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

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

# TITLE 1. ADMINISTRATION

## PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

### CHAPTER 353. MEDICAID MANAGED CARE SUBCHAPTER O. DELIVERY SYSTEM AND PROVIDER PAYMENT INITIATIVES

**1 TAC §353.1309, §353.1311**

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new §353.1309, concerning Texas Incentives for Physicians and Professional Services; and new §353.1311, concerning Quality Metrics for the Texas Incentives for Physician and Professional Services Program.

BACKGROUND AND PURPOSE

The purpose of the proposed new rules is to describe the circumstances under which HHSC will direct a Medicaid managed care organization (MCO) to provide a uniform per member per month payment, certain incentive payments, and a uniform percentage rate increase to physician practice groups in the MCO's network in a participating service delivery area (SDA) for the provision of physician and professional services. The rules also describe the methodology used by HHSC to determine the amounts of the payments or rate increase.

Currently, Texas' Medicaid physician payments, made through either the fee-for-service (FFS) or managed care models, do not always cover all Medicaid allowable costs for physician and professional services. HHSC is proposing these new rules to align with the ongoing efforts to transition from the Delivery System Reform Incentive Payment program and the Network Access Improvement Program.

Healthcare policy experts believe that increasing reimbursements in a value- or incentive-based manner may result in improved health outcomes for clients. HHSC anticipates that the increased payments to certain practice groups will support access to services, promote better health outcomes, and increase focus on improving quality goals that are established as part of the Texas Medicaid program.

In May 2016, the Centers for Medicare and Medicaid Services (CMS) finalized a rule that allows a state to direct expenditures under its contract with an MCO under certain limited circumstances. Under the federal rule, a state may direct an MCO to raise rates for a class of providers of a particular service by a uniform dollar amount or percentage, or as a performance incentive, subject to approval of the contract arrangements by CMS. To obtain approval, the arrangements must be based on the utilization and delivery of services; direct expenditures equally, and using the same terms of performance, for a class of providers of a particular service; advance at least one of the goals and objectives of the state's managed care quality strategy and have an evaluation plan to measure the effectiveness of the arrangements at doing so; not condition provider participation on an IGT; and not be automatically renewed.

These proposed rules authorize HHSC to use IGTs from governmental entities or from other state agencies to support capitation payment increases in one or more SDAs. Each MCO within the SDA would be contractually required by the state to increase payments by a per member per month payment, a performance incentive payment, or a uniform percentage for one or more classes of physician practice groups that provide services within the SDA.

Conceptual Framework

*Eligibility:*

HHSC determines eligibility for payments by physician practice group class. The SDA must have at least one governmental entity willing to provide IGT to support increased payments. Also, to be eligible for the reimbursement increase, a physician practice group must be within a class designated by HHSC to receive the increase.

HHSC proposes classifying physician practice groups into three groups: health-related institution physician practice groups, indirect medical education physician practice groups, and other physician practice groups. The classifications allow HHSC to direct reimbursement increases where they are most needed and to align with the quality goals of the program. The reimbursement increase will be uniform for all providers within each class; but if HHSC directs rate increases to more than one class within an SDA, the reimbursement increase may vary between classes.

*Services subject to rate increase:*

HHSC may direct rate increases for all or a subset of physician and professional services based on advancing the goals and objectives of HHSC's managed care quality strategy.

*Determination of rate increase:*

HHSC will consider several factors in determining the percentage rate increase that will be directed for one or more classes of hospital within an SDA, including the amount of available funding; the class or classes of physician practice groups eligible to receive the increase; the type of service subject to the increase; budget neutrality; and the actuarial soundness of the capitation payment needed to support the increase.

*Reconciliation and recoupment:*

HHSC will follow the methodology described in Texas Administrative Code Title 1 §353.1301 to reconcile the amount of non-federal funds expended under this section and to authorize recoupments of overpayments or disallowed amounts.

SECTION-BY-SECTION SUMMARY

Proposed new §353.1309(a) establishes the TIPPS program and describes the goals of the program. Subsection (b) defines key terms used in the section. Subsection (c) describes the physician practice groups eligible for reimbursement increases. Subsection (d) describes the data sources that will be used in the program. Subsection (e) describes the participation requirements of the physician practice groups that wish to participate in the program, including the application process. Subsection (f) describes the process for collecting the non-federal share of the program funding. No state general revenue funds are available for the program and the non-federal share will be comprised of intergovernmental transfers. Subsection (g) describes the value and allocation of TIPPS capitation rate components. Subsection (h) describes the timing and basis for the distribution of TIPPS payments. Subsection (i) describes the notice requirements if there are changes in operation of the physician practice group. Subsection (j) refers to §353.1301(g) of this subchapter for the description of the reconciliation authority. Subsection (k) refers to §353.1301(j) and (k) of this subchapter for the description of the recoupment authority.

Proposed new §353.1311 describes the quality metrics associated with the TIPPS program. Subsection (a) establishes the purpose of the section. Subsection (b) defines key terms used in the section. Subsection (c) describes the quality metrics HHSC can designate for each TIPPS capitation rate component. Possible metrics include structure, improvement over self (IOS), or benchmark measures and will be evidence-based and presented for public comment. Subsection (d) discusses the performance requirements that will be associated with the designated quality metrics. Achievement of performance requirements will trigger payments for the TIPPS capitation rate components as described in §353.1309 of this subchapter.

Subsection (e) provides for publication of the proposed metrics and their associated performance requirements. The notice will be published on HHSC's Internet website. Subsection (f) provides that final quality metrics and performance requirements will be provided on HHSC's website on or before February 28 of the calendar year that also contains the first month of the program period.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years the proposed rules are in effect, there may be a fiscal impact to state government for reimbursement increases to state-owned physician practice groups, but there is insufficient information to provide an estimate at this time because HHSC does not know what state-owned physician practice groups or state agencies will choose to sponsor increases under this section or at what level of funding.

There will be no fiscal impact to state government for reimbursement increases to non-state-owned physician practice groups because the non-federal share of the increase in capitation payments will be funded with IGTs from non-state governmental entities.

There may be a fiscal impact to local governments, but there is insufficient information to provide an estimate because HHSC does not know which governmental entities will choose to sponsor rate increases under this section or at what level of funding.

GOVERNMENT GROWTH IMPACT STATEMENT

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

(1) the proposed rules will create a government program;

(2) implementation of the proposed rules will not affect the number of HHSC employee positions;

(3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;

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

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

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

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

(8) the proposed rules will positively affect the state's economy.

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

Trey Wood has also determined that there will be no adverse economic effect on small businesses, or micro businesses, or rural communities to comply with the proposed rule because participation in the program is optional.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Victoria Grady, Director of Provider Finance, has determined that for each year of the first five years the rules are in effect, the public will benefit from the adoption of the rules. The anticipated public benefit will be improved health outcomes as a result of flowing funding through the managed care organizations.

Trey Woods has also determined that for the first five years the rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules because the rules do not impose any additional fees or costs on those who are required to comply.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC HEARING

A public hearing is scheduled for January 11, 2021, at 11:30 a.m. (Central Standard Time) to receive public comments on the proposal. Persons requiring further information, special assistance, or accommodations should email RAD_1115_Waiver_Finance@hhsc.state.tx.us.

Due to the declared state of disaster stemming from COVID-19, the hearing will be conducted online only. No physical entry to the hearing will be permitted.

Persons interested in attending may register for the public hearing at: https://attendee.gotowebinar.com/register/6921856016915791632.

After registering, a confirmation email will be sent with information about joining the webinar.

HHSC will broadcast the public hearing. The broadcast will be archived for access on demand and can be accessed at https://hhs.texas.gov/about-hhs/communications-events/live-archived-meetings.

PUBLIC COMMENT

Written comments on the proposal may be submitted to HHSC, Mail Code H400, P.O. Box 13247, Austin, Texas 78711-3247, or by email to RAD_1115_Waiver_Finance@hhsc.state.tx.us.

During the current state of disaster due to COVID-19, physical forms of communication are checked with less frequency than during normal business operations. Therefore, please submit comments by email if possible.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register.* Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 21R028" in the subject line.

STATUTORY AUTHORITY

The new rules are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for Medicaid payments under Texas Human Resources Code, Chapter 32; and Texas Government Code §533.002, which authorizes HHSC to implement the Medicaid managed care program.

The proposed new rules implement Texas Government Code, Chapter 531; Texas Government Code, Chapter 533; and Texas Human Resources Code, Chapter 32. No other statutes, articles, or codes are affected by this proposal.

*§353.1309. Texas Incentives for Physicians and Professional Services.*

(a) Introduction. This section establishes the Texas Incentives for Physicians and Professional Services (TIPPS) program. TIPPS is designed to incentivize physicians and certain medical professionals to improve quality, access, and innovation in the provision of medical services to Medicaid recipients through the use of metrics that are expected to advance at least one of the goals and objectives of the state's managed care quality strategy.

(b) Definitions. The following definitions apply when the terms are used in this section. Terms that are used in this section may be defined in §353.1301 of this subchapter (relating to General Provisions) or §353.1311 of this subchapter (relating to Quality Metrics for the Texas Incentives for Physicians and Professional Services Program).

(1) Health Related Institution (HRI) physician practice group--A network physician practice group associated with an institution named in Texas Education Code §63.002.

(2) Indirect Medical Education (IME) physician practice group - A network physician practice group contracted with, owned, or operated by a hospital receiving the indirect medical education add-on for which the hospital is assigned billing rights for the physician practice group.

(3) Network physician practice group--A physician practice group located in the state of Texas that has a contract with a Managed Care Organization (MCO) for the delivery of Medicaid covered benefits to the MCO's enrollees.

(4) Other physician practice group--A network physician practice group other than those specified under paragraphs (1) and (2) of this subsection.

(5) Program period--A period of time for which an eligible and enrolled physician practice group may receive the TIPPS amounts described in this section. Each TIPPS program period is equal to a state fiscal year beginning September 1 and ending August 31 of the following year.

(6) Total program value--The maximum amount available under the TIPPS program for a program period, as determined by HHSC.

(c) Eligibility for participation in TIPPS. A physician practice group is eligible to participate in TIPPS if it complies with the requirements described in this subsection.

(1) Physician group composition. A physician group must indicate the eligible physicians, clinics, and other locations to be considered for payment and quality measurement purposes in the application process.

(2) Minimum volume. Physician groups must have a minimum denominator volume of 30 Medicaid managed care patients in at least 60 percent of the quality metrics in each Component to be eligible to participate in the Component.

(3) The physician group is:

(A) an HRI physician practice group;

(B) an IME physician practice group; or

(C) any other physician practice group that:

*(i)* can achieve the minimum volume as described in subparagraph (2) of this subsection;

*(ii)* is located in a service delivery area with at least one sponsoring governmental entity; and

*(iii)* served at least 250 unique Medicaid managed care clients in the prior state fiscal year.

(d) Data sources for historical units of service and clients served. Historical units of service are used to determine a physician practice group's eligibility status and the estimated distribution of TIPPS funds across enrolled physician practice groups.

(1) HHSC will use encounter data and will identify encounters based upon the billing provider's national provider identification (NPI) number and taxonomy code combination that are billed as a professional encounter only.

(2) HHSC will use the most recently available Medicaid encounter data for a complete state fiscal year to determine eligibility status of other physician practice groups.

(3) HHSC will use the most recently available Medicaid encounter data for a complete state fiscal year to determine distribution of TIPPS funds across eligible and enrolled physician practice groups.

(4) In the event of a disaster, HHSC may use data from a different state fiscal year at HHSC's discretion.

(5) The data used to estimate eligibility and distribution of funds will align with the data used for purposes of setting the capitated rates for managed care organizations for the same period.

(6) HHSC will calculate the estimated rate that an average commercial payor would have paid for the same services using either data that HHSC obtains independently or data that is collected from providers through the application process described in subsection (c) of this section.

(e) Participation requirements. As a condition of participation, all physician practice groups participating in TIPPS must allow for the following.

(1) The physician practice group must submit a properly completed enrollment application by the due date determined by HHSC. The enrollment period will be no less than 21 calendar days, and the final date of the enrollment period will be at least nine days prior to the intergovernmental transfer (IGT) notification.

(2) The entity that bills on behalf of the physician practice group must certify, on a form prescribed by HHSC, that no part of any TIPPS payment will be used to pay a contingent fee, consulting fee, or legal fee associated with the physician practice group's receipt of TIPPS funds, and the certification must be received by HHSC with the enrollment application described in paragraph (1) of this subsection.

(3) The entity that bills on behalf of the physician practice group must submit to HHSC, upon demand, copies of contracts it has with third parties that reference the administration of, or payments from, TIPPS.

(f) Non-federal share of TIPPS payments. The non-federal share of all TIPPS payments is funded through IGTs from sponsoring governmental entities. No state general revenue is available to support TIPPS.

(1) HHSC will communicate suggested IGT responsibilities for the program period with all TIPPS eligible and enrolled HRI physician practice groups and IME physician practice groups at least 10 days prior to the IGT declaration of intent deadline. Suggested IGT responsibilities will be based on the maximum dollars available under the TIPPS program for the program period as determined by HHSC, plus eight percent; forecasted member months for the program period as determined by HHSC; and the distribution of historical Medicaid utilization across HRI physician practice groups and IME physician practice groups, plus estimated utilization for eligible and enrolled other physician practice groups within the same service delivery area, for the program period. HHSC will also communicate estimated maximum revenues each eligible and enrolled physician practice group could earn under TIPPS for the program period with those estimates based on HHSC's suggested IGT responsibilities and an assumption that all enrolled practice groups will meet 100 percent of their quality metrics.

(2) Sponsoring governmental entities will determine the amount of IGT they intend to transfer to HHSC for the entire program period and provide a declaration of intent to HHSC 15 business days before the first half of the IGT amount is transferred to HHSC.

(A) The declaration of intent is a form prescribed by HHSC that includes the total amount of IGT the sponsoring governmental entity intends to transfer to HHSC.

