access by an individual to a portion of the individual's body.

(21) Plan of correction--A plan documented on the HHSC Plan of Correction form that includes the corrective action that a program provider will take for each violation identified on a final survey report.

(22) Plan of removal--A written plan that describes the action a program provider will take to remove an immediate threat that HHSC identifies.

(23) Post 45-day follow-up survey--A follow-up survey conducted at least 46 calendar days after the exit conference of the survey in which the violation requiring corrective action was identified.

(24) [655] Post-move monitoring visit--As described in §17.503 of this title (relating to Transition Planning for a Designated Resident), a visit conducted by the service coordinator in the individual's residence and other locations, as determined by the service planning team, for an individual who enrolled in the TxHmL Program from a nursing facility or enrolled in the TxHmL Program as a diversion from admission to a nursing facility. The purpose of the visit is to review the individual's residence and other locations to:

(A) assess whether essential supports identified in the transition plan are in place;

(B) identify gaps in care; and

(C) address such gaps, if any, to reduce the risk of crisis, re-admission to a nursing facility, or other negative outcome.

(25) [666] Pre-move site review--As described in §17.503 of this title, a review conducted by the service coordinator in the planned residence and other locations, as determined by the service planning team, for an applicant transitioning from a nursing facility to the TxHmL Program. The purpose of the review is to ensure that essential supports and supports described in the applicant's transition plan are in place before the applicant moves to the residence or receives services in the other locations.

(26) [672] Program provider--A person, as defined in §49.102 of this title (relating to Definitions), that has a contract with HHSC to provide TxHmL Program services, excluding an FMSCA.

(27) [688] Provisional contract--An initial contract that HHSC enters into with a program provider in accordance with §49.208 of this title (relating to Provisional Contract Application Approval) that has a stated expiration date.

(28) [690] Public emergency personnel--Personnel of a sheriff's department, police department, emergency medical service, or fire department.

(79) Recertification survey--A review by HHSC of a program provider with a standard contract to determine if the program provider is in compliance with the certification principles and will be certified for a new certification period.

(80) [700] Related condition--A severe and chronic disability that:

(A) is attributed to:

(i) cerebral palsy or epilepsy; or

(ii) any other condition, other than mental illness, found to be closely related to an intellectual disability because the condition results in impairment of general intellectual functioning or adaptive behavior similar to that of individuals with an intellectual disability, and requires treatment or services similar to those required for individuals with an intellectual disability;

(B) is manifested before the individual reaches age 22;

(C) is likely to continue indefinitely; and

(D) results in substantial functional limitation in at least three of the following areas of major life activity:

(i) self-care;

(ii) understanding and use of language;

(iii) learning;

(iv) mobility;

(v) self-direction; and

(vi) capacity for independent living.

(81) Repeated violation--A violation that is:

(A) based on the same certification principle; and

(B) involves the same TxHmL Program service.

(82) [715] Respite facility--A site that is not a residence and that is owned or leased by a program provider for the purpose of providing out-of-home respite to not more than six individuals receiving TxHmL Program services or other persons receiving similar services at any one time.

(83) [722] Responder--A person designated to respond to an alarm call activated by an individual.

(84) [723] Restraint--Any of the following:

(A) a physical restraint;

(B) a mechanical restraint; or

(C) a chemical restraint.

(85) [724] RN--Registered nurse. A person licensed to practice professional nursing in accordance with Texas Occupations Code, Chapter 301.

(86) [735] Seclusion--The involuntary placement [separation] of an individual [away from other individuals and the placement of the individual] alone in an area from which the individual is prevented from leaving.

(87) [746] Service backup plan--A plan that ensures continuity of a service that is critical to an individual's health and safety if service delivery is interrupted.

(88) [729] Service coordination--A service as defined in Chapter 2, Subchapter L of this title (relating to Service Coordination for Individuals with an Intellectual Disability).
Service coordinator--An employee of a LIDDA who provides service coordination to an individual.

Service planning team--One of the following:

(A) for an applicant or individual other than one described in subparagraphs (B) or (C) of this paragraph, a planning team consisting of:

(i) an applicant or individual and LAR;

(ii) service coordinator; and

(iii) other persons chosen by the applicant, individual, or LAR, for example, a staff member of the program provider, a family member, a friend, or a teacher;

(B) for an applicant 21 years of age or older who is residing in a nursing facility and enrolling in the TxHmL Program, a planning team consisting of:

(i) the applicant and LAR;

(ii) service coordinator;

(iii) a staff member of the program provider;

(iv) providers of specialized services;

(v) a nursing facility staff person who is familiar with the applicant's needs;

(vi) other persons chosen by the applicant or LAR, for example, a family member, a friend, or a teacher; and

(vii) at the discretion of the LIDDA, other persons who are directly involved in the delivery of services to persons with an intellectual or developmental disability; or

(C) for an individual 21 years of age or older who has enrolled in the TxHmL program from a nursing facility or has enrolled in the TxHmL Program as a diversion from admission to a nursing facility, for 180 days after enrollment, a planning team consisting of:

(i) the individual and LAR;

(ii) service coordinator;

(iii) a staff member of the program provider;

(iv) other persons chosen by the individual or LAR, for example, a family member, a friend, or a teacher; and

(v) at the discretion of the LIDDA, other persons who are directly involved in the delivery of services to persons with an intellectual or developmental disability.

Service provider--A person, who may be a staff member, who directly provides a TxHmL Program service or CFC service to an individual.

Sexual abuse--Any of the following:

(A) sexual exploitation of an individual;

(B) non-consensual or unwelcomed sexual activity with an individual; or

(C) consensual sexual activity between an individual and a service provider, staff member, volunteer, or controlling person, unless a consensual sexual relationship with an adult individual existed before the service provider, staff member, volunteer, or controlling person became a service provider, staff member, volunteer, or controlling person.

Sexual activity--An activity that is sexual in nature, including kissing, hugging, stroking, or fondling with sexual intent.

Sexual exploitation--A pattern, practice, or scheme of conduct against an individual that can reasonably be construed as being for the purposes of sexual arousal or gratification of any person:

(A) which may include sexual contact; and

(B) does not include obtaining information about an individual's sexual history within standard accepted clinical practice.

Specialized services--Services defined in §17.102 of this title (relating to Definitions).

Staff member--An employee or contractor of a TxHmL Program provider.

Standard contract--A contract that HHSC enters into with a program provider in accordance with §49.209 of this title (relating to Standard Contract) that does not have a stated expiration date.

State supported living center--A state-supported and structured residential facility operated by HHSC to provide to persons with an intellectual disability a variety of services, including medical treatment, specialized therapy, and training in the acquisition of personal, social, and vocational skills, but does not include a community-based facility owned by HHSC.

System check--A test of the CFC ERS equipment to determine if:

(A) the individual can successfully activate an alarm call; and

(B) the equipment is working properly.

Support consultation--A service, as defined in §41.103 of this title, that is provided to an individual participating in the CDS option at the request of the individual or LAR.

Survey--An initial certification survey, a recertification survey, a follow-up survey, and an intermittent survey.

TAC--Texas Administrative Code. A compilation of state agency rules published by the Texas Secretary of State in accordance with Texas Government Code, Chapter 2002, Subchapter C.

THSC--Texas Health and Safety Code. Texas statutes relating to health and safety.

Transition plan--As described in §17.503 of this title, a written plan developed by the service planning team for an applicant residing in a nursing facility who is enrolling in the TxHmL Program. A transition plan includes the essential and nonessential services and supports the applicant needs to transition from a nursing facility to a community setting.

Transportation plan--A written plan, based on person-directed planning and developed with an applicant or individual using HHSC Individual Transportation Plan form found on the HHSC website. A transportation plan is used to document how transportation as a community support activity will be delivered to support an individual's desired outcomes and purposes for transportation as identified in the PDP.

TxHmL Program--The Texas Home Living Program, operated by HHSC and approved by CMS in accordance with §1915(c) of the Social Security Act, that provides community-based...
services and supports to eligible individuals who live in their own homes or in their family homes.

(107) [(95)] Vendor hold--A temporary suspension of payments that are due to a program provider under a contract.