(B) The declaration of intent is certified to the best knowledge and belief of a person legally authorized to sign for the sponsoring governmental entity but does not bind the sponsoring governmental entity to transfer IGT.

(3) Sponsoring governmental entities will transfer the first half of the IGT amount by a date determined by HHSC, but no later than June 1. Sponsoring governmental entities will transfer the second half of the IGT amount by a date determined by HHSC, but no later than December 1. HHSC will publish the IGT deadlines and all associated dates on its Internet website by March 15 of each year.

(4) Reconciliation. HHSC will reconcile the amount of the non-federal funds actually expended under this section during each program period with the amount of funds transferred to HHSC by the sponsoring governmental entities for that same period using the methodology described in §353.1301(g) of this subchapter.

(g) TIPPS capitation rate components. TIPPS funds will be paid to Managed Care Organizations (MCOs) through three components of the managed care per member per month (PMPM) capitation rates. The MCOs' distribution of TIPPS funds to the enrolled practice groups will be based on each practice group's performance related to the quality metrics as described in §353.1311 of this subchapter. The practice group must have provided at least one Medicaid service to a Medicaid client in each reporting period to be eligible for payments.

(1) Component One.

(A) The total value of Component One will be equal to 65 percent of total program value.

(B) Allocation of funds across qualifying HRI and IME physician practice groups will be proportional, based upon historical Medicaid clients served.

(C) Monthly payments to HRI and IME physician practice groups will be triggered by performance requirements as described in §353.1311 of this subchapter.

(D) Other physician practice groups are not eligible for payments from Component One.

(E) HHSC will reconcile the interim allocation of funds across qualifying HRI and IME physician groups to the actual distribution of Medicaid clients served across these physician groups during the program period as captured by Medicaid MCOs contracted with HHSC for managed care 180 days after the last day of the program period. This reconciliation will only be performed if the weighted average (weighted by Medicaid clients served during the program period) of the absolute values of percentage changes between each practice group's proportion of historical Medicaid clients served and actual Medicaid clients served is greater than 18 percent.

(2) Component Two.

(A) The total value of Component Two will be equal to 25 percent of total program value.

(B) Allocation of funds across qualifying HRI and IME practice groups will be proportional, based upon historical Medicaid utilization.

(C) Payments to practice groups will be triggered by achievement of performance requirements as described in §353.1311 of this subchapter.

(D) Other physician practice groups are not eligible for payments from Component Two.

(3) Component Three.

(A) The total value of Component Three will be equal to 10 percent of total program value.

(B) Allocation of funds across practice groups will be proportional, based upon actual Medicaid utilization of specific procedure codes as identified in the final quality metrics or performance requirements described in §353.1311 of this subchapter.

(C) Payments to practice groups will be triggered by achievement of performance requirements as described in §353.1311 of this subchapter during the reporting period prior to the payment period.

(4) Funds that are non-disbursed due to failure of one or more practice groups to meet performance requirements will be distributed across all qualifying practice groups in the service delivery area based on each practice group's proportion of total earned TIPPS funds from Components One, Two and Three combined at the end of the year.

(h) Distribution of TIPPS payments.

(1) Before the beginning of the program period, HHSC will calculate the portion of each PMPM associated with each TIPPS enrolled practice group broken down by TIPPS capitation rate component, quality metric, and payment period. For example, for a practice group, HHSC will calculate the portion of each PMPM associated with that practice that would be paid from the MCO to the practice group as follows.

(A) Monthly payments from Component One as performance requirements are met will be equal to the total value of Component One for the practice group divided by twelve.

(B) Semi-annual payments from Component Two associated with each quality metric will be equal to the total value of Component Two associated with the quality metric divided by 2.

(C) Payments from Component Three associated with each quality metric will be equal to the total value of Component Three attributed as a uniform rate increase based upon historical utilization.

(D) For purposes of the calculation described in subparagraph (B) of this paragraph, a physician group must achieve a minimum of four benchmark measures to be eligible for full payment of the benchmark measures. If a physician group achieves three benchmark measures, it is eligible for 75 percent payment. If a physician group achieves two benchmark measures, it is eligible for 50 percent payment.

(E) For purposes of the calculation described in subparagraph (C) of this paragraph, a physician group must achieve a minimum of one benchmark measure to be eligible for full payment.

(F) In situations where a practice does not have minimum denominator volume of 30 Medicaid managed care patients for a quality metric to be calculated, the funding associated with that metric will be evenly distributed across all remaining metrics within the component.

(2) MCOs will distribute payments to enrolled practice groups as they meet their reporting and quality metric requirements. Payments will be equal to the portion of the TIPPS PMPM associated with the achievement for the time period in question multiplied by the number of member months for which the MCO received the TIPPS PMPM.

(i) Changes in operation. If an enrolled practice group closes voluntarily or ceases to provide Medicaid services, the practice group must notify the HHSC Provider Finance Department by hand delivery, United States (U.S.) mail, or special mail delivery within 10 business days of closing or ceasing to provide Medicaid services. Notification is considered to have occurred when the HHSC Provider Finance Department receives the notice.

(j) Reconciliation. HHSC will reconcile the amount of the non-federal funds actually expended under this section during each program period with the amount of funds transferred to HHSC by the sponsoring governmental entities for that same period using the methodology described in §353.1301(g) of this subchapter and, as applicable, subsection (g)(1)(E) of this section.

(k) Recoupment. Payments under this section may be subject to recoupment as described in §353.1301(j) and §353.1301(k) of this subchapter.

*§353.1311. Quality Metrics for the Texas Incentives for Physicians and Professional Services Program.*

(a) Introduction. This section establishes the quality metrics that may be used in the Texas Incentives for Physician and Professional Services (TIPPS) program.

(b) Definitions. The following definitions apply when the terms are used in this section. Terms that are used in this section may be defined in §353.1301 of this subchapter (relating to General Provisions) or §353.1309 of this subchapter (relating to the Texas Incentives for Physicians and Professional Services).

(1) Baseline--An initial standard used as a comparison against performance in each metric throughout the program period to determine progress in the quality metrics.

(2) Benchmark--A metric-specific initial standard set prior to the start of the program period and used as a comparison against a physician practice group's progress throughout the program period.

(3) Measurement Period (MP)--The time period used to measure achievement of a quality metric.

(c) Quality metrics. For each program period, HHSC will designate one or more metrics for each TIPPS capitation rate component.

(1) Each quality metric will be identified as a structure measure, improvement over self (IOS) measure, or benchmark measure.

(2) Any metric developed for inclusion in TIPPS will be evidence-based.

(d) Performance requirements. For each program period, HHSC will specify the performance requirement that will be associated with the designated quality metric. Achievement of performance requirements will trigger payments for the TIPPS capitation rate components as described in §353.1309 of this subchapter. The following performance requirements are associated with the quality metrics described in subsection (c) of this section.

(1) A physician practice group must report all quality metrics to be eligible for payment.

(2) Achievement of quality metrics.

(A) To achieve a structure measure, providers must report their progress on associated activities for each MP.

(B) Achievement of an IOS measure is based on reporting of the baseline for each MP. For each program period except the one beginning September 1, 2021, achievement is based on meeting or exceeding during the MP the benchmark set prior to the start of the program period.

(C) Achievement of a benchmark measure is based on reporting for each MP and meeting or exceeding during the MP the benchmark set prior to the start of the program period.

(3) Reporting frequency. Achievement will be reported semi-annually unless otherwise specified by the quality metric.

(e) Notice and hearing.

(1) HHSC will publish notice of the proposed metrics and their associated performance requirements no later than January 31 preceding the first month of the program period. The notice must be published either by publication on HHSC's website or in the *Texas Register.* The notice required under this section will include the following:

(A) instructions for interested parties to submit written comments to HHSC regarding the proposed metrics and performance requirements; and

(B) the date, time, and location of a public hearing.

(2) Written comments will be accepted for 15 business days following publication. There will also be a public hearing within that 15-day period to allow interested persons to present comments on the proposed metrics and performance requirements.

(f) Publication of Final Metrics and Performance Requirements. Final quality metrics and performance requirements will be provided through HHSC's website on or before February 28 of the calendar year that also contains the first month of the program period. If Centers for Medicare and Medicaid Services requires changes to quality metrics or performance requirements after February 28 of the calendar year but before the first month of the program period, HHSC will provide notice of the changes through HHSC's website.

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

Filed with the Office of the Secretary of State on December 11, 2020.

TRD-202005442
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 424-6637

♦ ♦ ♦

# TITLE 7. BANKING AND SECURITIES

## PART 2. TEXAS DEPARTMENT OF BANKING

## CHAPTER 33. MONEY SERVICES BUSINESSES

### 7 TAC §33.13

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), proposes to amend Chapter 33, §33.13 concerning how to obtain a new license and the deadlines associated with applications. The amended rule is proposed to clarify the accepted payment form and refund of money services businesses (MSB) license application fees.

**Amendments to §33.13(d)(1)(B)**

Current §33.13(d)(1)(B) requires a MSB license applicant to submit the application fee in the form of a check. In practice, an applicant will often submit the fee through the Nationwide Multistate Licensing System and Registry (NMLS). The proposed amendment clarifies that an applicant may submit the fee either through the NMLS or in the form of a check.

**Amendments to §33.13(d)(2)**

Current §33.13(d)(2) allows the department to return an MSB license application before processing if the application is missing one of the items required by §33.13(d)(1), such as the application fee, search firm reports, or financial statements. The department can determine if one of these items is missing with an initial cursory review of the application. If the application fee is submitted, but other items are missing, current §33.13(d)(2) allows the department to either return the application fee or apply it to a "promptly" submitted "subsequent application" containing the missing items. In most cases where the department receives an application missing the required items, an applicant submits the missing items within several business days and before the department returns the application or fee; therefore, the department applies the fee to the initial application and no subsequent application is submitted. If a subsequent application or the missing items are not submitted promptly, it is unclear under current §33.13(d)(2) whether the department is required to refund the fee.

Proposed amended §33.13(d)(2) eliminates the ambiguity of the term "promptly" by requiring the applicant to submit missing items within 10 days of the department receiving the application and removes reference to a "subsequent application." The proposed amendment to §33.13(d)(2) also clarifies that the department will refund an application fee if the missing items are not submitted within 10 days. Thus, as proposed, §33.13(d)(2) will allow the department to either: (1) return an application and refund the application fee; or (2) apply the fee to the application within 10 days if missing items are submitted. If missing items are not submitted within 10 days, the department will return the application and refund the fee.

**Amendments to §33.13(f)**

When an application contains all required items and is not returned, the department must process and investigate the application before it is accepted for filing. This often involves making a request for additional information from the applicant pursuant to §33.13(e)(1). After reviewing the additional information, the department can make follow-up requests for additional information pursuant to §33.13(f)(3). If the applicant does not provide the requested information, the application can be considered abandoned pursuant to TAC §33.13(g)(1), and the application fee is not refunded pursuant to §33.13(g)(2). After the department has fully processed and investigated an application, the department accepts the application for filing, and the application fee is non-refundable pursuant to §33.27(d)(1).

In a limited number of cases, an applicant withdraws the application and demands a refund of the fee after the department has made multiple requests for additional information and expended

significant resources processing it, but before the department has accepted it for filing. Current §33.13 does not explicitly give the department the right to keep the application fee in these situations.

Proposed amended §33.13(f) clarifies at what point in the application process the application fee becomes non-refundable if the applicant withdraws the application. As amended, §33.13(f) provides that the application fee will not be refunded after the applicant responds to the department's initial request for additional information pursuant to §33.13(e)(1). Thus, as proposed, after the department has requested additional information, an applicant will have the option to either: (1) allow the department to continue to process the application but not receive a refund if the application is later withdrawn; or (2) withdraw their application at that time and receive a refund.

Russell Reese, Assistant Deputy Commissioner, Texas Department of Banking, has determined that for the first five-year period the proposed rule is in effect, there will be minimal fiscal implications for state government as a result of enforcing or administering the rule.

Mr. Reese has also determined that, for each year of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing the rule is that MSB license applicants will know with greater certainty whether their application fee is refundable or non-refundable, and may make an informed decision about whether to proceed with the application or withdraw it.

For each year of the first five years that the rule will be in effect, there will be minimal economic costs to persons required to comply with the rule as proposed.

For each year of the first five years that the rule will be 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 create a new regulation;

-- will not expand, limit or repeal an existing regulation;

-- will not increase or decrease the number of individuals subject to the rule's applicability;

-- will not positively or adversely affect this state's economy; and

-- will not require an increase or decrease in fees paid to the agency for an individual MSB license application but may increase or decrease the aggregate fees collected by the agency depending on how many applications require a fee refund.

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities. There will be no difference in the cost of compliance for these entities.

To be considered, comments on the proposed amendments must be submitted no later than 5:00 p.m. on January 25, 2021. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@dob.texas.gov.

The amendments to Chapter 33 are proposed under Texas Finance Code (Finance Code), §151.102, which authorizes the commission to adopt rules for the regulation of money services businesses.

Finance Code, §151.304 is affected by the proposed amendments.

*§33.13. How Do I Obtain a New License and What are the Deadlines Associated with Applications?*

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

(d) What is required for the department to begin processing my application?

(1) Your application must provide and be accompanied by the following at the time you submit the application to the department:

(A) your signature or the signature of your duly authorized officer, as applicable, sworn to before a notary, affirming that the information in the application and accompanying documentation is true;

(B) an application fee, in the amount established by commission rule, in the form of a check payable to the Texas Department of Banking or through the Nationwide Multistate Licensing System and Registry;

(C) all required search firm reports; and

(D) if you are applying for a money transmission license:

*(i)* security in the amount of at least $300,000 that complies with Finance Code, §151.308, and an undertaking to increase the amount of the security if additional security is required under that section; and

*(ii)* an audited financial statement demonstrating that you satisfy the minimum net worth requirement established by Finance Code, §151.307(a), and that, if the license is issued, you are likely to maintain the required minimum; or

(E) if you are applying for a currency exchange license:

*(i)* security in the amount of $2,500 that complies with Finance Code, §151.308; and

*(ii)* a financial statement demonstrating your solvency.

(2) The department may refuse to process and may return to you an application submitted without all the items identified in paragraph (1) of this subsection. If you submit your application fee, but fail to include one or more of the other items identified in paragraph (1) of this subsection, the department will return the application and refund the fee or, if you submit the missing items within 10 days of the department receiving your application, apply the fee to your application. [~~or refund the fee or, if you promptly submit an application that includes the missing items, apply the fee to your subsequent application.~~] If the missing items are not received within 10 days of the department receiving your application, the department will return the application and refund the fee.

(e) (No change.)

(f) When must I provide the additional information the department requires to consider my application complete and to accept it for filing?

(1) Subject to paragraph (2) of this subsection, the department must receive all information required to consider your application

complete and to accept it for filing on or before the 61st day after the date the department receives your initial application.

(2) Upon a finding of good and sufficient cause, the banking commissioner shall grant an applicant additional time to complete the application. Extensions will be communicated to the applicant before the expiration of the filing period.

(3) After reviewing the information you provide in response to the department's initial request for additional information, the department may determine that still more information is required to consider your application complete and to accept it for filing. The department will notify you in writing if further information is required and specify the date by which the department must receive the information.

(4) After the department receives any information you provide in response to the department's initial request for additional information under subsection (e)(1) of this section, the application fee will not be refunded if you withdraw your application.

(g) - (j) (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 December 11, 2020.

TRD-202005447
Catherine Reyer
General Counsel
Texas Department of Banking
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 475-1301

♦ ♦ ♦

# TITLE 10. COMMUNITY DEVELOPMENT

## PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

### CHAPTER 1. ADMINISTRATION

### SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

**10 TAC §1.15**

The Texas Department of Housing and Community Affairs (the Department) proposes an amendment to 10 TAC §1.15, Integrated Housing Rule. The purpose of the revision is to correct an incorrect citation to a regulation.

Tex. Gov't Code §2001.0045(b) does apply to the rule being adopted and no exceptions are applicable. However, the rule already exists and the correction is only administrative in nature. There are no costs associated with this rule action; therefore, no costs or impacts warrant a need to be offset.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the amendment will be in effect:

1. The amended rule does not create or eliminate a government program, but relates to the activity of the Department to ensure that Developments voluntarily participating in programs funded by the Department offer an integrated housing opportunity for Households with Disabilities.

2. The amended rule does not require a change in work that will require the creation of new employee positions, nor is the amendment significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The amended rule does not require additional future legislative appropriations.

4. The amended rule does not result in an increase in fees paid to the Department or in a decrease in fees paid to the Department

5. The amendment is creating a new regulation, which is being created to ensure that rental housing developed with state funding is subject to integrated housing requirements.

6. The amended rule will not limit or repeal an existing regulation, but can be considered to "expand" the existing regulations related to development of rental housing with state funds; however, this addition to the rule is necessary to conform to the requirements of Tex. Gov't Code §2306.111(g).

7. The amended rule will increase the number of individuals subject to the rule's applicability as described in item 6 above.

8. The amended rule will not negatively or positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code §2306.111(g).

1. The Department has evaluated this proposed action and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. This rule relates to the Department ensuring that Developments voluntarily participating in programs funded by the Department offer an integrated housing opportunity for Households with Disabilities. Other than in the case of a small or micro-business that is voluntarily participating in one of the Department's multifamily programs, no small or micro-businesses are subject to the rule. However, if a small or micro-business is pursuing a multifamily activity with the Department, this rule action merely clarifies a citation.

3. The Department has determined that because the proposed amendment merely corrects a citation, there will be no economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The amended rule does not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first

five years the rule will be in effect the amended rule has no economic effect on local employment because the rule relates only to a correction to an incorrect citation.

Texas Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that this rule merely provides a minor technical change, there are no "probable" effects of the new rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of the amended section will be a rule with correct references. There will not be any economic cost to any individuals subject to the amended rule as the processes described by the rule have already been in existence.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the amended section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments.

g. REQUEST FOR PUBLIC COMMENT. The public comment period will be held December 28, 2020, through January 29, 2021, to receive input on the proposed amended section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m. Austin local time January 29, 2021.

STATUTORY AUTHORITY. The amendment is proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the amended section affects no other code, article, or statute.

*§1.15. Integrated Housing Rule.*

(a) Purpose. It is the purpose of this section to provide a standard by which Developments funded by the Department offer an integrated housing opportunity for Households with Disabilities. This rule is authorized by Tex. Gov't Code, §2306.111(g) that promotes projects that provide integrated affordable housing.

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

(1) Capitalized words used herein have the meaning assigned in the specific Chapters and Rules of this Part that govern the program associated with the funded or awarded Development, or assigned by federal or state law.

(2) Households with Disabilities--A Household composed of one or more persons, at least one of whom is an individual who is determined to have a physical or mental impairment that substantially limits one or more major life activities; or having a record of such an impairment; or being regarded as having such an impairment. Included in this meaning is the term handicap as defined in the Fair Housing Act or disability as defined by other applicable federal or state law.

(3) Integrated Housing--Living arrangements typical of the general population. Integration is achieved when Households with Disabilities have the option to choose housing units that are located among units that are not reserved or set aside for Households with Disabilities. Integrated Housing is distinctly different from assisted living facilities/arrangements.

(4) Unit--has the meaning in Chapter 11 of this title (relating to Qualified Allocation Plan (QAP)), or of Single Family Dwelling Unit in Chapter 20 of this title (relating to Single Family Programs Umbrella Rule), or Dwelling Unit in Chapter 7 of this title (relating to Construction Activities), as determined by the applicable funding source.

[(2) Integrated Housing--Living arrangements typical of the general population. Integration is achieved when Households with Disabilities have the option to choose housing units that are located among units that are not reserved or set aside for Households with Disabilities. Integrated Housing is distinctly different from assisted living facilities/arrangements.]

[(3) Households with Disabilities--A Household composed of one or more persons, at least one of whom is an individual who is determined to have a physical or mental impairment that substantially limits one or more major life activities; or having a record of such an impairment; or being regarded as having such an impairment. Included in this meaning is the term handicap as defined in the Fair Housing Act or disability as defined by other applicable federal or state law.]

(c) Applicability. This rule applies to:

(1) All Multifamily Developments subject to Chapter 11 of this title[(relating to Qualified Allocation Plan (QAP))], Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules), and Chapter 13 of this title (relating to Multifamily Direct Loan Rule), with the exclusion of Transitional Housing Developments;

(2) Single Family Developments subject to Chapter 23, Subchapter F, Single Family Development Program, [Subchapter G,] of this title [, relating to,] (relating to Single Family HOME Program) [HOME Program Single Family Developments], §7.3 of this title, or done with Neighborhood Stabilization Program funds, with the exclusion of Shelters, Transitional Housing, and Scattered-site developments, meaning one to four family dwellings located on sites that are on non-adjacent lots, with no more than four units on any one site; and

(3) Only the restrictions or set asides placed on Units through a Contract, LURA, or financing source that limits occupancy to Persons with Disabilities. This rule does not prohibit a Development from having a higher percentage of actual occupants who are Persons with Disabilities.

(4) Previously awarded Multifamily Developments that would no longer be compliant with this rule are not considered to be in violation of the percentages described in subsection (d)(2) or subsection (d)(3) of this section if the award is made prior to September 1, 2018, and the restrictions or set asides were already on the Development or proposed in the Application for the Development.

(d) Integrated Housing Standard. Units exclusively set aside or containing a preference for Households with Disabilities must be dispersed throughout a Development.

(1) A Development may not market or restrict occupancy solely to Households with Disabilities unless required by a federal funding source.

(2) Developments with 50 or more Units shall not exclusively set aside more than 25% of the total Units in the Development for Households with Disabilities.

(3) Developments with fewer than 50 Units shall not exclusively set aside more than 36% of the Units in the Development for Households with Disabilities.

(e) Board Waiver. The Board may waive the requirements of this rule if the Board can affirm that the waiver of the rule is necessary to serve a population or subpopulation that would not be adequately served without the waiver, and that the Development, even with the waiver, does not substantially deviate from the principle of Integrated Housing.

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 December 14, 2020.

TRD-202005470
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 475-1762

♦ ♦ ♦

**10 TAC §1.23**

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 1, Subchapter A, General Policies and Procedures, §1.23, State of Texas Low Income Housing Plan and Annual Report (SLIHP). The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action, in order to adopt by reference the 2021 SLIHP.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous adoption by reference the 2021 SLIHP, as required by Tex. Gov't Code §2306.0723.

2. The proposed repeal does not require a change in work that would require the creation of new employee positions, nor is the proposed repeal significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The proposed repeal does not require additional future legislative appropriations.

4. The proposed repeal does not result in an increase in fees paid to the Department nor in a decrease in fees paid to the Department.

5. The proposed repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The proposed action will repeal an existing regulation, but is associated with a simultaneous readoption in order to adopt by reference the 2021 SLIHP.

7. The proposed repeal will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The proposed repeal will not negatively nor positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this proposed repeal and determined that the proposed repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed repeal does not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the proposed repeal as to its possible effects on local economies and has determined that for the first five years the proposed repeal would be in effect there would be no economic effect on local employment; therefore, no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the proposed repeal is in effect, the public benefit anticipated as a result of the repealed section would be an updated more germane rule that will adopt by reference the 2021 SLIHP. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the proposed repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The 22 day public comment period for the rule will be held Monday, December 21, 2020, to Monday, January 11, 2021, to receive input on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Elizabeth Yevich, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-0070, or email info@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, MONDAY, JANUARY 11, 2021.

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed repealed section affects no other code, article, or statute.

*§1.23. State of Texas Low Income Housing Plan and Annual Report (SLIHP).*

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 December 14, 2020.

TRD-202005473
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 463-9761

♦ ♦ ♦

**10 TAC §1.23**

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 1, Subchapter A, General Policies and Procedures, §1.23 State of Texas Low Income Housing Plan and Annual Report (SLIHP). The purpose of the proposed new section is to provide compliance with Tex. Gov't Code §2306.0723 and to adopt by reference the 2021 SLIHP, which offers a comprehensive reference on statewide housing needs, housing resources, and strategies for funding allocations. The 2021 SLIHP reviews TDHCA's housing programs, current and future policies, resource allocation plans to meet state housing needs, and reports on performance during the preceding state fiscal year (September 1, 2019, through August 31, 2020).

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action because it is exempt under item (c)(9) because it is necessary to implement legislation. Tex. Gov't Code §2306.0721 requires that the Department produce a state low income housing plan, and Tex. Gov't Code §2306.0722 requires that the Department produce an annual low income housing report. Tex. Gov't Code §2306.0723 requires that the Department consider the annual low income housing report to be a rule. This rule provides for adherence to that statutory requirement. Further no costs are associated with this action, and therefore no costs warrant being offset.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed new rule would be in effect:

1. The proposed new rule does not create or eliminate a government program, but relates to the adoption, by reference, of the 2021 SLIHP, as required by Tex. Gov't Code §2306.0723.

2. The proposed new rule does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.

3. The proposed new rule changes do not require additional future legislative appropriations.

4. The proposed new rule changes will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The proposed new rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.

6. The proposed new rule will not expand, limit, or repeal an existing regulation.

7. The proposed new rule will not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed new rule will not negatively or positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this proposed rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code §2306.0723.

1. The Department has evaluated this rule and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. There are no small or micro-businesses subject to the proposed rule for which the economic impact of the rule is projected to be null. There are no rural communities subject to the proposed rule for which the economic impact of the rule is projected to be null.

3. The Department has determined that because the proposed rule will adopt by reference the 2021 SLIHP, there will be no economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed rule does not contemplate nor authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule has no economic effect on local employment because the proposed rule will adopt by reference the 2021 SLIHP; therefore, no local employment impact statement is required to be prepared for the rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule." Considering that the proposed rule will adopt by reference the 2021 SLIHP there are no "probable" effects of the new rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be an updated and more germane rule that will adopt by reference the 2021 SLIHP, as required by Tex. Gov't Code §2306.0723. There will not be any economic cost to any individuals required to comply with the new section because the adoption by reference of prior year SLIHP documents has already been in place through the rule found at this section being repealed.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments because the new rule will adopt by reference the 2021 SLIHP.

REQUEST FOR PUBLIC COMMENT. The 22 day public comment period for the rule will be held Monday, December 21, 2020, to Monday, January 11, 2021, to receive input on the new proposed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Elizabeth Yevich, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-0070, or email info@td-hca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, MONDAY, JANUARY 11, 2021.

STATUTORY AUTHORITY. The new section is proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new section affects no other code, article, or statute.

*§1.23. State of Texas Low Income Housing Plan and Annual Report (SLIHP).*

The Texas Department of Housing and Community Affairs (TDHCA or the Department) adopts by reference the 2021 State of Texas Low Income Housing Plan and Annual Report (SLIHP). The full text of the 2021 SLIHP may be viewed at the Department's website: www.td-hca.state.tx.us. The public may also receive a copy of the 2021 SLIHP by contacting the Department's Housing Resource Center at (512) 475-3976.

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 December 14, 2020.

TRD-202005474
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 463-7961

♦ ♦ ♦

## CHAPTER 2. ENFORCEMENT
## SUBCHAPTER B. ENFORCEMENT FOR NONCOMPLIANCE WITH PROGRAM REQUIREMENTS OF CHAPTERS 6 AND 7

### 10 TAC §2.201, §2.202

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 2 Enforcement, Subchapter B, Enforcement for Noncompliance with Program Requirements of Chapters 6 and 7, §2.201, Cost Reimbursement, and §2.202, Sanctions and Contract Closeout. The purpose of the proposed repeal is to clarify requirements for participants of the Department's program.