(108) [(96)] Verbal or emotional abuse--Any act or use of verbal or other communication, including gestures:

(A) to:

(i) harass, intimidate, humiliate, or degrade an individual; or

(ii) threaten an individual with physical or emotional harm; and

(B) that:

(i) results in observable distress or harm to the individual; or

(ii) is of such a serious nature that a reasonable person would consider it harmful or a cause of distress.

(109) Violation--A finding by HHSC that a program provider is not or has not been in compliance with a certification principle.

(110) [(97)] Volunteer--A person who works for a program provider without compensation, other than reimbursement for actual expenses.

(111) Widespread--The scope of a violation that:

(A) is pervasive throughout the services provided by the program provider; or

(B) represents a systemic failure by the program provider that affects or has the potential to affect a large portion of or all individuals.

(112) Willfully interfering--Acting or not acting to intentionally prevent, interfere with, or impede, or to attempt to intentionally prevent, interfere with, or impede.


(a) A program provider may request an administrative hearing in accordance with 1 TAC §357.484 (relating to Request for a Hearing) if HHSC (Chapter 94 of this title (relating to Hearings Under the Administrative Procedure Act)) and I TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act) if DADS takes or proposes to take the following action:

(1) proposes or imposes a sanction described in §49.531(a)

of this title (relating to Sanction by HHSC); or [vendor hold;]

(2) denies a program provider's request for payment.

[contract termination;]

[3] recoupment of payments made to the program provider; or


(b) If the basis of an administrative hearing requested in accordance with subsection (a)(2) of this section is a dispute regarding an LON assignment, the program provider may receive an administrative hearing only if reconsideration was requested by the program provider in accordance with §9.568 of this subchapter (relating to Revisions and Renewals of Individual Plans of Care (IPC’s), Levels of Care (LOC’s), and Levels of Need (LON’s) for Enrolled Individuals).


(a) A [The] program provider must be in continuous compliance with the certification principles contained in this subchapter that apply to program providers §§9.578 - 9.580 and §9.584 of this subchapter (relating to Program Provider Certification Principles: Service Delivery; Certification Principles: Qualified Personnel; Certification Principles: Quality Assurance; and Certification Principles: Prohibitions).

(b) HHSC conducts the following surveys:

(1) an initial certification survey;

(2) a recertification survey;

(3) a follow-up survey; and

(4) an intermittent survey.

[(b) DADS conducts an on-site certification review of the program provider, at least annually, to evaluate evidence of the program provider's compliance with certification principles. Based on its review, DADS takes action as described in §9.577 of this subchapter (relating to Program Provider Compliance and Corrective Action).]

(c) HHSC conducts an initial certification survey [After a program provider has obtained a provisional contract, DADS conducts an initial on-site certification review] within 120 calendar days after the date HHSC [DADS] approves the enrollment or transfer of the first individual to receive TxHmL Program services from the program provider [under the provisional contract].

(d) HHSC may conduct an intermittent survey at any time during a certification period.

(e) HHSC may conduct a combination of two or more different types of surveys at the same time.

(f) [DADS conducts an on-site certification review of the program provider after completion of an initial or a recertification survey [annual certification review], the certification period is for no more than 365 calendar days.

[(e) DADS may conduct reviews of the program provider at any time.]

(g) HHSC may choose not to conduct a recertification survey of a program provider that has a standard contract if the program provider submits a statement that the program provider continues to be in compliance with the certification principles.

(h) [DADS conducts an exit conference at the end of a survey [all on-site reviews], for closing of the program; if the exit conference has been conducted, there will be a written preliminary review report.

(i) [DADS conducts an exit conference at the end of a survey [all on-site reviews], at a time and location determined by HHSC, at the exit conference, HHSC informs the program provider of preliminary findings, including findings that may result in a critical violation [DADS, at the conference gives the program provider a written preliminary review report].

(j) If HHSC identifies a finding that may be a critical violation noted during an exit conference, HHSC holds a new exit conference with a program provider to discuss the findings [a program provider disagrees with any of the findings in a preliminary review re-
port, the program provider may request that DADS conduct an informal review of the findings.

(1) To request an informal review of any of the findings in the preliminary review report, the program provider must:

(A) complete DADS Form 3610 "Informal Review Request" as instructed on the form; and

(B) mail or fax the completed DADS Form 3610 to the address or fax number listed on the form.

(2) DADS must receive the completed form within seven calendar days after the date of the review exit conference.

(3) If DADS receives a timely request for an informal review, DADS:

(A) notifies the program provider in writing of the results of the informal review within 10 calendar days of receipt of the request; and

(B) sends the program provider a final review report within 21 calendar days after the date of the review exit conference.

(4) If a program provider does not request an informal review as described in subsection (b) of this section, DADS sends the program provider a final review report within 21 calendar days after the date of the review exit conference.

(k) Based on a survey, HHSC takes action as described in §9.587 of this subchapter (relating to Program Provider Compliance and Corrective Action).

(l) HHSC may evaluate the health and safety of an individual at any time. If HHSC identifies a concern from the evaluation, HHSC may conduct an intermittent survey.


(a) HHSC may impose and collect an administrative penalty against a program provider for:

(1) a violation of a certification principle that applies to a program provider; and

(2) any of the following:

(A) willfully interfering with the work of a representative of HHSC or the enforcement of this subchapter which may include:

(i) making a false statement of material fact that the program provider knows or should know is false with respect to a matter under investigation by HHSC; and

(ii) falsifying documentation including documenting the provision of a service before the service has been provided; or

(B) failing to pay an administrative penalty within 10 calendar days after the date the assessment of the penalty becomes final.

(b) The range of the administrative penalty that may be imposed against a program provider each day for a violation described in subsection (a)(1) of this section is based on the scope and severity of the violation and whether it is an initial or repeated violation, as set forth in the following figure:

Figure: 40 TAC 9.581(b)

(c) In determining the amount of an administrative penalty within a range, HHSC considers:

(1) the seriousness of the violation, including:

(A) the nature, circumstances, extent, and gravity of the violation; and

(B) the hazard to the health or safety of individuals resulting from the violation;

(2) the program provider's history of previous violations;

(3) whether the program provider:

(A) had prior knowledge of the violation, including whether the program provider identified the violation through the program provider's internal quality assurance process; and

(B) made any efforts to mitigate or correct the identified violation;

(4) the penalty amount necessary to deter future violations; and

(5) any other matter that justice may require.

(d) If HHSC determines that a violation is not a critical violation, HHSC allows a program provider one opportunity to correct the violation to avoid the imposition of an administrative penalty. If HHSC determines that the violation is a critical violation, HHSC does not allow a program provider an opportunity to correct the violation before HHSC imposes an administrative penalty.

(e) If HHSC imposes an administrative penalty for a violation described in subsection (a)(1) of this section, the administrative penalty begins accruing:

(1) for a critical violation, on the date HHSC identifies the violation; or

(2) for a violation that is not critical, on the date of the exit conference of the post 45-day follow-up survey.

(f) An administrative penalty accrues each day until the earliest of the following:

(1) the program provider completes corrective action for that violation, as determined by HHSC;

(2) HHSC imposes a vendor hold for that violation; or

(3) HHSC withholds payments as the result of a proposed contract termination.

(g) If the program provider demonstrates that corrective action is complete on the same day an administrative penalty begins accruing, HHSC imposes an administrative penalty for one day.

(h) For an administrative penalty imposed in accordance with subsection (a)(2) of this section:

(1) HHSC imposes the penalty no more than once per survey;

(2) HHSC does not allow a program provider an opportunity to correct the action before imposing the penalty; and

(3) the amount of the penalty is $1000.

(i) If HHSC imposes an administrative penalty against a program provider in accordance with subsection (a) of this section, HHSC does not, at the same time, impose a vendor hold or otherwise withhold contract payments from the program provider for the same violation, action, or failure to act.


(a) In lieu of requiring payment for an administrative penalty imposed against a program provider in accordance with §9.581 of this subchapter (relating to Administrative Penalties), HHSC may give the program provider the opportunity for amelioration in accordance with this subsection.
(b) HHSC does not give a program provider the opportunity for amelioration:
   (1) more than three times in a two-year period;
   (2) more than one time in a two-year period for the same or similar violation;
   (3) for a critical violation that is an immediate threat; or
   (4) for the actions or failures to act described in §9.581(a)(2) of this subchapter.