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Bobby Wilkinson, Executive Director of the Department, has determined that, for the first five years the proposed repeal would be in effect:

1. The proposed repeal does not create or eliminate a government program but relates to changes to existing guidance for program subrecipients.

2. The proposed repeal does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.

3. The proposed repeal does not require additional future legislative appropriations.

4. The proposed repeal will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The proposed repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The proposed repeal will not expand, limit, or repeal an existing regulation.

7. The proposed repeal will not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed repeal will not negatively or positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated the proposed repeal and determined that the proposed repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed repeal does not contemplate nor authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the proposed repeal as to its possible effects on local economies and has determined that for the first five years the proposed repeal would be in effect there would be no economic effect on local employment; therefore, no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the proposed repeal is in effect, the public benefit anticipated as a result of the changed sections would be an updated and more germane rule. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the proposed repeal is in effect,

enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held December 28, 2020, through January 29, 2021, to receive input on the proposed action. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time January 29, 2021.

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed amended sections affect no other code, article, or statute.

*§2.201. Cost Reimbursement.*

*§2.202. Sanctions and Contract Closeout.*

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 December 14, 2020.

TRD-202005471
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 475-1762

♦ ♦ ♦

**10 TAC §2.201, §2.202**

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 2 Enforcement, Subchapter B, Enforcement for Noncompliance with Program Requirements of Chapters 6 and 7, §2.201, Cost Reimbursement, and §2.202, Sanctions and Contract Closeout. The purpose of the proposed new sections is to provide clarity in these sections.

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Bobby Wilkinson, Executive Director of the Department, has determined that, for the first five years the proposed new rule would be in effect:

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

2. The proposed new rule does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.

3. The proposed rule changes do not require additional future legislative appropriations.

4. The proposed rule changes will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The proposed rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.

6. The proposed rule will not expand, limit, or repeal an existing regulation.

7. The proposed rule will not increase or decrease the number of individuals subject to the rule's applicability; and

8. The proposed rule will not negatively or positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this proposed rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code §2306.041 and §2306.0504.

1. The Department has evaluated this rule and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. Other than in the case of a small or micro-business that participates in the Department's programs covered by this rule, no small or microbusinesses are subject to the rule. If a small or micro-business does participate in the program, the rule provides a clear set of regulations for doing so.

3. The Department has determined that there will be no economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed rule does not contemplate nor authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule has no economic effect on local employment therefore, no local employment impact statement is required to be prepared for the rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule. Considering that the proposed rule has no economic impact on local employment there are no "probable" effects of the new rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the new sections will be an updated and more germane rule. There will not be any economic cost, other than that described above, to any individuals

required to comply with the new section. because the processes described by the rule have already been in place through the rule found at this section being repealed.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held December 28, 2020, through January 29, 2021, to receive input on the proposed action. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time January 29, 2021.

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

*§2.201. Cost Reimbursement.*

(a) The Department may place on Cost Reimbursement any contract, other than non-Discretionary CSBG. Cost reimbursement requires Subrecipients to submit supporting documentation and back up for Expenditures or Obligations prior to the Department releasing funds. The Department staff shall establish appropriate review protocols for each party placed on cost reimbursement status, indicating whether all expenses will be reviewed or a sample, and the nature of any additional documentation that will be required in connection therewith. Approving the release of funds in a cost review situation does not constitute final approval of the expenditure. Funds so advanced remain subject to future reviews, monitorings, and audits and in no way serve to constrain or limit them.

(b) In addition to the reporting requirements outlined in §6.7 of this Title (relating to Subrecipient Reporting Requirements) an entity on Cost Reimbursement must submit, at a minimum, their expanded general ledger, chart of accounts, cost allocation plan, and bank reconciliations for the previous three months. Upon review of those items the Department will request submission of back up for some or all of the reported Expenditures.

(c) The budget caps for each budget category will be enforced each month the entity is on Cost Reimbursement.

(d) An entity will be removed from Cost Reimbursement when the Department determines that identified risks or concerns have been sufficiently mitigated.

(e) An entity on Cost Reimbursement remains subject to monitoring.

(f) The Department reserves the right to outsource some or all of its work associated with the Cost Reimbursement process to a third party.

*§2.202. Sanctions and Contract Closeout.*

(a) Subrecipients that enter into a Contract with the Department to administer programs are required to follow all Legal Requirements governing these programs.

(b) If a Subrecipient fails to comply with program and Contract requirements, rules, or regulations and in the event monitoring or other reliable sources reveal material Deficiencies or Findings in performance, or if the Subrecipient fails to correct any Deficiency or Finding within the time allowed by federal or state law, the Department, in order to protect state or federal funds, may take reasonable and appropriate actions, including but not limited to one or more of the items described in paragraphs (1) - (6) of this subsection. In so doing, the Department will not take any action that exceeds what it is permitted to do under applicable state and federal law. The Department, as appropriate, may provide written notice of its actions and the rights of a Subrecipient to appeal.

(1) Place it on Cost Reimbursement.

(2) With the exception of non-Discretionary CSBG, withhold all payments from the Subrecipient (both reimbursements and advances) until acceptable confirmation of compliance with the rules and regulations are received by the Department;

(3) Reduce the allocation of funds to Subrecipients as described in §2.203 of this subchapter (relating to Termination and Reduction of Funding for CSBG Eligible Entities) and as limited for LIHEAP funds as outlined in Tex. Gov't Code, Chapter 2105;

(4) With the exception of non-Discretionary CSBG, suspend performance of the Contract or reduce funds until proof of compliance with the rules and regulations are received by the Department or a decision is made by the Department to initiate proceedings for Contract termination;

(5) If permitted by applicable state and federal statute and regulations, elect not to provide future grant funds to the Subrecipient, either prospectively in general or until appropriate actions are taken to ensure compliance; or

(6) Terminate the Contract. Adhering to the requirements governing each specific program administered by the Department, as needed, the Department may determine to proceed with the termination of a Contract, in whole or in part, at any time the Department establishes there is good cause for termination. Such cause may include, but is not limited to: fraud; waste; abuse; fiscal mismanagement; not providing services to clients, or failing to expend Contract funds to serve clients, as contemplated under the Contract; or other serious Findings in the Subrecipient's performance. For CSBG contract termination procedures, refer to §2.203 of this subchapter.

(c) Contract Closeout. When a Contract is terminated, or voluntarily relinquished, the procedures described in paragraphs (1) - (12) of this subsection will be implemented. The terminology of a "terminated" Subrecipient below is intended to include a Subrecipient that is voluntarily terminating the Contract.

(1) The Department will issue a termination letter to the Subrecipient no less than 30 days prior to terminating the Contract; in the case of a Subrecipient that has notified the Department in writing of voluntarily relinquishment, the Department will acknowledge that termination in writing. If the entity is an Eligible Entity the Department, following the CSBG Act, will simultaneously initiate proceedings to terminate the Eligible Entity status and the effectiveness of the contractual termination will be stayed automatically pending the outcome of those proceedings. The Department may determine to take one of the following actions: suspend funds immediately or allow a temporary transfer to another provider; require Cost Reimbursement for closeout proceedings, or provide instructions to the Subrecipient to prepare a proposed budget and written plan of action that supports the closeout of the Contract. The plan must identify the name and current job titles of staff that will perform the closeout and an estimated dollar amount to be incurred. The plan must identify the CPA or firm which will perform the Single Audit. The Department will issue an official

termination date to allow all parties to calculate deadlines which are based on such date.

(2) If the Department determines that Cost Reimbursement is appropriate to accomplish closeout, the Subrecipient will submit backup documentation for all current Expenditures associated with the closeout. The required documentation will include, but not be limited to, the chart of accounts, detailed general ledger, revenue and expenditure statements, time sheets, payment vouchers and/or receipts, and bank reconciliations.

(3) No later than 30 calendar days after the Contract is terminated, the Subrecipient will take a physical inventory of client files, including case management files.

(4) The terminated Subrecipient will have 30 calendar days from the date of the physical inventory to make available all current client files, which must be boxed by county of origin. Current and active case management files also must be inventoried, and boxed by county of origin.

(5) Within 60 calendar days following the Subrecipient due date for preparing and boxing client files, Department staff will retrieve the client files.

(6) The terminated Subrecipient will prepare and submit no later than 30 calendar days from the date the Department retrieves the client files, a final report containing a full accounting of all funds expended under the contract.

(7) A final monthly expenditure report and a final monthly performance report for all remaining expenditures incurred during the closeout period must be received by the Department no later than 45 calendar days from the date the Department determines that the closeout of the program and the period of transition are complete.

(8) The Subrecipient will submit to the Department no later than 45 calendar days after the termination of the Contract, an inventory of the non-expendable personal property acquired in whole or in part with funds received under the Contract.

(9) The Department may require transfer of title to Equipment to the Department or to any other entity receiving funds under the program in question. The Department will make arrangements to remove Equipment covered by this paragraph within 90 calendar days following termination of the Contract.

(10) Upon selection of a new service provider, the Department will transfer to the new provider client files and, as appropriate, Equipment.

(11) A current year Single Audit must be performed for all entities that have exceeded the federal expenditure threshold under 2 CFR Part 200, Subpart F or the State expenditure threshold under UGMS, as applicable. The Department will allow a proportionate share of program funds to pay for accrued audit costs, when an audit is required, for a Single Audit that covers the date up to the closeout of the contract. The terminated Subrecipient must have a binding contract with a CPA firm on or before the termination date of the contract. The actual costs of the Single Audit and accrued audit costs including support documentation must be submitted to the Department no later than 45 calendar days from the date the Department determines the closeout is complete.

(12) Subrecipients shall submit within 45 calendar days after the date of the closeout process all financial, performance, and other applicable reports to the Department. The Department may approve extensions when requested by the Subrecipient. However, unless the Department authorizes an extension, the Subrecipient must abide by the 45 calendar day requirement of submitting all referenced reports and documentation to the Department.

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 December 14, 2020.

TRD-202005472
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 475-1762

♦ ♦ ♦

# TITLE 16. ECONOMIC REGULATION

## PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

### CHAPTER 130. PODIATRIC MEDICINE PROGRAM

The Texas Department of Licensing and Regulation (Department) proposes amendments to an existing rule at 16 Texas Administrative Code (TAC), Chapter 130, Subchapter E, §130.59; and proposed repeal of an existing rule at Subchapter G, §130.74, regarding the Podiatry program. These proposed changes are referred to as the "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC Chapter 130, implement Texas Occupations Code, Chapter 202, Podiatrists.

The proposed rules provide for a waiver of the requirements in Texas Health and Safety Code §481.074 and §481.075 for controlled substance prescriptions to be issued electronically (electronic prescribing requirements) and repeal the rule adopting a penalty matrix. House Bill (HB) 2174, 86th Legislature, Regular Session (2019), and Texas Health and Safety Code §481.0756 authorize the Department to grant licensed podiatrists a waiver from electronic prescribing requirements. The proposed rules also repeal the rule adopting a penalty matrix for the Podiatry program. The statutory requirement for adopting a penalty matrix rule in Texas Occupations Code §202.6011 was repealed by HB 2847, 86th Legislature, Regular Session (2019).

The proposed rules were presented to and discussed by the Podiatric Medical Examiners Advisory Board at its meeting on December 7, 2020. The Advisory Board did not make any changes to the proposed rules. The Advisory Board voted to recommend that the proposed rules be published in the *Texas Register* for public comment.

SECTION-BY-SECTION SUMMARY

The proposed rules amend 16 TAC §130.59, Opioid Prescription Limits and Required Electronic Prescribing. The proposed rules establish a procedure and specify criteria for the Department to apply when granting a waiver from the electronic prescribing requirements for controlled substances. New subsection (d) establishes the Department's authority to require a form, the one-year

time period for a waiver, and the renewal application timeline. New subsection (e) establishes the criteria that a waiver request must satisfy for the Department to grant a waiver. New subsection (f) establishes the Department's authority to revoke or refuse to grant a waiver.

The proposed rules repeal 16 TAC §130.74, Penalty Matrix. The repeal of this rule reduces redundancy and increases efficiency by harmonizing the program with other Department programs which do not maintain a penalty matrix in rule. Texas Occupations Code §51.302(c) requires the Texas Commission of Licensing and Regulation (Commission), the Department's governing body, to establish a written enforcement plan that provides specific ranges of penalties for specific violations and the criteria by which the Department determines the amount of the penalty. The Department's enforcement plan contains a schedule of penalties for each program known as a "penalty matrix." The podiatry penalty matrix was incorporated into the Department's enforcement plan when it was created and it will continue to serve its purpose there after 16 TAC §130.74 is repealed. A public notice of revisions to the enforcement plan is published in the *Texas Register* as required by Texas Occupations Code §51.302(c) each time a program's penalty matrix is revised.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rule is in effect, enforcing or administering the proposed rules do not have foreseeable implications relating to costs or revenues of state or local governments. The proposed rules will not impact the Department's costs or fees paid to the Department. Additionally, local governments are not responsible for enforcing or administering the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be that the proposed rules provide for more effective and efficient regulation of podiatrists regarding prescribing of controlled substances which enhances the public health, safety, and welfare. Some members of the public and their families will benefit from the electronic prescribing requirements waivers. Podiatrists who are granted a waiver will not be required to send an electronic prescription for controlled substances directly to a pharmacy, and instead will be able to provide a paper prescription. Podiatrists that have documented circumstances justifying a waiver will still be able to serve clients who require controlled substance prescriptions to assist in their podiatric treatment.