(c) HHSC gives a program provider the opportunity for amelioration in the notice required by §49.535(c) of this title (relating to Administrative Penalties in the HCS and TxHmL Programs). If the program provider does not notify HHSC that the program provider chooses amelioration within the required period described in the notice, the program provider forfeits the opportunity to choose amelioration and HHSC requires the program provider to pay the administrative penalty.

(d) If a program provider chooses amelioration in accordance with the notice required by §49.535(c) of this title, the program provider must submit a written plan for amelioration to HHSC within 45 calendar days after the date of the notice required by §49.535(c) of this title. If a program provider does not submit a plan for amelioration within 45 calendar days, HHSC requires the program provider to pay the administrative penalty in accordance with §49.535(d)(1).

(e) A plan for amelioration must include:
   (1) proposed changes to the management or operation of the program provider that will improve services or the quality of care for the individuals;
   (2) the ways in which and the extent to which the proposed changes will improve services or quality of care for the individuals through measurable outcomes;
   (3) clear goals to be achieved through the proposed changes;
   (4) a timeline for implementing the proposed changes;
   (5) specific actions necessary to implement the proposed changes;
   (6) the cost of the proposed changes; and
   (7) an agreement to waive the program provider’s right to appeal the imposition of the administrative penalty if HHSC approves the plan for amelioration.

(f) The cost of the proposed changes must be incurred by the program provider after HHSC approves the plan for amelioration. If HHSC approves the plan and the cost of the proposed changes is less than the amount of the administrative penalty, HHSC requires the program provider to pay the difference between the cost of the proposed changes and the administrative penalty.

(g) HHSC may require a plan for amelioration to propose changes that result in conditions exceeding the requirements of this subchapter.

(h) HHSC notifies a program provider of its decision to approve or deny a plan for amelioration within 45 calendar days after the date HHSC receives the plan. During the 45-day period, HHSC may allow the program provider an opportunity to revise the plan.

   (1) If HHSC approves the plan:
      (A) the program provider must implement the plan; and

   (B) HHSC:
      (i) requires the program provider to pay the amount of the difference between the cost of the proposed changes and the administrative penalty, if any; and
      (ii) determines in one or more surveys conducted in accordance with §9.576 of this subchapter (relating to HHSC Surveys of a Program Provider) if the program provider has implemented the plan.

   (2) If HHSC denies the plan HHSC requires the program provider to pay the amount of the administrative penalty in accordance with §49.535(d)(2). The program provider may appeal the administrative penalty in accordance with §49.541 of this title (relating to Contractor’s Right to Appeal).

   (i) If HHSC determines that a program provider did not implement an approved plan for amelioration, HHSC requires the program provider to pay the amount of the administrative penalty in accordance with §49.535(d)(3) of this title. The program provider may appeal the sole issue of whether the plan for amelioration was implemented.


(a) If HHSC determines from a survey that a program provider is in compliance with the certification principles, HHSC:

   (1) sends the program provider a final survey report stating that the program provider is in compliance with the certification principles;
   (2) does not require any action by the program provider;
   (3) if the survey is an initial or a recertification survey, certifies the program provider as described in §9.576(d) of this subchapter (relating to HHSC Surveys of a Program Provider).

(b) If HHSC determines from a survey that a program provider is not in compliance with a certification principle and the violation is an immediate threat, HHSC notifies the program provider of the determination. The program provider must immediately provide HHSC with a plan of removal.

   (c) In a plan of removal provided in accordance with subsection (b) of this section, a program provider must specify the time by which the program provider will remove the immediate threat. HHSC approves or disapproves the plan of removal and monitors to ensure the immediate threat is removed.

   (d) If a program provider that is required to provide a plan of removal does not provide a plan of removal, HHSC does not implement the program provider’s plan of removal, or the program provider does not implement the plan of removal approved by HHSC, HHSC:

      (1) denies or terminates certification of the program provider; and
      (2) coordinates with the LIDDAs the immediate provision of alternative services for the individuals.

   (e) If HHSC determines from a survey that a program provider is not in compliance with a certification principle, HHSC sends to the program provider, within 14 calendar days after the date of the exit conference:

      (1) a final survey report with a list of violations;
      (2) a letter notifying the program provider that the program provider may request an informal dispute resolution to dispute a violation in the final survey report; and
Section 45 of the Texas Register. This section includes several subsections that outline procedures for handling non-compliance by program providers, including the submission of corrective actions and the imposition of administrative penalties. The section is divided into several parts, each detailing different scenarios and actions to be taken by HHSC.

(1) If HHSC determines from the earlier follow-up survey that corrective action has been completed and the program provider has not yet submitted a plan of correction to HHSC in accordance with subsection (l) of this section, the program provider must include the corrective action taken on the plan of correction that is submitted.

(2) If HHSC determines from the earlier follow-up survey that corrective action has not been completed for a violation that is not critical, HHSC conducts the post 45-day follow-up survey.

(m) If HHSC determines from a follow-up survey described in subsection (k)(2)(A) or (l) of this section that the program provider has completed corrective action for a critical violation, the administrative penalty stops accruing on the date corrective action was completed, as determined by HHSC. HHSC sends the program provider a written notice as described in §49.535(c) of this title.

(n) If HHSC determines from a follow-up survey described in subsection (k)(2)(A) or (l) of this section that the program provider has not completed the corrective action for a critical violation, HHSC:

(1) continues the administrative penalty and conducts another follow-up survey to determine if the program provider completed the corrective action;
(2) imposes a vendor hold against the program provider; or
(3) denies or terminates certification of the program provider.

(o) HHSC takes the actions described in this subsection regarding a follow-up survey described in subsection (n)(1) of this section.

(1) If HHSC determines from the survey that the program provider has completed the corrective action, the administrative penalty stops accruing on the date corrective action was completed, as determined by HHSC. HHSC sends the program provider a written notice as described in §49.535(c) of this title.

(2) If HHSC determines from the survey that the program provider has not completed the corrective action, the administrative penalty stops accruing and HHSC:

(A) imposes a vendor hold against the program provider; or
(B) denies or terminates certification of the program provider.

(p) If HHSC determines from a post 45-day follow-up survey or an earlier survey described in subsection (l) of this section that a program provider has completed corrective action for a non-critical violation, HHSC does not impose an administrative penalty for the non-critical violation.

(q) If HHSC determines from a post 45-day follow-up survey that a program provider has not completed corrective action for a non-critical violation, HHSC:

(1) imposes an administrative penalty for the non-critical violation in accordance with §9.581 of this subchapter;
(2) notifies the program provider of the administrative penalty, as described in §49.535(b) of this title; and
(3) conducts a survey:

(A) at least 31 calendar days after the date of the exit conference of the post 45-day follow-up survey; or
(B) earlier than 31 calendar days after the date of the exit conference of the post 45-day follow-up survey if the program provider requests a follow-up survey earlier than the timeframes described in subsection (k)(2) of this section.
provider has submitted evidence of corrective action to HHSC during
the 30-day period.

(r) HHSC takes the actions described in this subsection regarding
a survey described in subsection (q)(3) of this section:

(1) If HHSC determines from the survey that the program
provider has completed corrective action, the administrative penalty
stops accruing on the date corrective action was completed, as deter-
mined by HHSC. HHSC sends the program provider a written notice
as described in §49.535(c) of this title.

(2) If HHSC determines from the survey that the program
provider has not completed the corrective action, the administrative
penalty stops accruing and HHSC:

(A) imposes a vendor hold against the program
provider; or

(B) denies or terminates certification of the program
provider.

(s) If HHSC determines that a program provider committed
any of the actions described in §9.581(a)(2) of this subchapter, HHSC
takes one of the following actions:

(1) imposes an administrative penalty against the program
provider as described in §9.581 of this subchapter;

(2) imposes a vendor hold against the program provider; or

(3) denies or terminates certification of the program
provider.

(t) If HHSC imposes a vendor hold in accordance with this
section:

(1) for a program provider with a provisional contract,
HHSC initiates termination of the program provider’s contract in ac-
cordance with §49.534 of this title (relating to Termination of Contract
by HHSC); or

(2) for a program provider with a standard contract, HHSC
conducts a survey at least 31 calendar days after the effective date of
the vendor hold to determine if the program provider completed the
corrective action required to release the vendor hold and:

(A) if the program provider completed the corrective
action, HHSC releases the vendor hold; or

(B) if the program provider has not completed the cor-
rective action, HHSC denies or terminates certification.

(u) If HHSC determines that a program provider is out of com-
pliance with §9.579(s) or (t) of this subchapter (relating to Certification
Principles: Qualified Personnel), corrective action required by HHSC
may include the program provider paying or ensuring payment to a
service provider of supported home living or CFC PAS/HAB who was
not paid the wages required by §9.579(s) of this subchapter, the differ-
ence between the amount required and the amount paid to the service
provider.

(v) HHSC does not cite a program provider for violation of a
certification principle based solely on the action or inaction of a person
who is not a service provider or a staff member. HHSC may cite a
program provider for violation of a certification principle based on the
program provider’s response to the action or inaction of such a person.

The agency certifies that legal counsel has reviewed the pro-
posal 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 21,
2019.

TRD-201904404
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: January 5, 2020
For further information, please call: (512) 438-3161

40 TAC §9.577
STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code §531.0055,
which provides that the Executive Commissioner of HHSC shall
adopt rules for the operation and provision of services by the
health and human services agencies, and Texas Government
Code §531.021, which provides HHSC with the authority to ad-
minister federal funds and plan and direct the Medicaid program
in each agency that operates a portion of the Medicaid program;
Texas Human Resources Code §32.021, which provides that
HHSC shall adopt necessary rules for the proper and efficient
operation of the Medicaid program; Texas Human Resources
Code §§161.089, which allows HHSC to assess and collect
an administrative penalty against an HCS or TxHmL program
provider, Texas Human Resources Code §161.0891, which permits an HCS or TxHmL program provider to use any portion
of the amount of an administrative penalty to ameliorate the
violation or improve services in the HCS or TxHmL Program,
Texas Human Resources Code §161.0892, which establishes an
informal dispute resolution process for an HCS or TxHmL
program provider to adjudicate disputes related to a proposed
effortment action or related proceeding by HHSC; and Texas
Government Code, Chapter 531, Subchapter A-1, which trans-
fers functions of DADS to HHSC.

The repeal affects Texas Government Code §531.0055,
§531.021, and Chapter 531, Subchapter A-1, and Texas Human
Resources Code, §§32.021, 161.089, 161.0891, and 161.0892.

The agency certifies that legal counsel has reviewed the pro-
posal and found it to be within the state agency’s legal authority
to adopt.

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2019.

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Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: January 5, 2020
For further information, please call: (512) 438-3161

CHAPTER 49. CONTRACTING FOR
COMMUNITY SERVICES

As required by Texas Government Code §531.0202(b), the De-
partment of Aging and Disability Services (DADS) was abolished
effective September 1, 2017, after all of its functions were trans-
ferred to the Texas Health and Human Services Commission
(HHSC) in accordance with Texas Government Code §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC.

Texas Government Code §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the Health and Human Services System, including rules in Title 40, Part 1. Therefore, the Executive Commissioner of HHSC proposes amendments to Title 40, Part 1, Chapter 49, Contracting for Community Services, §§49.209, 49.531, 49.532, and 49.534; and new §49.535.

BACKGROUND AND PURPOSE

The purpose of the proposed rules is to implement Texas Human Resources Code §161.089 and §161.0891 added by House Bill 2590, 85th Legislature, Regular Session, 2017. These new sections allow HHSC to assess and collect an administrative penalty against a Home and Community-based Services (HCS) program provider or a Texas Home Living (TxHmL) program provider for a violation of a law or rule relating to the program and to permit a program provider to use any portion of the amount of an administrative penalty to ameliorate the violation or improve services in the HCS or TxHmL Program. New and amended rules in Title 40, Chapter 9, Intellectual Disability Services–Medicaid State Operating Agency Responsibilities, are proposed elsewhere in this issue of the Texas Register, to implement administrative penalties and an amelioration process in the HCS and TxHmL Programs. The proposed rules in Chapter 49 add an administrative penalty as a sanction that HHSC may take against a contractor that has a contract for the HCS Program or TxHmL Program. The proposed rules provide that HHSC requires a contractor to pay HHSC the amount of an administrative penalty if the contractor does not choose amelioration or the plan of amelioration is not submitted, denied, or not implemented and the contractor does not appeal the administrative penalty or the contractor appeals the administrative penalty and the final decision from the administrative hearing is favorable to HHSC. The proposed rules provide that, if HHSC approves a plan of amelioration and the cost of the proposed changes is less than the amount of the administrative penalty, HHSC requires a contractor to pay HHSC the difference between the cost of the proposed changes and the administrative penalty.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §49.209, Standard Contract, corrects rule references.

The proposed amendment to §49.531, Sanction by HHSC, adds an administrative penalty as a sanction HHSC may take against a contractor that has a contract for the HCS Program or TxHmL Program. The proposed amendment clarifies that the factors set forth in §49.531 are the factors HHSC may consider in determining whether to apply to a vendor hold and contract termination. This change is needed because the factors HHSC considers in determining the amount of an administrative penalty in the HCS Program or TxHmL Program are described in the program rules.

The proposed amendment to §49.532, Vendor Hold, corrects rule references.

The proposed amendment to §49.534, Termination of Contract by HHSC, deletes subsection (a)(2)(T). This subsection allows HHSC to terminate a contract if HHSC does not certify a contractor that has a contract for the HCS or TxHmL Program for a new certification period, as described in §9.185(c) and §9.577(c), Program Provider Compliance and Corrective Action. This deletion is made because §§9.185(c) and §9.577(c) are proposed for deletion elsewhere in this issue of the Texas Register. The proposed amendment also corrects a rule reference.

Proposed new §49.535, Administrative Penalties in the HCS and TxHmL Programs, allows HHSC to impose an administrative penalty for a contractor that has a contract for the HCS Program or the TxHmL Program, in accordance with proposed new §§9.181 or §9.581, Administrative Penalties. The proposed rule requires HHSC, for a violation described in §§9.181(a)(1) or in §9.581(a)(1), to send a written notice to the contractor that includes the date the administrative penalty begins to accrue and the amount of the administrative penalty that will accrue each day. For an action described in §§9.181(a)(2) or in §9.581(a)(2), the proposed rule requires HHSC to send a written notice to the contractor that includes the amount of the administrative penalty that a program provider must pay to HHSC and the date that HHSC will require the contractor to pay HHSC the administrative penalty. The proposed rule requires that HHSC also send a written notice for such a violation when the administrative penalty stops accruing and any informal dispute resolution related to the violation is complete. This notice includes (1) the date the administrative penalty stopped accruing; (2) the total amount of the administrative penalty; (3) the date HHSC will require the contractor to pay HHSC the administrative penalty; and (4) if the violation is not an immediate threat, an opportunity to choose amelioration within 10 business days after the date of HHSC’s notice and a statement that the opportunity will be forfeited if such choice is not made within the 10-day period. The proposed rule also describes the circumstances under which HHSC will require payment of an administrative penalty if the contractor chooses amelioration and the contractor does not submit a plan for amelioration, if HHSC denies the plan for amelioration, or if the contractor does not implement an approved plan for amelioration. The proposed rule provides that HHSC requires a contractor to pay HHSC the difference between the cost of the proposed changes and the administrative penalty if the plan of amelioration is approved and cost of the proposed changes is less than the amount of the administrative penalty. The proposed rule describes the circumstances under which HHSC will require a contractor to pay an administrative penalty if the contractor does not notify HHSC that the contractor chooses amelioration within the required 10-day period.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, there will be an estimated additional cost and an increase in revenue to state government as a result of enforcing and administering the rules as proposed. Enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of local government.

Fiscal implications to state government relating to the imposition of administrative penalties for the HCS and TxHmL Programs are addressed concurrently in the fiscal note to the rules in Title 40, Chapter 9, Intellectual Disability Services–Medicaid State Operating Agency Responsibilities, as proposed elsewhere in this issue of the Texas Register.