Repealing the redundant penalty matrix from rule will reduce confusion for the public and licensees by providing one document that contains the most up-to-date information, and allowing the Commission to update the matrix as needed through revisions to the Department's enforcement plan rather than the rule amendment process required by the Administrative Procedure Act. The podiatry penalty matrix was incorporated into the Department's enforcement plan when it was created for the rules and it will continue to serve its purpose there after the matrix is repealed from the rules.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

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

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

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

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

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

GOVERNMENT GROWTH IMPACT STATEMENT

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

1. The proposed rules do not create or eliminate a government program.

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

3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.

4. The proposed rules do not require an increase or decrease in fees paid to the agency.

5. The proposed rules do not create a new regulation.

6. The proposed rules do expand, limit, or repeal an existing regulation.

The proposed rules expand an existing regulation in 16 TAC §130.59 by outlining the parameters under which the Department may grant a waiver from the electronic prescribing requirements for controlled substance prescriptions.

The proposed rules also repeal 16 TAC §130.74. This section is no longer statutorily required with the repeal of Texas Occupations Code §202.6011, and repealing the rule reduces regulatory redundancy and harmonizes the program with other Department programs which do not maintain a penalty matrix in rule.

7. The proposed rules do not increase or decrease the number of individuals subject to the rules' applicability.

8. The proposed rules do not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENTS

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

## SUBCHAPTER E. PRACTITIONER RESPONSIBILITIES AND CODE OF ETHICS

### 16 TAC §130.59

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 202, which authorize the Commission to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The rules are also proposed under Texas Health and Safety Code Chapter 481, which mandates that practitioners observe electronic prescription requirements for controlled substances, and requires agencies which regulate practitioners to implement a process for granting waivers from electronic prescription requirements.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 202, and Texas Health and Safety Code Chapter 481. No other statutes, articles, or codes are affected by the proposed rules.

*§130.59. Opioid Prescription Limits and Required Electronic Prescribing.*

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

(c) After January 1, 2021 all controlled substances must be prescribed electronically except:

(1) - (7) (No change.);

(8) by a practitioner who has received a waiver under Section 481.0756 of the Texas Health and Safety Code from the requirement to use electronic prescribing, as provided by subsections (d) - (e); or

(9) (No change.)

(d) To obtain a waiver of the requirement to use electronic prescribing, a practitioner must submit a waiver request on a form approved by the department. The waiver request form must document sufficient evidence of the circumstances justifying the waiver as outlined in subsection (e). A waiver granted by the department under this section shall expire one year after the date of approval. A practitioner may reapply for a subsequent waiver not earlier than the 30th day before the date the waiver expires if the circumstances that necessitated the waiver continue.

(e) A practitioner's waiver of electronic prescribing request form must contain sufficient evidence of one or more of the following that, in the judgment of the executive director, justify the issuance of a waiver:

(1) economic hardship, including:

(A) any special situational factors affecting either the cost of compliance or ability to comply;

(B) the likely impact of compliance on profitability or viability; and

(C) the availability of measures that would mitigate the economic impact of compliance;

(2) technological limitations not reasonably within the control of the practitioner;

(3) issuance of fifty or fewer prescriptions for controlled substances in the year immediately prior to the application for a waiver, as documented by the Texas Prescription Monitoring Program; or

(4) other exceptional circumstances demonstrated by the practitioner.

(f) The department may revoke or refuse to issue a waiver under this section if the practitioner violates any provision of Texas Occupations Code, Chapters 51 or 202, this chapter, or any rule or order of the executive director or commission.

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

Filed with the Office of the Secretary of State on December 14, 2020.

TRD-202005475
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 463-3671

♦ ♦ ♦

## SUBCHAPTER G. ENFORCEMENT

### 16 TAC §130.74

The proposed repeal is proposed under Texas Occupations Code, Chapters 51 and 202, which authorize the Commission to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The repeal is also proposed under Texas Health and Safety Code Chapter 481, which mandates that practitioners observe electronic prescription requirements for controlled substances, and requires agencies which regulate practitioners to implement a process for granting waivers from electronic prescription requirements.

The statutory provisions affected by the proposed repeal are those set forth in Texas Occupations Code, Chapters 51 and 202, and Texas Health and Safety Code Chapter 481. No other statutes, articles, or codes are affected by the proposed rules.

*§130.74. Penalty Matrix.*

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 December 14, 2020.

TRD-202005477
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 463-3671

♦ ♦ ♦

# TITLE 19. EDUCATION

## PART 2. TEXAS EDUCATION AGENCY

### CHAPTER 101. ASSESSMENT

### SUBCHAPTER DD. COMMISSIONER'S RULES CONCERNING SUBSTITUTE ASSESSMENTS FOR GRADUATION

**19 TAC §101.4002**

The Texas Education Agency (TEA) proposes an amendment to §101.4002, concerning end-of-course (EOC) substitute assessments. The proposed amendment would add the new Texas Success Initiative Assessment, Version 2.0 (TSIA2) to the list of approved substitute assessments.

BACKGROUND INFORMATION AND JUSTIFICATION: Section 101.4002 specifies the assessments the commissioner of education recommends as substitute assessments that a student may use to meet EOC assessment graduation requirements and establishes the cut scores needed for graduation purposes. The proposed amendment would update the rule to include references to the new TSIA2. The proposed amendment would also update the figure in subsection (b) to include the new TSIA2 and the passing scores that are required to use this assessment as a substitute assessment.

FISCAL IMPACT: Lily Laux, deputy commissioner for school programs, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government, including school districts and open-enrollment charter schools, required to comply with the proposal.

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

SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would expand an existing regulation due to the addition of the TSIA2 to the list of approved substitute assessments. However, although existing results from the original TSIA can be utilized, the TSIA2 is a replacement for the original TSIA, which will no longer be administered. In addition, the proposed rulemaking would increase the number of individuals subject to its applicability by providing additional opportunities for students to meet graduation requirements.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not limit or repeal an existing regulation; would not decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Ms. Laux has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be additional opportunities for students to meet graduation requirements. There is no anticipated economic cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have no data and reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins December 25, 2020, and ends January 25, 2021. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on December 25, 2020. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/. Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

STATUTORY AUTHORITY. The amendment is proposed under Texas Education Code (TEC), §39.023(c), which requires the agency to adopt end-of-course (EOC) assessment instruments for secondary-level courses in Algebra I, biology, English I, English II, and United States history; and TEC, §39.025, which establishes the secondary-level performance required to receive a Texas high school diploma. TEC, §39.025(a), requires the commissioner of education to adopt rules requiring students to achieve satisfactory performance on each EOC assessment listed under TEC, §39.023(c), in order to receive a Texas high school diploma. TEC, §39.025(a-1), (a-2), and (a-3), allow for the use of specific substitute assessments to satisfy the EOC assessment graduation requirements under certain conditions.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §39.023 and §39.025.

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

(a) For purposes of this subchapter, "equivalent course" is defined as a course having sufficient content overlap with the essential knowledge and skills of a similar course in the same content area listed

under §74.1(b)(1)-(4) of this title (relating to Essential Knowledge and Skills).

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

Figure: 19 TAC §101.4002(b)

[~~Figure: 19 TAC §101.4002(b)~~]

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

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

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

(3) a student using a Texas Success Initiative Assessment (TSIA) or a Texas Success Initiative Assessment, Version 2.0 (TSIA2) [~~(TSI) assessment~~] also meets the requirements of subsection (d) of this section.

(d) Effective beginning with the 2014-2015 school year, a student must meet criteria established in paragraph (1) or (2) of this subsection in order to qualify to use TSIA or TSIA2 [~~TSI~~] as a substitute assessment.

(1) A student must have been enrolled in a college preparatory course for English language arts (PEIMS code CP110100) or mathematics (PEIMS code CP111200) and, in accordance with the TEC, §39.025(a-1), have been administered an appropriate TSIA or TSIA2 [~~TSI assessment~~] at the end of that course.

(A) A student under this paragraph who meets all three TSIA or both TSIA2 [~~TSI~~] English language arts score requirements provided in the figure [~~chart~~] in subsection (b) of this section satisfies both the English I and English II EOC assessment graduation requirements.

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

(2) In accordance with the TEC, §39.025(a-3), a student who has not been successful on the Algebra I or English II EOC assessment after taking the assessment at least two times may use the corresponding TSIA or TSIA2 [~~TSI assessment~~] in place of that EOC assessment.

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

(B) The provisions of this paragraph expire September 1, 2023. A student may meet the assessment graduation requirements under this paragraph using TSIA or TSIA2 [~~TSI~~] if the student has met the necessary score requirements as specified in subsection (b) of this section prior to September 1, 2023.

(e) A student electing to substitute an assessment for graduation purposes must still take the corresponding EOC assessment required under the TEC, §39.023(c), at least once for federal accountability purposes. If a student sits for an EOC assessment, a school district may not void or invalidate the test in lieu of a substitute assessment.

(f) A student who fails to perform satisfactorily on a PSAT, PLAN, or Aspire test (or any versions of these tests) as indicated in the chart in subsection (b) of this section must take the appropriate EOC assessment required under the TEC, §39.023(c). However, a student who does not receive a passing score on the EOC assessment and retakes a PSAT, PLAN, or Aspire test (or any versions of these tests) is eligible to meet the requirements specified in subsection (c) 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 December 14, 2020.

TRD-202005476
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 475-1497

♦ ♦ ♦

# TITLE 22. EXAMINING BOARDS

## PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

### CHAPTER 74. SUBSTANCE ABUSE TESTING AND MONITORING

**22 TAC §74.1**

The Texas Board of Chiropractic Examiners (Board) proposes new 22 TAC §74.1 (Substance Abuse Testing and Monitoring of Applicants). The Board proposes this rule to formally state the Board's procedures when certain applicants for a chiropractic license may be subject to substance abuse testing in order to obtain a probationary license.

Under Occupations Code §53.021, the Board has the authority to deny an applicant for a chiropractic license because of convictions directly related to the duties and obligations of the occupation. This may include substance abuse-related offenses. This proposed rule formalizes the Board's current practice of allowing certain applicants with substance abuse offenses to still receive a probationary license by agreeing to testing and monitoring for a specified period of time.

The Board's Executive Director, Patrick Fortner, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local government. There will be no adverse effect on small businesses or rural communities, micro-businesses, or local or state employment. There will be no additional economic costs to persons required to comply with the rule as proposed. An Economic Impact Statement

and Regulatory Flexibility Analysis is not required because the proposed rule will not have an adverse economic effect on small businesses or rural communities as defined in Texas Government Code §2006.001(1-a) and (2).

Mr. Fortner has determined that for each year of the first five years the proposed rule will be in effect the public benefit is to allow certain applicants with substance abuse offenses to receive a probationary license by agreeing to testing and monitoring for a specified period of time.

The Board provides this Government Growth Impact Statement, pursuant to Texas Government Code §2001.0221, for the proposed new 22 TAC §74.1. For each year of the first five years the proposed rule is in effect, Mr. Fortner has determined:

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

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

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

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

(5) The proposed rule does create a new regulation.

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

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

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

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

The rule is proposed under Texas Occupations Code §53.021, which authorizes the Board to deny an applicant for a chiropractic license because of offenses directly related to the duties and obligations of the occupation, and Texas Occupations Code §201.152, which authorizes the Board to adopt rules necessary to perform the Board's duties and to regulate the practice of chiropractic.

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

*§74.1. Substance Abuse Testing and Monitoring of Applicants.*

(a) The Board may require an applicant for a license who has a criminal conviction for substance abuse offenses within 5 years before the date of the application to undergo substance abuse testing and monitoring as a condition of licensure.

(b) If the Board requires an applicant to undergo substance abuse testing and monitoring under this section, the cost shall be borne by the applicant.

(c) The Board shall make reasonable efforts to ensure testing will be done in a manner to accomplish the goals of the testing while minimizing the applicant's cost.

(d) The Board may grant a probationary license to an applicant who agrees in writing to substance abuse testing and monitoring under this section.

(e) The Board shall state in writing the length of time an applicant shall be under probation and subject to substance abuse testing and monitoring.

(f) The Board may not place an applicant under probation for substance abuse testing and monitoring for more than two years from the date the Board issues the applicant's probationary license.

(g) The Board may revoke the probationary license of any applicant who agrees to substance abuse testing and monitoring if the applicant fails to pass any test or provide required monitoring documentation.

(h) A Board order revoking a license under subsection (g) of this section is final and unappealable.

(i) An applicant whose probationary license has been revoked under this section may reapply for a license not sooner than one year from the date the license was revoked under subsection (g) 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 December 7, 2020.

TRD-202005308
Christopher Burnett
General Counsel
Texas Board of Chiropractic Examiners
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 305-6700

♦ ♦ ♦

**22 TAC §74.2**

The Texas Board of Chiropractic Examiners (Board) proposes new 22 TAC §74.2, (Substance Abuse Testing and Monitoring of Licensees). The Board proposes this rule to comply with Texas Occupations Code §201.602, which requires the Board to adopt by rule a system for monitoring a licensee's compliance with conditions imposed by the Board in disciplinary actions. The purpose of the rule is to permit licensees with substance abuse problems an opportunity to retain their license while still being subject to oversight by the Board.

Under the proposed rule, which formalizes the Board's current practice, a licensee who agrees to undergo substance abuse testing and monitoring as part of an agreed order in a disciplinary action shall bear the cost; the Board shall make reasonable efforts to minimize that cost.

The Board's Executive Director, Patrick Fortner, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local government. There will be no adverse effect on small businesses or rural communities, micro-businesses, or local or state employment. There will be no additional economic costs to persons required to comply with the rule as proposed. An Economic Impact Statement

and Regulatory Flexibility Analysis is not required because the proposed rule will not have an adverse economic effect on small businesses or rural communities as defined in Texas Government Code §2006.001(1-a) and (2).

Mr. Fortner has determined that for each year of the first five years the proposed rule will be in effect the public benefit is to permit licensees with substance abuse problems an opportunity to retain their license while still being subject to oversight by the Board.

The Board provides this Government Growth Impact Statement, pursuant to Texas Government Code §2001.0221, for the proposed new of 22 TAC §74.2. For each year of the first five years the proposed rule is in effect, Mr. Fortner has determined:

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

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

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

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

(5) The proposed rule does create a new regulation.

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

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

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

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

The rule is proposed under Texas Occupations Code §201.602, which requires the Board to adopt by rule a system for monitoring a licensee's compliance with conditions imposed by the Board in disciplinary actions, and Texas Occupations Code §201.152, which authorizes the Board to adopt rules necessary to perform the Board's duties and to regulate the practice of chiropractic.

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

*§74.2. Substance Abuse Testing and Monitoring of Licensees.*

(a) The Board may require a licensee who has been subject to disciplinary action for drug or alcohol offenses to undergo substance abuse testing and monitoring.

(b) If the Board requires a licensee to undergo substance abuse testing and monitoring under this section, the cost shall be borne by the licensee.

(c) The Board shall make reasonable efforts to ensure testing will be done in a manner to accomplish the goals of the testing while minimizing the licensee's cost.

(d) A licensee who agrees to undergo substance abuse testing and monitoring to settle a disciplinary action by the Board shall agree to the terms of the testing and monitoring in writing as part of the agreed order with the Board.

(e) The Board, upon the recommendation of the Board's Enforcement Committee, may revoke the license of a licensee who agrees to substance abuse testing and monitoring if the licensee fails to pass any test or provide monitoring documentation as required by the agreed order with the Board.

(f) A Board order revoking a license under subsection (e) of this section is final and unappealable.

(g) A licensee whose license has been revoked under this section may reapply for a license not sooner than one year from the date the license was revoked under subsection (e) 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 December 7, 2020.

TRD-202005310
Christopher Burnett
General Counsel
Texas Board of Chiropractic Examiners
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 305-6700

♦ ♦ ♦

# TITLE 34. PUBLIC FINANCE

## PART 6. TEXAS MUNICIPAL RETIREMENT SYSTEM

### CHAPTER 125 ACTIONS OF PARTICIPATING MUNICIPALITIES

The Board of Trustees (Board) of the Texas Municipal Retirement System (TMRS or the System) proposes the repeal of current 34 TAC Chapter 125 (Chapter 125), relating to actions of participating municipalities. TMRS is also proposing to replace current Chapter 125 with proposed new Chapter 125, also relating to actions of participating municipalities.

REPEAL OF CURRENT CHAPTER 125

TMRS proposes the repeal of current 34 TAC Chapter 125, which includes the following sections: 34 TAC §125.1, Optional Vesting Must Include All Departments; 34 TAC §125.2, Composite Participating Date Requires Council Action; 34 TAC §125.3, Actuary Determines Contribution Rates; 34 TAC §125.4, Effect of Adopting Composite Participating Date; 34 TAC §125.5, When Composite Participating Date Must Be Adopted; 34 TAC §125.6, Limitations on Buy-Back Ordinances; 34 TAC §125.7, Optional Additional Contributions to Benefit Accumulation Fund.

PROPOSAL OF NEW CHAPTER 125

As proposed, the new Chapter 125 will address: 34 TAC §125.1, Optional Vesting Must Include All Departments; 34 TAC §125.2, Composite Participating Date Requires Council Action; 34 TAC §125.3, Effect of Adopting Composite Participating Date; 34 TAC §125.4, When Composite Participating Date Must Be Adopted;

34 TAC §125.5, Limitations on Buy Back Ordinances; 34 TAC §125.6, Optional Additional Contributions to Benefit Accumulation Fund; 34 TAC §125.7, Elected Officials; 34 TAC §125.8, Collection of Contributions; 34 TAC §125.9, Correction of Errors; 34 TAC §125.10, Ordinances; 34 TAC §125.11, Use of City Portal System.

BACKGROUND AND PURPOSE

TMRS proposes to repeal and replace Chapter 125 to update, modernize, and provide clarification to its rules relating to actions of participating municipalities under existing benefit plans of TMRS. Statutes specific to TMRS are found in Title 8, Subtitle G, Chapters 851 through 855, Texas Government Code (the "TMRS Act"). In addition, the repeal and replacement of Chapter 125 is being proposed as a result of TMRS' rule review, which was conducted pursuant to Texas Government Code §2001.039.

Five provisions of the proposed new Chapter 125 rules are unchanged from existing rules; these five rules are found in new 34 TAC §125.1, Optional Vesting Must Include All Departments; 34 TAC §125.2, Composite Participating Date Requires Council Action; 34 TAC §125.3, Effect of Adopting Composite Participating Date; 34 TAC §125.4, When Composite Participating Date Must Be Adopted; and, 34 TAC §125.6, Optional Additional Contributions to Benefit Accumulation Fund. One proposed rule for new Chapter 125 (in 34 TAC §125.5, Limitations on Buy Back Ordinances) is amended to add one word for clarity. Substantive changes, however, are proposed in the form of five additional new rules, which are described as follows: clarify documentation that TMRS may request regarding the eligibility of elected officials to participate in the System pursuant to §852.107 of the TMRS Act (in §125.7); clarify duties under the TMRS Act (including, but not limited to, §855.402) regarding the collection and receipt of payroll reports and member and employer contributions, and provide for cities to submit electronic payments to TMRS unless otherwise excepted by the proposed rule (in §125.8); clarify processing of error corrections regarding service credits, contributions and payments under applicable federal and state laws and Internal Revenue Service guidance (in §125.9); clarify deadlines for ordinances not otherwise specified in the TMRS Act and delegate to the TMRS Executive Director authority to approve ordinances regarding certain benefits, Cost of Living Adjustments and Updated Service Credits (in §125.10); and, clarify terms and conditions under which participating cities may use the System's electronic city portal system (in §125.11).

Current rule §125.3, Actuary Determines Contribution Rates, is being repealed as it is no longer necessary for the administration of the System.

At a Board meeting on October 22, 2020, the TMRS Board approved the publication for comment of the proposed repeal of current Chapter 125 and the proposed replacement of current Chapter 125 with the new Chapter 125 rules.

FISCAL NOTE

Debbie Munoz, TMRS Director of Member Services, has determined that for the first five-year period the proposed new rules are in effect there will be no foreseeable fiscal implications to state or local governments as a result of enforcing or administering the proposed rules.

PUBLIC COST/BENEFIT

Ms. Munoz also has determined that for each year of the first five years the proposed new rules are in effect, the public benefit of Chapter 125 will be: (i) a clearer and more accurate statement of the administrative rules of TMRS regarding actions of participating municipalities; and, (ii) to modernize and conform administrative rules with the System's interpretation and administration of the TMRS Act provisions.

LOCAL EMPLOYMENT IMPACT STATEMENT

TMRS has determined that there will be no adverse economic effects on local economies or local employment because of the proposed new rules, which are proposed for the modernization, clarification and implementation of provisions relating to actions of participating municipalities under existing benefit plans of TMRS. Therefore, no local employment impact statement is required under Texas Government Code §2001.022.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

TMRS has determined that there will be no adverse economic effects on small businesses, micro-businesses, or rural communities because the proposed new rules are proposed for modernization, clarification and implementation of provisions relating to actions of participating municipalities under existing benefit plans of TMRS. Rural communities include municipalities under a certain population, but the proposed rules do not differentiate between municipalities on the basis of population, and the proposed rules relate to existing benefit plans of TMRS for which municipalities are provided options under the TMRS Act regarding their levels of participation. Therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under Texas Government Code §2006.002.

GOVERNMENT GROWTH IMPACT STATEMENT

TMRS has determined that for each year of the first five years the proposed new rules are in effect, the proposed rules: will not create or eliminate any TMRS programs; will not require either the creation of or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to TMRS (TMRS does not receive any legislative appropriations); will not require an increase or decrease in fees paid to TMRS; will not create a new regulation (because new Chapter 125 updates and replaces existing Chapter 125); do not expand, limit or repeal an existing regulation (because new Chapter 125 updates and replaces existing Chapter 125); do not increase or decrease the number of individuals subject to the rules' applicability; and, do not affect this state's economy.

TAKINGS IMPACT ASSESSMENT

TMRS has determined that there are no private real property interests affected by the proposed new rules, therefore a takings impact assessment is not required under Texas Government Code §2007.043.

COSTS TO REGULATED PERSONS

TMRS has determined that Texas Government Code §2001.0045(b) does not apply to the proposed new rules because they do not impose a cost on regulated persons (including another state agency, a special district, or a local government).

ENVIRONMENTAL RULE ANALYSIS

The proposed new rules are not a "major environmental rule" as defined by Texas 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.

COMMENTS

Comments on the proposed rules may be submitted to Christine Sweeney, Chief Legal Officer, TMRS, P.O. Box 149153, Austin, Texas 78714-9153, faxed to (512) 225-3786, or submitted electronically to csweeney@tmrs.com. Written comments must be received by TMRS no later than 30 days after publication of this notice in the *Texas Register.*

**34 TAC §§125.1 - 125.7**

STATUTORY AUTHORITY

The repeal of existing Chapter 125 is proposed and implements the authority granted under the following provisions of the TMRS Act or the Texas Government Code: (i) Government Code §855.102, which allows the Board to adopt rules it finds necessary or desirable for the efficient administration of the System; and, (ii) Government Code §855.201, which allows the Board to delegate to the executive director powers and duties provided to the Board by the TMRS Act. In addition, the rule changes are proposed as a result of TMRS' rule review, which was conducted pursuant to Texas Government Code §2001.039.

CROSS-REFERENCE TO STATUTES

The proposal implements the following sections of the Texas Government Code: §§802.1024 and 802.1025, concerning correction of errors and complaint procedure; §852.005, concerning certain entities that are provided the standing of a municipality for purposes of participating in TMRS benefit plans; §852.107, concerning optional membership requirement for elected officials; §853.003, concerning buy back of credited service previously cancelled; §853.403, concerning approval of certain ordinances; §854.203, concerning ordinances for optional increases in annuities, and multiple sections of TMRS Act Chapter 853, which sections allow municipalities to adopt ordinances for certain benefits under TMRS benefit plans; §855.402, concerning collection of member contributions; and §855.403, concerning collection of municipality contributions.

*§125.1 Optional Vesting Must Include All Departments.*

*§125.2 Composite Participating Date Requires Council Action.*

*§125.3 Actuary Determines Contribution Rates.*

*§125.4 Effect of Adopting Composite Participating Date.*

*§125.5 When Composite Participating Date Must Be Adopted.*

*§125.6 Limitations on Buy-Back Ordinances.*

*§125.7 Optional Additional Contributions to Benefit Accumulation Fund.*

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 December 14, 2020.

TRD-202005468
Christine M. Sweeney
Chief Legal Officer
Texas Municipal Retirement System
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 225-3710

♦ ♦ ♦

**34 TAC §§125.1 - 125.11**

STATUTORY AUTHORITY

The new Chapter 125 rules are proposed and implement the authority granted under the following provisions of the TMRS Act or the Texas Government Code: (i) Government Code §855.102, which allows the Board to adopt rules it finds necessary or desirable for the efficient administration of the System; and, (ii) Government Code §855.201, which allows the Board to delegate to the executive director powers and duties provided to the Board by the TMRS Act. In addition, the rule changes are proposed as a result of TMRS' rule review, which was conducted pursuant to Texas Government Code §2001.039.

CROSS-REFERENCE TO STATUTES

The proposal implements the following sections of the Texas Government Code: §§802.1024 and 802.1025, concerning correction of errors and complaint procedure; §852.005, concerning certain entities that are provided the standing of a municipality for purposes of participating in TMRS benefit plans; §852.107, concerning optional membership requirement for elected officials; §853.003, concerning buy back of credited service previously cancelled; §853.403, concerning approval of certain ordinances; §854.203, concerning ordinances for optional increases in annuities, and multiple sections of TMRS Act Chapter 853, which sections allow municipalities to adopt ordinances for certain benefits under TMRS benefit plans; §855.402, concerning collection of member contributions; and §855.403, concerning collection of municipality contributions.

*§125.1. Optional Vesting Must Include All Departments.*
A participating municipality which adopts an optional vesting provision must include all participating departments. A composite participation date is optional but recommended.

*§125.2. Composite Participating Date Requires Council Action.*
Adoption of a single composite participating date for a city with two or more participating dates must be at the election of and by council action.

*§125.3. Effect of Adopting Composite Participating Due.*
A city which elects to adopt a composite participating date will be treated as if a single department for determining amortization periods and normal and prior service contribution rates; but accumulated prior service credits will be based on actual participating dates and periods of current service.

*§125.4. When Composite Participating Date Must Be Adopted.*
A composite participating date must be elected by a city if contributions from one department are to be used to support the obligations of another department.

*§125.5. Limitations on Buy Back Ordinances.*
Ordinances of participating municipalities agreeing to underwrite and assume the obligations rising out of the granting of creditable service under §853.003 of the Act, to persons who had terminated a previous membership, shall be limited to persons in the employment of the consenting municipality at the date specified in the ordinance, which date shall not be subsequent to the effective date of the ordinance.

*§125.6. Optional Additional Contributions to Benefit Accumulation Fund.*

(a) Effective January 1, 2008, a municipality may make deposits in excess of its actuarially required contribution to its account in the benefit accumulation fund. The deposit may be in the form of a lump sum payment or periodic payments. All funds deposited in a municipality's account in the benefit accumulation fund are held in trust by the retirement system and cannot be returned to the municipality.

(b) The retirement system retains the right to not accept a payment if, in the opinion of the director, acceptance of the payment would

result in an unreasonable administrative or investment burden. A decision by the director to not accept a contribution may be appealed to the board of trustees.

(c) A contribution made in accordance with this section is not subject to the maximum contribution rules under §855.407 and §855.501 of the Act.

(d) The retirement system may adopt reasonable policies and procedures to administer this section.