GOVERNMENT GROWTH IMPACT STATEMENT
HHSC has determined that during the first five years that the
rules will be in effect:
(1) the proposed rules will not create or eliminate a government
program;
(2) implementation of the proposed rules will create new HHSC
employee positions;
(3) implementation of the proposed rules will require an increase
in future legislative appropriations;
(4) the proposed rules will require an increase in fees paid to
HHSC;
(5) the proposed rules will create a new rule;
(6) the proposed rules will expand existing rules;
(7) the proposed rules will not change the number of individuals
subject to the rules; and
(8) the proposed rules will not affect the state’s economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL-COM-
UNITY IMPACT ANALYSIS

Trey Wood has also determined that there will be an adverse
economic effect on small businesses or micro-businesses. There
will not be an adverse economic effect on rural communities
because no rural communities are HCS or TxHmL program
providers.

The proposed rules allow HHSC to impose an administrative
penalty on HCS and TxHmL program providers, some of which
may be small businesses or micro-businesses.

HHSC lacks sufficient data to estimate the number of small
businesses and micro-businesses subject to the proposed rules
and cannot determine the projected economic impact for a small
business or micro-business.

HHSC determined that alternative methods to achieve the pur-
pose of the proposed rules for small businesses and micro-busi-
nesses would not be consistent with ensuring the health and
safety of individuals receiving services in the HCS and TxHmL
programs.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect local economy.

COSTS TO REGULATED PERSONS

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

PUBLIC BENEFIT AND COSTS

David Kostroun, Deputy Executive Commissioner for Regulatory
Services, has determined that for each year of the first five years
the rules are in effect, the public benefit expected is that individ-
uals enrolled in the HCS and TxHmL Programs will benefit from
an additional sanction that HHSC may take against a program
provider that does not comply with a certification principle. This
will help ensure the quality of services and the health and safety
of individuals enrolled in the HCS and TxHmL Programs.

Trey Wood has also determined that for the first five years the
rules are in effect, persons who are required to comply with
the proposed rules may incur economic costs because program
providers may be assessed an administrative penalty if they are
out of compliance with the program rules. HHSC lacks sufficient
information to estimate program provider administrative penal-
ties. As a result, the cost to persons required to comply cannot
be determined at this time.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit
an owner’s right to his or her property that would otherwise exist
in the absence of government action and, therefore, does not

PUBLIC COMMENT

Questions about the content of this proposal may be directed
to Tahoe Fintel at (512) 438-3161 in HHSC Regulatory Services
Division.

Written comments on the proposal may be submitted to Tahoe
Fintel, Senior Policy Specialist, P.O. Box 149030 Austin,
Texas 78714-9030; or by e-mail to HHSRulesCoordinationOf-
Fice@hhsc.state.tx.us.

To be considered, comments must be submitted no later than
31 days after the date of this issue of the Texas Register. Com-
ments must be: (1) postmarked or shipped before the last day of
the comment period; (2) hand-delivered before 5:00 p.m. on
the last working day of the comment period; or (3) e-mailed before
midnight on the last day of the comment period. If last day to sub-
mit comments falls on a holiday, comments must be postmarked,
shipped, or e-mailed before midnight on the following business
day to be accepted. When e-mailing comments, please indicate
"Comments on Proposed Rule 40R069" in the subject line.

SUBCHAPTER B. CONTRACTOR
ENROLLMENT

40 TAC §49.209

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code
§531.0055, which provides that the HHSC Executive Commis-
sioner shall adopt rules for the operation and provision of ser-
vice by the health and human services agencies; Texas Gov-
ernment Code §531.021, which provides HHSC with the author-
ity to administer federal funds and plan and direct the Medicaid
program in each agency that operates a portion of the Medicaid
program; Texas Human Resources Code §32.021, which pro-
vides that HHSC shall adopt necessary rules for the proper and
efficient operation of the Medicaid program; Texas Human Re-
sources Code §§161.089, which allows HHSC to assess and
collect an administrative penalty against an HCS or TxHmL pro-
gram provider, Texas Human Resources Code §161.0891, which
permits an HCS or TxHmL program provider to use any portion
of the amount of an administrative penalty to ameliorate the vi-
olation or improve services in the HCS or TxHmL Program; and
Texas Government Code, Chapter 531, Subchapter A-1, which
transfers functions of DADS to HHSC.

The amendments affect Texas Government Code §531.0055,
§531.021, and Chapter 531, Subchapter A-1, and Texas Human
Resources Code §32.021, §161.089, and §161.0891.

(a) Except as provided in subsection (e) of this section, a con-
tractor that has a provisional contract, other than a provisional
contract for the HCS Program, TxHmL Program, or hospice, qualifies for a stan-
dard contract if, based on contract monitoring described in §49.411 of
this chapter (relating to Contract and Fiscal Monitoring), HHSC determines that the overall compliance score for the provisional contract is 90 percent or greater.

(b) Except as provided in subsection (e) of this section, a contractor that has a provisional contract for the HCS or TxHmL Program qualifies for a standard contract if:

(1) the contractor is certified by HHSC in accordance with §9.183 (relating to Program Provider Compliance and Corrective Action) or §9.587 (relating to Program Provider Compliance and Corrective Action); and

(2) during the term of the provisional contract, HHSC has not imposed a vendor hold on the contractor in accordance with §9.183 or §9.587 of this title.

(c) Except as provided in subsection (e) of this section, a contractor that has a provisional contract for hospice qualifies for a standard contract if the contractor has the license and written notification required by §49.205 of this subchapter (relating to License, Certification, Accreditation, and Other Requirements).

(d) A standard contract issued by HHSC in accordance with subsections (a) - (c) of this section is for the same program, service, or facility in the same service, catchment, or waiver contract area as the provisional contract.

(e) A contractor may not qualify for a standard contract for any reason for which HHSC may deny a provisional contract application, as described in §49.207 of this subchapter (relating to Provisional Contract Application Denial).

(f) HHSC may subject a standard contract to conditions in accordance with 1 TAC Chapter 352 (relating to Medicaid and the Children's Health Insurance Program Provider Enrollment) and 1 TAC Chapter 371, Subchapter E (relating to Provider Disclosure and Screening).

(g) A standard contract is effective the day after the provisional contract ends.

(h) If HHSC determines a contractor does not qualify for a standard contract, HHSC notifies:

(1) the contractor of the determination, in writing, and includes in the notification the application denial period set in accordance with §49.702(a) of this chapter (relating to Application Denial Period); and

(2) any controlling person of the contractor, in writing, of the application denial period.

(i) If a contractor refuses a standard contract, HHSC notifies the contractor and any controlling person of the contractor, in writing, of the application denial period set in accordance with §49.702(b) of this chapter.

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

Filed with the Office of the Secretary of State on November 21, 2019.
TRD-201904407

Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: January 5, 2020
For further information, please call: (512) 438-3161

SUBCHAPTER E. ENFORCEMENT BY HHSC AND TERMINATION BY CONTRACTOR
DIVISION 4. SANCTIONS
40 TAC §§49.531, 49.532, 49.534, 49.535

STATUTORY AUTHORITY

The amendments and new section are proposed under Texas Government Code §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Government Code §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; Texas Human Resources Code §§161.089, which allows HHSC to assess and collect an administrative penalty against an HCS or TxHmL program provider, Texas Human Resources Code §161.0891, which permits an HCS or TxHmL program provider to use any portion of the amount of an administrative penalty to ameliorate the violation or improve services in the HCS or TxHmL Program; and Texas Government Code, Chapter 531, Subchapter A-1, which transfers functions of DADS to HHSC.


§49.531. Sanction by HHSC.

(a) HHSC may take one or more of the following sanctions [against a contractor]:

(1) for any contractor, impose a vendor hold in accordance with §49.532 of this division (relating to Vendor Hold);

(2) for any contractor, recoup funds in accordance with §49.533 of this division (relating to Recoupment); and

(3) for any contractor, terminate the contract in accordance with §49.534 of this division (relating to Termination of Contract by HHSC); and [ ]

(4) for a contractor that has a contract for the HCS Program or TxHmL Program, impose an administrative penalty in accordance with §49.535 of this division (relating to Administrative Penalties in HCS and TxHmL Programs).