*§125.7. Elected Officials.*

If a participating municipality provides by ordinance that persons who hold and are regularly engaged in the performance of duties of an elective office that normally requires actual performance of services in a participating department of the municipality for not less than 1,000 hours a year are employees required to become members of the retirement system pursuant to §852.107 of the Act, then the system may require the municipality to provide information regarding the municipality's charter, budgets, departmental organization and similar information regarding the department in which the elective officials serve, in addition to providing certification of employee contributions based on compensation in accordance with the Act.

*§125.8. Collection of Contributions.*

(a) The powers and duties of the board pursuant to §855.402 may be exercised or performed by the director or his or her designee.

(b) Certification to the system by a participating municipality of the amount to be deducted from the compensation of each member that it employs ("Member Contributions") and of the names and monthly salaries of each employee of the municipality pursuant to §855.402 of the Act shall be done at least monthly through a system payroll report certified, either in writing or electronically, by the municipality and submitted to the system. Submission of a certified payroll report in accordance with this subsection by a municipality shall satisfy any requirement in the Act for a municipality to certify the Member Contributions or to provide a certified list of the names and monthly and annual salaries for employees to the system before January 31 of each year.

(c) Member Contributions deducted and paid pursuant to §855.402 shall be for members who qualify as employees, as defined in the Act, of the participating municipality.

(d) Payment of Member Contributions pursuant to §855.402 of the Act and municipality contributions pursuant to §855.403 of the Act shall be made by a participating municipality to the system at least monthly by electronic funds transfer unless the municipality provides written notice to the system of the reasons for which electronic funds transfers are impractical for the municipality or more costly to the municipality than otherwise.

*§125.9. Correction of Errors.*

(a) Service Credit and Contribution Errors.

(1) A participating municipality is responsible for the correction of an error arising from an act or omission of the municipality that results in a person contributing more or less than the correct amount to the system or receiving more or less credited service, prior service credit, current service credit, or benefits than the person is rightfully entitled to receive under the system.

(2) If the error involves member contributions, the participating municipality may initiate the correction process in a manner determined by the system.

(A) The municipality will need to provide identifying information for the affected member or members, the time period during which the error occurred, and the amount of the correction to member contributions submitted by the municipality. The member contributions are determined according to the employee deposit rate in effect at the time that the error occurred.

(B) The municipality will also need to submit its municipal contribution based on the sum total of the member contributions made in connection with the correction and the municipal contribution rate in effect at the time that the correction is made by the municipality.

(3) Corrections to service credits or benefits shall be considered as part of, and funded in the same manner as, any other pension liabilities of the participating municipality; however, corrections will not include an adjustment for any missed annual interest credits or an adjustment or recalculation for updated service credits unless otherwise authorized under the Act.

(4) The processing and authorization of all service credit and contribution errors will be administered in accordance with applicable system policies and procedures as adopted and amended from time to time.

(b) For purposes of §802.1024 of the Government Code, if an overpayment is received because a person intentionally or knowingly provided inaccurate information or withheld accurate information from the system, that overpayment shall be deemed to be one that a reasonable person should have known the person is not entitled to receive.

(c) The system may correct other errors caused by an act or an omission by appropriate means to ensure that the system complies with the terms set forth in the Act and maintains its qualified-plan status.

(d) The system may adopt and amend policies and procedures to implement corrections of errors under the Act, Government Code §§802.1024 and 802.1025, and this Chapter of Part 6 of Title 34, Administrative Code. To the extent that the system has existing policies and procedures relating to correction of errors, the adoption of this section of Part 6 of Title 34, Administrative Code, will not invalidate, supplant, replace, or void such policy or procedure and they shall remain in full force and effect until further amended or revised by the system.

*§125.10. Ordinances.*

(a) Except to the extent otherwise provided by the Act, an ordinance adopted by a participating municipality pursuant to the Act takes effect on either (i) the effective date stated in the ordinance, if the system receives the ordinance by the fifteenth day of the month after the effective date; or (ii) the first day of the month after the month in which the system receives the ordinance, if the ordinance does not specify an effective date or is not received by the system by the fifteenth day of the month after the specified effective date. Notwithstanding the foregoing, an ordinance adopted under §853.003 of the Act becomes effective on the actual date of final adoption by the participating municipality.

(b) Pursuant to §§855.102 and 855.201 of the Act, the board authorizes the director of the system to approve those ordinances requiring approval of the board, under §§853.403 and 854.203(g) of the Act. All ordinances approved by the director shall be reported to the board at the next meeting.

(c) For any entity that is not a municipality but (i) that is granted the standing of a municipality pursuant to §852.005 of the Act, or (ii) that the system determines to be a department of a participating municipality for purposes of the Act where such entity has a governing board separate from the governing body of the municipality, the governing board of such entity may by board resolution, or by other appropriate documentation normally taken by the governing board to take action, take any action that is required or authorized by the Act or this Part 6 of Title 34, Administrative Code, to be made by municipal ordinance.

*§125.11. Use of City Portal System.*

Use of the system's electronic city portal system by a municipality shall be subject to system terms and conditions posted on the website for the city portal, which terms and conditions shall include but may not be limited to, provisions regarding: authorization by a municipality for use of the city portal by the municipality representative accessing the portal; limiting access to the portal by the municipality to only authorized employees performing official duties for the municipality; keeping confidential information that is submitted through the portal where the information is made confidential by state or federal law; and, confirming that municipalities and their representatives are not agents of the system and may not speak for the system. The system may enforce the terms and conditions for use of the city portal system by law, by seeking equitable relief such as an injunction, or by denying or revoking access to the city portal system by a municipality.

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 December 14, 2020.

TRD-202005469
Christine M. Sweeney
Chief Legal Officer
Texas Municipal Retirement System
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 225-3710

♦ ♦ ♦

# TITLE 37. PUBLIC SAFETY AND CORRECTIONS

## PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

### CHAPTER 1. ORGANIZATION AND ADMINISTRATION

### SUBCHAPTER F. TESTIMONY

**37 TAC §1.92**

The Texas Department of Public Safety (the department) proposes new §1.92, concerning Reimbursement of Witnesses at Public Safety Commission Hearings. New §1.92 is simultaneously proposed with the repeal of §29.201, concerning Reimbursement of Witnesses at Public Safety Commission Hearings to move this section to a more appropriate chapter and subchapter of the department's rules.

Suzy Whittenton, Assistant Director, Finance, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of this rule will be clearer presentation of the department's rules.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rule is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Louis Beaty, Office of General Counsel, Texas Department of Public Safety, P.O. Box 4087 (MSC 0140), Austin, Texas 78773; by fax to (512) 424-5716. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and §411.007(f).

Texas Government Code, §§411.004(3) and 411.007(f) are affected by this proposal.

*§1.92. Reimbursement of Witnesses at Public Safety Commission Hearings.*

The director is authorized to reimburse witnesses who are requested by the director or the director's designee to attend hearings before the commission relating to the discharge of any officer or employee under Texas Government Code, §411.007. Witnesses may be reimbursed in the amounts provided under Texas Government Code, §2001.103.

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 December 11, 2020.

TRD-202005426

D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 424-5848

♦ ♦ ♦

# CHAPTER 15. DRIVER LICENSE RULES
# SUBCHAPTER B. APPLICATION REQUIREMENTS--ORIGINAL, RENEWAL, DUPLICATE, IDENTIFICATION CERTIFICATES

## 37 TAC §15.29

The Texas Department of Public Safety (the department) proposes new §15.29, concerning Alternative Methods for Driver License Transactions. Driver License System (DLS) upgrades underway include programming to allow learner license holders to submit proof of completion of requirements to obtain a provisional license through Texas.gov. This will also allow these applicants to obtain duplicates and change their address without visiting a driver license office, reducing the number of times teen license holders must return to the driver license office. Other changes clarify language and requirements for alternative transactions that will include renewals for commercial driver license holders conforming to recent Federal Motor Carrier Safety Administration (FMCSA) rule changes. The new rule is necessary to move the issuance related information from repealed §15.59 into Subchapter B and clarify that learner, provisional and commercial driver license holders may perform transactions through alternative methods.

Suzy Whittenton, Assistant Director, Finance, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of this rule will be clearer presentation of issuance and examination related information in Subchapter B and Subchapter C and reduced number of times teen license holders must return to the driver license office.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rule is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Janie Sawatsky, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to *DLDrulecomments@dps.texas.gov.* Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

*§15.29. Alternative Methods for Driver License Transactions.*

(a) Eligible driver license or identification certificate holders may utilize alternative methods to renew or obtain a duplicate of their Texas driver license or identification certificate.

(b) Applicants must apply in the manner provided by the department and pay the applicable fee.

(c) Alternative renewal cannot be used for any two consecutive renewal periods for the purpose of updating the digital images.

(d) Applicants listed in paragraphs (1) - (8) of this subsection, are not eligible to renew or apply for a duplicate driver license or identification certificate by alternative methods:

(1) any holder of an occupational license;

(2) any driver license holder who has an administrative or card status that requires review by the department, including, but not limited to, a medical or physical condition that may affect the driver license holder's ability to safely operate a motor vehicle;

(3) any driver license holder applying for renewal that will be 79 years of age or older on the expiration of their current license;

(4) any driver license or identification certificate holder subject to the registration requirements of Code of Criminal Procedure, Chapter 62, Sex Offender Registration Program;

(5) any driver license or identification certificate holder who is suspended, canceled, revoked, or denied renewal;

(6) any driver license or identification certificate holder who does not have a verified social security number on file with the department;

(7) any driver license or identification certificate holder who does not have a digital image (e.g. photograph or signature) on file with the department; or

(8) any applicant whose lawful presence needs to be verified.

(e) The department may reject an application for an alternative transaction and require the personal appearance of the applicant at a driver license office if it has information concerning the eligibility of the applicant, including, but not limited to, medical and vision 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 December 11, 2020.

TRD-202005428
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 424-5848

♦ ♦ ♦

**37 TAC §15.34**

The Texas Department of Public Safety (the department) proposes amendments to §15.34, concerning Renewal Period Prior to Expiration. Minors who are eligible to apply for a provisional license may do so sixty (60) days prior to their 18th birthday. The current rule limits the applicant to a thirty day window for that transaction. The Driver License System (DLS) is programmed to allow the application sixty (60) days prior to their 18th birthday.

Suzy Whittenton, Assistant Director, Finance, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period this rule is in effect, the public benefit anticipated as a result of this rule will be consistent application of rules and departmental policies regarding provisional driver license renewals.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rule is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Janie Sawatsky, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to DLDrulecomments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

*§15.34. Renewal Period Prior to Expiration.*

(a) Any class of driver license or identification card, except those noted in paragraphs (1) - (3) of this subsection, may be renewed 24 months before the expiration date.

(1) Provisional licenses may be renewed 60 [~~30~~] days before expiration.

(2) Driver licenses or identification cards issued to applicants required to register under Code of Criminal Procedure, Chapter 62, Sex Offender Registration Program, may be renewed 60 days before expiration.

(3) Driver licenses with an expiration date determined by Transportation Code, §521.2711 (person at least 85 years of age) may be renewed 180 days before expiration.

(b) Any applicant for a renewal driver license or identification card must present at least one identity document listed in §15.24 of this title (relating to Identification of Applicants) if the driver license or identification card is not presented.

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 December 11, 2020.

TRD-202005429

D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 424-5848

♦ ♦ ♦

## SUBCHAPTER C. EXAMINATION REQUIREMENTS

### 37 TAC §15.59

The Texas Department of Public Safety (the department) proposes the repeal of §15.59, concerning Alternative Methods for Driver License Transactions. This repeal is necessary to move the issuance related information in current §15.59 to new proposed §15.29 in Subchapter B and incorporate the exam related information from §15.59 into §15.62, concerning Additional Requirements in Subchapter C. These proposed simultaneous changes will replace §15.59.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the repeal as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeal is in effect, the public benefit will be clearer presentation of issuance and examination related information in Subchapter B and Subchapter C.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed repeal is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Janie Sawatsky, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to DLDrulecomments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

*§15.59. Alternative Methods for Driver License Transactions.*

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 December 11, 2020.

TRD-202005441
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 424-5848

♦ ♦ ♦

### 37 TAC §15.62

The Texas Department of Public Safety (the department) proposes amendments to §15.62, concerning Additional Requirements. The Impact Texas Drivers (ITD) program includes components for teens and young adults. The current rule references an adult component that is not being pursued and has been replaced by the teen component of the program. This amendment also adds examination related information from §15.59 that is being repealed.

Suzy Whittenton, Assistant Director, Finance, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period this rule is in effect, the public benefit anticipated as a result of this rule will be better understanding of the Impact Texas Driver (ITD) requirements and better organization of driver license rules.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a

rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rule is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Janie Sawatsky, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to *DLDrulecomments@dps.texas.gov.* Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

*§15.62. Additional Requirements.*

(a) All skills examination applicants must complete the appropriate Impact Texas Drivers (ITD) program and obtain proof of program completion.

(1) Applicants younger than 18 years of age who are required to complete an approved Parent Taught Driver Education or Minor and Adult Driver Education course shall complete the Impact Texas Teen Drivers (ITTD) program after completion of behind the wheel driver education requirements and prior to taking the skills examination.

(2) Applicants ages 18 through 24 years of age who complete an Adult Driver Education course shall complete the Impact Texas Young Drivers (ITYD) program after completion of the course and prior to taking the skills examination.

(3) Applicants ages 25 and older must complete an ITD [~~Impact Texas Adult Drivers (ITAD)~~] program prior to taking the skills examination. These applicants should complete ITYD.

(b) The proof of appropriate ITD program completion must be provided to the testing entity prior to administration of the skills examination and no later than ninety (90) days after program completion.

(c) Applicants conducting original or renewal driver license transactions at a driver license office are required to complete a vision test in addition to any other tests required by the department.

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 December 11, 2020.