(b) For a sanction described in subsection (a)(1) or (3) of this section, HHSC may consider factors in determining the sanction to be taken, including [For a vendor hold or contract termination, the factors HHSC may consider in determining whether to take the sanction include]:

(1) the extent and seriousness of the contractor's non-compliance with the contract that is the subject of the sanction;
§49.532. Vendor Hold.

(a) HHSC imposes a vendor hold on a contractor if:

(1) HHSC has proposed to terminate the contract and the contractor participates in attendant compensation rate enhancement as described in 1 TAC §355.112 (relating to Attendant Compensation Rate Enhancement); or

(2) The HHSC Office of Inspector General determines that a vendor hold must be imposed in accordance with 42 CFR §455.23(a) due to a credible allegation of fraud for which an investigation is pending under the Medicaid Program.

(b) HHSC may impose a vendor hold on a contractor:

(1) if HHSC has proposed to terminate the contract and the contractor does not participate in attendant compensation rate enhancement as described in 1 TAC §355.112;

(2) if the contractor does not qualify for a standard contract at the expiration of a provisional contract;

(3) if the contractor qualifies for a standard contract at the expiration of a provisional contract but refuses a standard contract;

(4) if the contractor terminates the contract;

(5) if HHSC determines the contractor has not complied with the contract, including a determination of non-compliance described in §49.411(e) of this chapter (relating to Contract and Fiscal Monitoring) or §49.413(e) of this chapter (relating to Investigation);

(6) if the contractor has not submitted or has not complied with an immediate protection plan as described in §49.511(d) of this subchapter (relating to Immediate Protection and Immediate Protection Plan);

(7) if the contractor has not submitted or has not complied with a corrective action plan as described in §49.522(d) of this subchapter (relating to Corrective Action Plan); or

(8) if the contractor's application packet described in §49.203(a)(3) of this chapter (relating to Provisional Contract Application Process):

(A) contained incorrect information; or

(B) contains information that has become incorrect and the contractor has not notified HHSC in accordance with §49.302(i) - (q) of this chapter (relating to General Requirements);

(9) for a contractor that has a contract for the HCS Program, in accordance with §§9.183 [§9.185] of this title (relating to Program Provider Compliance and Corrective Action); or

(10) for a contractor that has a contract for the TxHmL Program, in accordance with §9.587 [§9.572] of this title (relating to Program Provider Compliance and Corrective Action).

(c) If HHSC imposes a vendor hold on a contractor in accordance with subsection (a) or (b) of this section, HHSC notifies the contractor of the vendor hold in writing. HHSC may impose a vendor hold pending an administrative hearing appealing the vendor hold.

(d) HHSC releases a vendor hold less any amounts being recouped by HHSC:

(1) imposed in accordance with subsections (a)(1) and (b)(1) - (4) of this section if:

(A) the contract has been terminated or expires and any amounts owed to individuals and LARs have been paid by the contractor;

(B) HHSC withdraws the proposed contract termination; or

(C) the contractor appeals the proposed contract termination and the final decision from the administrative hearing is favorable to the contractor;

(2) imposed in accordance with subsection (a)(2) of this section, if the HHSC Office of Inspector General determines that HHSC must resume payment under the contract;

(3) imposed in accordance with subsection (b)(5) - (8) of this section, if HHSC determines the contractor has resolved the reason for the vendor hold; or

(4) imposed in accordance with subsection (b)(9) - (10) of this section if HHSC determines it may be released as described in §§9.183 [§9.185] or §9.587 [§9.572] of this title.

§49.534. Termination of Contract by HHSC.

(a) HHSC may propose to terminate a contract:

(1) without cause by giving at least 60 days written notice to the contractor as provided by the contract; or

(2) for good cause as determined by HHSC, including if:

(A) the contractor has not provided any services under the contract during a period of 12 consecutive months;

(B) the contractor has not complied with the terms of the contract, including:

(i) the contractor's overall compliance score from a contract monitoring is less than 90 percent, as described in §49.411(e) of this chapter (relating to Contract and Fiscal Monitoring);

(ii) the contractor has not submitted or complied with a corrective action plan as described in §49.522(d) of this subchapter (relating to Corrective Action Plan);

(iii) the contractor has not submitted or complied with an immediate protection plan as described in §49.511(d) of this subchapter (relating to Immediate Protection and Immediate Protection Plan); or

(iv) DADS or HHSC has imposed repeated actions or sanctions against the contractor that, when considered cumulatively, constitute significant non-compliance with the contract;

(C) the contractor undergoes a change of ownership or change of legal entity and the requirements in §49.210(a)(1) - (4) of this chapter (relating to Contractor Change of Ownership or Legal Entity) are not met, as described in §49.210(c)(1) of this chapter;
(D) the contractor’s application packet described in §49.203(a)(3) of this chapter (relating to Provisional Contract Application Process):

(i) contained incorrect information; or
(ii) contains information that has become incorrect and the contractor has not notified HHSC in accordance with §49.302(i) - (q) of this chapter (relating to General Requirements);
(E) the contractor or a controlling person of the contractor is under a period of exclusion in accordance with §§1128, 1128A, 1136, 1156, or 1842(j)(2) of the Social Security Act;
(F) the contractor or a controlling person of the contractor is ineligible to contract with HHSC in accordance with §49.206 of this chapter (relating to Ineligibility Due to Criminal History);
(G) the contractor or a controlling person of the contractor is prohibited from contracting with HHSC in accordance with Chapter 79, Subchapter S of this title (relating to Contracting Ethics);
(H) the contractor is required to register with the Texas Secretary of State and contractor’s status with the Texas Secretary of State is not “in existence”;
(I) the contractor is required to pay Texas franchise tax and the contractor’s right to transact business status with the Texas Comptroller of Public Accounts is not “active”;
(J) HHSC or another governmental entity proposed or imposed a penalty, revocation, denial, termination, or suspension against a license, certification, or registration held by the contractor;
(K) the contractor no longer has a license, certification, accreditation or other document required by §49.302(a) of this chapter;
(L) the contractor or a controlling person of the contractor is listed on:

(i) the HHSC employee misconduct registry as unemployable;
(ii) the HHSC nurse aide registry as revoked or suspended;
(iii) the United States System for Award Management maintained by the General Services Administration;
(iv) the LEIE maintained by the United States Department of Health and Human Services, Office of Inspector General;
(v) the LEIE maintained by the HHSC Office of Inspector General;
(vi) the Debarred Vendor List maintained by the Texas Comptroller of Public Accounts and the period of debarment has not expired; or
(vii) the HHS list of exclusions;
(M) the contractor or a controlling person of the contractor has been confirmed by DFPS or HHSC as having committed abuse, neglect, or exploitation;
(N) HHSC proposed or imposed an action or sanction against:

(i) another contract of the contractor or a controlling person of the contractor; or
(ii) a contract of a person for whom the contractor or a controlling person of the contractor was a controlling person;
(O) a governmental entity other than HHSC or a managed care organization contracting with a governmental entity proposed or imposed an action or sanction against:

(i) a contractual agreement of the contractor or a controlling person of the contractor; or
(ii) a contractual agreement of a person for whom the contractor or a controlling person of the contractor was a controlling person;
(P) the contractor or a controlling person of the contractor terminated a contractual agreement with a governmental entity in a federal health care program, as defined in §1128B(f) of the Social Security Act, while an adverse action or sanction was proposed or in effect;
(Q) the contractor or a controlling person of the contractor terminated another contract while an action or sanction was proposed or in effect;
(R) the contractor or a controlling person of the contractor has an unresolved financial liability with HHSC or another governmental entity;
(S) HHSC denies or terminates certification of a contractor that has a contract for the HCS or TxHmL Program, in accordance with §9.183 (§9.185) of this title (relating to Program Provider Compliance and Corrective Action) or §9.587 (§9.527) of this title (relating to Program Provider Compliance and Corrective Action); or
[T] HHSC does not certify a contractor that has a contract for the HCS or TxHmL Program for a new certification period as described in §9.185(a) and §9.577(c) of this title; or
[T] [44] for a contractor that has a contract for Title XIX DAHS, Title XX AFC, RC, or DAHS, the contractor does not have a legal right to occupy the facility under the contract.
(b) If HHSC proposes to terminate a contract:

(1) in accordance with subsection (a)(1) of this section, HHSC notifies the contractor of the proposed termination in writing at least 60 days before the effective date of termination; or
(2) in accordance with subsection (a)(2) of this section, HHSC notifies the contractor of the proposed termination in writing, which may be less than 60 days before the effective date of termination.
(c) If HHSC proposes to terminate a contract, HHSC notifies individuals receiving services from the contractor and the individual’s LARs that:

(1) HHSC has proposed to terminate the contract and has placed the contractor’s payments on a vendor hold; and
(2) an individual or LAR may choose to receive services under a contract listed on the choice list, subject to program-specific requirements.
(d) HHSC terminates a contract on the date given in HHSC’s notice of proposed termination if:

(1) the contractor does not appeal the proposed contract termination; or
(2) the contractor appeals the proposed contract termination and the final decision from the administrative hearing is favorable to HHSC.
(e) HHSC does not pay a contractor for services provided after the effective date of contract termination.
(f) If HHSC terminates a contract, HHSC notifies the contractor and any controlling person of the contractor, in writing, of the application denial period set in accordance with §49.702(c) or (d) of this chapter (relating to Application Denial Period).

§49.535 Administrative Penalties in the HCS and TxHmL Programs.

(a) HHSC may impose an administrative penalty:

(1) for a contractor that has a contract for the HCS Program, in accordance with §9.181 of this title (relating to Administrative Penalties); or

(2) for a contractor that has a contract for the TxHmL Program, in accordance with §9.581 of this title (relating to Administrative Penalties).

(b) HHSC sends a contractor written notice if HHSC is imposing an administrative penalty. The notice includes:

(1) for a violation described in §9.181(a)(1) or §9.581(a)(1) of this title:

(A) the date the administrative penalty begins to accrue, as described in §9.181(e) or §9.581(e) of this title; and

(B) the amount of the administrative penalty that will accrue each day; or

(2) for an action described in §9.181(a)(2) or §9.581(a)(2) of this title:

(A) the amount of the administrative penalty, as described in §9.181(b) or §9.581(b) of this title; and

(B) the date HHSC will require the contractor to pay HHSC the amount of the administrative penalty.

(c) For a violation described in §9.181(a)(1) or §9.581(a)(1) of this title, HHSC gives a contractor written notice after the administrative penalty stops accruing and any informal dispute resolution related to the violation is completed. The notice includes:

(1) the date the administrative penalty stopped accruing, as described in §9.181(f) or §9.581(f) of this title;

(2) the total amount of the administrative penalty;

(3) the date HHSC will require the contractor to pay HHSC the amount of the administrative penalty; and

(4) if the violation is not an immediate threat as defined in §9.153 or §9.553 of this title (relating to Definitions), a statement that:

(A) the contractor may choose amelioration as described in §9.182 or §9.586 of this title (relating to Amelioration); and

(B) to choose amelioration, the contractor must notify HHSC of the choice, in writing, within 10 business days after the date HHSC receives notice that the administrative penalty has stopped accruing.

(C) if the contractor does not notify HHSC that the contractor is choosing amelioration within the required 10-day period the contractor forfeits the opportunity to choose amelioration.

(d) If HHSC imposes an administrative penalty and the contractor chooses amelioration, HHSC requires the contractor to pay HHSC the amount of the administrative penalty only if:

(1) the contractor does not submit a plan for amelioration as described in §9.182(d) or §9.586(d) of this title, and the contractor:

(A) does not appeal the administrative penalty; or

(B) appeals the administrative penalty and the final decision from the administrative hearing is favorable to HHSC;

(2) HHSC denies the plan for amelioration as described in §9.182(b)(2) or §9.586(b)(2) of this title, and the contractor:

(A) does not appeal the administrative penalty; or

(B) appeals the administrative penalty and the final decision from the administrative hearing is favorable to HHSC; or

(3) the contractor does not implement an approved plan for amelioration as described in §9.182(i) or §9.586(i) of this title and the contractor:

(A) does not appeal the issue of whether the plan was implemented; or

(B) appeals the issue of whether the plan was implemented and the final decision from the administrative hearing is favorable to HHSC.

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 21, 2019.

TRD-201904408

Karen Ray
Chief Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: January 5, 2020

For further information, please call: (512) 438-3161

PART 17. STATE PENSION REVIEW BOARD

CHAPTER 609. PUBLIC RETIREMENT SYSTEM INVESTMENT EXPENSE REPORTING

40 TAC §§609.101, 609.103, 609.105, 609.107, 609.109, 609.111

The State Pension Review Board (the Board or PRB) proposes new 40 TAC Chapter 609, concerning Public Retirement System Investment Expense Reporting.

BACKGROUND AND PURPOSE
The proposed rules would enhance the investment fee disclosure requirements for the purpose of financial reporting by Texas public retirement systems. Texas Government Code §802.103(a)(3), as added by Senate Bill 322 (86R) requires Texas public retirement systems to list by asset class, all direct and indirect commissions and fees paid by the retirement system during the system's previous fiscal year for the sale, purchase or management of system assets.

To standardize reporting, the proposed rules would provide a comprehensive definition of investment expense to include direct and indirect investment management fees and commissions, broken down by five asset classes, and to include other investment-related expenses, which would include expenses for investment consultant(s), custodial, investment-related legal, and investment research.

Over the past decade, institutional investors, including public retirement systems, have increased their allocation to alternative investments. Those investors have raised concerns that expenses for alternative investments are opaque and generated momentum for greater fee transparency in this asset class. A 2015 report by CEM Benchmarking showed that a substantial portion of private equity expenses comprised carried interest and other performance incentives and bonuses.

Many of the large public retirement systems, outside of and within Texas, already require their managers to disclose performance fees. The 2017 Sunset legislation for the Employees Retirement System of Texas required the system to report profit-share expenses for alternative investments, including investments in private equity, hedge funds, and private real estate. Therefore, to increase transparency and disclosure for the alternative/other asset class, the proposed rules would require a retirement system to report any financial remuneration related to profit-share arrangements.

Greater investment fee transparency and standardized reporting would allow the PRB, policymakers, public retirement systems, system members, and the public to effectively compare the investment expenses associated with the operation and management of a public retirement system's investment activities. Therefore, the PRB is proposing these rules to implement Texas Government Code §802.103(a)(3), as added by Senate Bill 322 (86R).

SECTION-BY-SECTION SUMMARY

Proposed new §609.101 establishes the authority for the chapter.

Proposed new §609.103 establishes the purpose of the chapter.

Proposed new §609.105 establishes the definitions specific to the chapter.

Proposed new §609.107 establishes the applicability of investment expense reporting and outlines the exceptions as determined by the Board.

Proposed new §609.109 outlines the information to be reported by Texas public retirement systems.

Proposed new §609.111 establishes a structure by which Texas public retirement systems should report investment expenses. It also adopts the Asset Categorization Document, which provides guidance to Texas public retirement systems on reporting their direct and indirect management fees and commissions.

FISCAL NOTE ON STATE AND LOCAL GOVERNMENTS

Westley Allen, Accountant, has determined that for each year of the first five-year period the proposed new rules would be in effect, there will be no foreseeable implications relating to cost or revenues of state or local governments, under Government Code §2001.024(a)(4), as a result of enforcing or administering these rules.

PUBLIC BENEFIT/COST NOTE

Mr. Allen has determined, under Government Code §2001.024(a)(5) that for each year of the first five-year period the proposed new rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules would be that it creates greater investment fee transparency and that it standardizes reporting, which would allow the board, policymakers, public retirement systems, system members, and the public to effectively compare the investment expenses associated with the operation and management of a public retirement system's investment activities. Also, the proposed rules will help with a clearer and consistent implementation of §802.103(a)(3) of the Texas Government Code.

Potential impact on those public retirement systems that are required to comply with the rules is unlikely, and related costs, if any, would be minimal. Systems could use existing resources to absorb the minor costs associated with adding a note on direct and indirect fees to the annual reports they already provide to the Board. The fiscal note prepared by the Legislative Budget Board in response to SB 322, which requires the reporting that these rules address, concluded there would be no impact to local governments or to the systems required to comply. LBB's analysis reflects, partly, the comments provided by various pension systems during the legislative session. (LBB Fiscal Note, 86th Legislative Regular Session, SB 322, Committee Report 2nd House, Substituted, https://capitol.texas.gov/ltodocs/86R/fiscal-notes/pdf/SB00322H.pdf#navpanes=0 ).

Agency staff, likewise, shared drafts of the proposed rules content with stakeholders for their input. After considering any comments received, the agency staff developed the proposed rules. Several stakeholders commented that the original draft provisions may have been construed by some systems to require that systems submit audited investment-fee information, resulting in possible costs to a system. After considering the stakeholders' comments, staff proposes a rule that does not require systems to submit audited investment-fee information, and the board hereby clarifies that intent in this rule proposal. The rules allow a public retirement system to report the investment-fee information in an unaudited schedule within the system's annual financial report.

GOVERNMENT GROWTH IMPACT STATEMENT

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

1. the proposed rules will not create or eliminate a government program;
2. implementation of the proposed rules will not affect the number of PRB employee positions;
3. implementation of the proposed rules will result in no assumed change in future legislative appropriations;
4. the proposed rules will not affect fees paid to PRB;
5. the proposed rules may create a new regulation to the extent that it implements a statutorily imposed reporting requirement (SB 322);
(6) the proposed rules will not expand, limit, or repeal existing regulations;

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

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

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES.

Mr. Allen has also determined that there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments because the rules do not involve those entities and, instead, concern administrative reporting requirements applicable only to public pension systems. Therefore, no regulatory flexibility analysis, as specified in Texas Government Code §2006.002 is required.

IMPACT ON LOCAL EMPLOYMENT OR ECONOMY

Mr. Allen has further determined there is no effect on local economy for the first five years that the proposed amendments are in effect because the rules do not involve factors of local economy. Therefore, no economic impact statement, local employment impact statement, nor regulatory flexibility analysis is required under Texas Government Code §§2001.022 or 2001.024(a)(6).

COST TO REGULATED PERSONS (COST-IN/COST-OUT)

This rule proposal is not subject to Texas Government Code §2001.0045, concerning increasing costs to regulated persons, because, as described above in the public benefit and cost note, the proposed amendments do not impose a cost on regulated persons under Government Code §2001.024, including another state agency, a special district, or a local government.

TAKINGS IMPACT ASSESSMENT

The Board has determined that no private real property interests are affected by this proposal and the proposal does not restrict or limit an owner’s right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

ENVIRONMENTAL RULE ANALYSIS

The proposed rules are not a “major environmental rule” as defined by Government Code §2001.0225. The proposed rules are not specifically intended to protect the environment or to reduce risks to human health from environmental exposure. Therefore, a regulatory environmental analysis is not required.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Anumeha Kumar, Executive Director, State Pension Review Board, P.O. Box 13498, Austin, Texas 78711-3498 or by electronic mail to prb@prb.texas.gov. Commenters are encouraged to include “rule comments” in the subject line of the electronic mail. Comments will be accepted until 5:00 p.m. on January 10, 2020, which is 35 days after publication in the Texas Register.

STATUTORY AUTHORITY

The proposed rules are authorized by the Texas Government Code, §802.201(a), which grants specific authority to the Board to adopt rules for the conduct of its business; and §802.103(e), which allows the Board to adopt rules to implement requirements related to a public retirement system’s annual financial report.

CROSS REFERENCE TO STATUTES AND CODES AFFECTED

The proposed new rules affect and implement Texas Government Code, Chapter 802, including §802.103.

§609.101. Authority.

These rules are promulgated under the authority of Texas Government Code, §801.201, relating to rulemaking, and §802.103, relating to an annual financial report and the Board’s authority to adopt rules necessary to implement that section.

§609.103. Purpose.

(a) The governing body of a public retirement system, as mandated by §802.103 of the Texas Government Code, is required to publish an annual financial report showing the financial condition of the system as of the last day of the fiscal year covered in the report.

(b) Texas Government Code §802.103(a)(3) requires within the annual financial report, a listing, by asset class, of all direct and indirect commissions and fees paid by the retirement system during the system's previous fiscal year for the sale, purchase or management of system assets.

(c) This chapter implements these reporting requirements to help ensure consistency in investment expense reporting by public retirement systems, which will benefit those systems, the Board, policymakers, and the public, through the ability to make enhanced comparisons and allow for the better analysis, policymaking, and understanding of investment expenses paid by public retirement systems.

(d) This chapter is not intended to contradict generally accepted auditing standards, governmental accounting standards, or widely recommended best practices for financial reporting by governmental entities. It is also not intended to prevent systems from making additional disclosures beyond those listed in this chapter.

§609.105. Definitions.

The following words and terms, for the purposes of this chapter, shall have the following meanings, unless the rule indicates otherwise.

(1) "Annual financial report" means as defined by §802.103 of the Texas Government Code.

(2) "Asset class" means a group of securities that share similar characteristics, perform comparably in the marketplace, and are generally governed by the same laws and regulations.

(3) "Board" means the State Pension Review Board.

(4) "Direct and indirect fees and commissions" means amounts paid to investment managers for managing assets; commissions paid to brokers for trading securities on a per share basis; and profit share as defined by §815.3015(a)(2) of the Texas Government Code.

(5) "Fees netted from returns" means an amount that an investment manager collects or retains from earned investment returns rather than from the pension trust fund.

(6) "Governing body of a public retirement system" means as provided by Texas Government Code §802.0012).

(7) "Investment expense" means direct and indirect fees and commissions and amounts retained or paid for investment services.

(8) "Investment manager" means as defined by §802.204 of the Texas Government Code.
§609.111. Investment Expense Reporting.  
(9) "Investment service" means a service provided to a public retirement system for general purposes of administering its investment program such as custodial, investment consulting, investment-related legal services, and research.

(10) "Public retirement system" means as defined by §801.001(2) and §802.001(3) of the Texas Government Code, but shall not include defined contribution plans as defined by Texas Government Code, §802.001(1-a) or retirement systems consisting exclusively of volunteers organized under the Texas Local Fire Fighters' Retirement Act as defined by Texas Government Code, §802.002(d).

§609.107. Applicability.  
This chapter applies to every public retirement system.

For the first reporting period:

(1) A public retirement system with 180 days or more remaining in its current fiscal year as of the effective date of this section shall include the required investment expense disclosures per this chapter in its annual financial report that covers that fiscal year.

(2) A public retirement system with fewer than 180 days remaining in its current fiscal year as of the effective date of this section shall include the required investment expense disclosures per this chapter during the first fiscal year that begins after the effective date of this chapter, as part of its regularly scheduled annual financial report.

(3) The provisions of this section shall expire on April 1, 2022.

§609.111. Investment Expense Reporting Structure.

(a) Public retirement systems shall:

(1) report direct and indirect fees and commissions:

(A) in the fiscal year they are incurred;

(B) by asset class;

(C) in a supplemental schedule in the notes to the financial statements; and

(2) identify amounts netted from returns separately from those paid from the trust.

(b) Investment services provided to the system shall be reported in a supplemental schedule contained in the notes to the financial statements that are part of a public retirement system's annual financial report.

(c) A retirement system shall report expenses incurred for investment services by type of service provided, even if multiple investment services are provided by a single firm. Those expenses should not be reported by asset class.

(d) The asset classes are:

(1) Cash;

(2) Public Equity;

(3) Fixed Income;

(4) Real Assets;

(5) Alternative/Other.

(e) The Board hereby adopts by reference the 2020 Asset Class Categorization Guide (2020 ACC Guide) to assist in categorizing items by asset class.

(f) The Asset Class Categorization Guide is available to all public retirement systems. A public retirement system may obtain the most current version of the Asset Class Categorization Guide from the offices of the State Pension Review Board and from its website at http://www.prb.texas.gov.

(g) For an investment product containing investments in more than one asset class, a public retirement system shall report fees according to the corresponding asset class.

(h) For a fund of funds, reported fees must include the top-layer management fees charged by the fund-of-fund manager and the fees charged by all subsidiary fund managers, and all profit share, reported as a single amount.

(i) A public retirement system must list the types of investment included in the "Alternative/Other" asset class as described in the 2020 ACC Guide.

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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Anumeha Kumar
Executive Director
State Pension Review Board
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For further information, please call: (512) 463-1736

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