TRD-202005430
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 424-5848

♦ ♦ ♦

## CHAPTER 29. PRACTICE AND PROCEDURE

### 37 TAC §§29.1 - 29.3, 29.5, 29.21, 29.24, 29.27, 29.29, 29.30, 29.32, 29.33

The Texas Department of Public Safety (the department) proposes amendments to §§29.1 - 29.3, 29.5, 29.21, 29.24, 29.27, 29.29, 29.30, 29.32, and 29.33, concerning Practice and Procedure. These amendments are necessary to implement Senate Bill 616 enacted by the 86th Legislature, specifically changes regarding procedures for contested cases.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rules are in effect, the public benefit will be clearer and more concise rules concerning contested cases before the department.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program;

will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed repeal is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Louis Beaty, Office of General Counsel, Texas Department of Public Safety, P.O. Box 4087 (MSC 0140), Austin, Texas 78773; by fax to (512) 424-5716. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and §2001.004 which authorizes state agencies to adopt rules of practice concerning contested cases.

Texas Government Code, §§411.004(3) and 2001.004 are affected by this proposal.

*§29.1. Definitions.*

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

(1) APA [~~APT~~] -- [~~refers to~~] The Administrative Procedures Act, Texas Government Code §2001.001, et seq.

(2) Commission -- The Public Safety Commission.

(3) [~~(2)~~] Contested case -- A [~~refers to a~~] contested case as defined by the APA [~~APT~~].

(4) [~~(3)~~] Department -- The [~~refers to the~~] Department of Public Safety.

(5) [~~(4)~~] Director -- The [~~refers to the~~] director of the Department of Public Safety or the designee of the director.

~~[(5) Intervenor -- Refers to any party not otherwise defined.]~~

~~[(6) Judge -- Refers to the administrative law judge or hearing examiner assigned to hear a contested case and prepare a proposal for decision for the director or the director's designee.]~~

~~[(7) Movant -- Refers to the party who files a motion.]~~

~~[(8) Non-movant -- Refers to any party other than the party filing a motion.]~~

(6) [~~(9)~~] Party -- Each [~~Refers to each~~] person or agency named [~~or admitted in a contested case~~].

~~[(10) Petitioner -- Refers to the party classification of the department after it has instituted a contested case.]~~

~~[(11) Respondent -- Refers to a party against whom a contested case has been instituted by the department.]~~

(7) [~~(12)~~] SOAH -- The [~~refers to the~~] State Office of Administrative Hearings.

*§29.2. Scope.*

These rules [~~shall~~] govern the procedure for the institution, conduct and determination of all contested cases [~~arising~~] under the department's jurisdiction. These rules do not apply to [~~with the exception of~~] cases [~~arising~~] under Texas Transportation Code, Chapters 521, 522, 524, and 724, except [~~. These rules, however, do apply to~~] contested cases brought under the Ignition Interlock Program, Texas Transportation Code, §§521.247, 521.2475, and 521.2476. These rules do not apply to internal personnel matters of the department.

*§29.3. Institution of a Contested Case.*

[~~(a)~~] A contested case may [~~shall~~] be instituted by the department after a person requests [~~has requested~~] a hearing or declines [~~declined~~] a penalty.

~~[(b) Upon receipt of a setting for a hearing in a contested case, the department shall serve a notice of hearing upon the respondent.]~~

~~[(c) A notice of hearing shall include the following:]~~

~~[(1) a statement of the nature of the hearing;]~~

~~[(2) a statement of the date, time, and place of the hearing;]~~

~~[(3) a statement of the legal authority and jurisdiction under which a hearing is to be held;]~~

~~[(4) a reference to the particular sections of the statutes and rules involved;]~~

~~[(5) a short, plain statement of the matters asserted, including the recommended penalty or action;]~~

~~[(6) the following language in capital letters in at least 10-point boldface type: "YOUR FAILURE TO APPEAR AT THE HEARING WILL RESULT IN THE ALLEGATIONS AGAINST YOU SET OUT IN THIS NOTICE BEING ADMITTED AS TRUE, AND THE RELIEF SOUGHT IN THIS NOTICE OF HEARING MAY BE GRANTED BY DEFAULT"; and]~~

~~[(7) the language provided under §29.11(e) of this title (relating to Entry of Appearance; Continuance).]~~

~~[(d) After a hearing has been set, any party may move for appropriate relief, including, but not limited to, prehearing conferences, discovery, evidentiary rulings, continuances, and settings.]~~

~~[(e) A notice of hearing shall be served in accordance with the procedure set out in §29.5 (relating to Service of Notice of Hearing for Contested Cases-Motor Carrier) or §29.6 (relating to Service of Notice of Hearing for Contested Cases-Other) of this title. An amended notice of hearing may be served in accordance with §29.9 of this title (relating to Service of Pleadings and Motions).]~~

*§29.5. Service of Notice of Hearing for Contested Cases--Motor Carrier.*

(a) [~~Registered motor carriers:~~] A notice of hearing shall be served on a respondent who is a motor carrier that is registered with the Texas Department of Motor Vehicles [~~Transportation~~] by certified mail, return receipt requested, or by personal delivery at:

(1) the last known address as reflected in the records or investigation of the department, or

(2) an alternative address specified in writing to the department by the respondent or the respondent's authorized representative after receipt of a notice of claim under §4.17 [~~§3.62~~] of this title (relating to Notification and Hearing Processes [~~Regulations Governing Transportation Safety~~]), or

(3) the address registered by the motor carrier with the Texas Department of Motor Vehicles [~~Transportation~~].

(b) [~~Unregistered motor carriers and other persons.~~] A notice of hearing shall be served on a person who is an unregistered motor carrier or other person subject to administrative penalties under Texas

Transportation Code, Chapter 644, by certified mail, return receipt requested, or by personal delivery, and addressed to the last known address of the motor carrier or other person as reflected in the records of investigation of the department.

(c) [~~Commercial driver's license.~~] A notice of hearing shall be served on a person who holds a commercial driver's license and is subject to administrative penalties under Texas Transportation Code, Chapter 644, by serving the notice on the last known address provided to the department or other governmental authority that issued the license by certified mail, return receipt requested, or personal delivery.

*§29.21. Transcripts.*

[~~(a)~~] [ ~~Transcripts.~~] Contested case hearings shall be transcribed or recorded [~~tape-recorded~~]. The cost of any transcription may be assessed against the party requesting it and included in the final decision of the director or the director's designee.

[~~(b) Suggested corrections. Suggested corrections to the transcript of the record may be offered within 10 days after the transcript is filed in the contested case, unless the judge shall permit suggested corrections to be offered thereafter. Suggested corrections shall be served in writing upon each party of record, the official reporter, and the judge. If suggested corrections are not objected to, the judge will direct the corrections to be made and the manner of making them. In case the parties disagree on suggested corrections, they may be heard by the judge, who shall then determine the manner in which the record shall be changed, if at all.~~]

*§29.24. Discovery[~~--General~~].*

[~~(a)~~] The scope of discovery in contested case proceedings under this chapter is governed by the APA, 1 Texas Administrative Code, Part 7, Chapter 155 (relating to Rules of Procedure); this chapter; and the Texas Rules of Civil Procedure, as applicable. [~~APT. Unless otherwise ordered by the Administrative Law Judge, requests for disclosure, requests for admission, written interrogatories, and requests for production that are served:~~]

[~~(1) prior to the time SOAH acquires jurisdiction shall be due 30 days from the date notice is received by respondent, or~~]

[~~(2) at or after the time SOAH acquires jurisdiction shall be due 20 days from the date notice is received by the respondent.~~]

[~~(b) Any time after SOAH acquires jurisdiction, a party may deliver or have delivered to any other party a written request for admissions of facts and genuineness of documents. Requests for admission and responses to Requests for admission shall be filed with SOAH only when they become the subject of discovery disputes, or along with evidentiary exhibits if they will be used as to prove admitted or deemed admitted facts.~~]

[~~(c) Each matter for which an admission is requested shall be deemed admitted unless, within the time provided, the party to whom the request is directed serves upon the party requesting admissions, a sufficient written answer or objection addressed to each matter of which an admission is requested. An evasive or incomplete answer may be treated as a failure to answer.~~]

[~~(d) If a respondent refuses to admit a matter or the authenticity of a document which is later proved, the petitioner may include its costs incurred in making the proof under §29.29 of this title (relating to Proof of Attorney's Fees, Costs, and Expenses of the Department).~~]

*§29.27. Failure To Attend Hearing; Informal Disposition.*

(a) If a respondent fails to appear in person or by authorized representative on the day and time set for hearing in the contested case, the department will ask [~~, regardless of whether an appearance has been entered,~~] the [~~administrative law~~] judge to dismiss the case from the docket and remand it to the department to [~~must enter an order abating the proceedings so that the department may~~] informally dispose of the case by default.

(b) For purposes of this chapter, informal disposition means the removal of the matter as a contested case before SOAH [~~the State Office of Administrative Hearings~~], hearing officer, or other administrative entity with jurisdiction over the case. After the time period to contest the order of dismissal issued by the ALJ expires and the case is remanded to the department, the department will notify the respondent of the dismissal and the effective date of the administrative action. [~~The department will then find the respondent in default, the allegations charged will be deemed admitted, and the department will enter an order enforcing the denial, suspension, revocation, or administrative penalty that was recommended in the case.~~]

[~~(c) After the granting of a motion for abatement, a motion by the respondent to reopen the record may be granted if the respondent establishes that the failure to attend the hearing was neither intentional nor the result of conscious indifference.~~]

[~~(1) A motion to reopen the record must be filed with the judge within five (5) days of the date of the hearing. The judge shall only grant the motion to reopen the record upon a showing of good cause for the respondent's failure to attend the hearing.~~]

[~~(2) A motion to reopen the record is not a motion for rehearing and is not to be considered a motion for rehearing. The filing of a motion to reopen has no effect on either the statutory time periods for the filing of a motion for rehearing or on the time period for ruling on a motion for rehearing.~~]

*§29.29. Proof of Attorney's Fees, Costs, and Expenses of the Department.*

(a) [~~General.~~] If authorized by statute, the department may submit evidence of costs, fees, expenses, and reasonable and necessary attorney's fees incurred by the department. Costs include all expenses incurred by the department in instituting and prosecuting the contested case. Costs specifically include, but are not limited to, investigative costs, witness fees and deposition expenses, travel expenses of witnesses, fees for professional services or expert witnesses, costs of adjudication before SOAH, and any other costs [~~that are~~] necessary for the preparation of the department's case including the cost of any transcriptions, or any other costs specifically provided for by statute.

(b) [~~Submission.~~] The department may submit evidence of costs, fees, expenses, and reasonable and necessary attorney's fees as part of its case-in-chief, by affidavit, or by motion after the issuance of the judge's proposal for decision. Postponement of the introduction of evidence of costs until after the issuance of a proposal for decision shall not constitute a waiver of the department's right to recover any part of its incurred costs.

(c) [~~Collection.~~] Once assessment of costs of the department are [~~have been~~] approved by order of the director, any payments which do not cover the administrative penalty and assessed costs in full shall be applied to payment of the costs until they are paid in full, then to the outstanding balance of the administrative penalty.

*§29.30. Final Decisions and Orders.*

(a) All final decisions and orders shall be in writing and shall be signed by the chair of the Commission [~~director or the director's designee~~].

[~~(b) If the director or the director's designee seeks clarification or additional information relating to the proposal for decision, the director or the director's designee may send written questions, including a request to reopen the hearing if necessary, to the judge with copies to all parties of record.~~]

(b) [(c)] The Commission's [director or the director's designee's] final decision may adopt the judge's findings and conclusions of law [finding], setting out costs, fees, expenses, and reasonable and necessary attorneys' fees incurred by the department in bringing the proceeding.

*§29.32. Certified Record.*

[(a) Upon receiving a copy of a petition filed in district court which seeks judicial review of a final decision in a contested case decided under this title, the department shall prepare a certified copy of the entire record of the proceeding under review, and transmit it to the reviewing court.]

[(b)] Pursuant to the APA, [APT] §2001.177, a party seeking judicial review of the final decision of the Commission [director or the director's designee] in a contested case shall pay all costs of preparing a record of the contested case proceedings.

*§29.33. Conflicts.*

If there is a conflict between the SOAH [SOAH's] rules of procedure and these rules of procedure, these rules shall control. If there is conflict between these rules and the applicable statutes, the statutes shall control.

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 December 11, 2020.

TRD-202005432
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 424-5848

♦ ♦ ♦

## 37 TAC §§29.4, 29.6 - 29.10, 29.12 - 29.19, 29.22, 29.23, 29.25, 29.26, 29.28, 29.34, 29.201

The Texas Department of Public Safety (the department) proposes the repeal of §§29.4, 29.6 - 29.10, 29.12 - 29.19, 29.22, 29.23, 29.25, 29.26, 29.28, 29.34, and 29.201, concerning Practice and Procedure. These repeals are necessary to remove department procedural rules currently addressed by Texas Government Code, Chapter 2001, the Texas Rules of Civil Procedure or the administrative rules of the State Office of Administrative Hearings.

Section 29.201, concerning Reimbursement of Witnesses at Public Safety Commission Hearings is being relocated to Chapter 1 of the department's administrative rules. The repeal of §29.201 is proposed simultaneously with proposed new §1.92, Reimbursement of Witnesses at Public Safety Commission Hearings.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the repeals as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeals are in effect, the public benefit will be clearer and more concise rules concerning contested cases before the department.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does repeal existing regulations. It does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed repeal is in effect, the proposed repeal should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Louis Beaty, Office of General Counsel, Texas Department of Public Safety, P.O. Box 4087 (MSC 0140), Austin, Texas 78773; by fax to (512) 424-5716. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Government Code, §2001.004 which authorizes state agencies to adopt rules of practice concerning contested cases.

Texas Government Code, §§411.004(3) and 2001.004 are affected by this proposal.

*§29.4. Agreements To Be in Writing.*
*§29.6. Service of Notice of Hearing for Contested Cases--Other.*
*§29.7. Notice of Hearing.*
*§29.8. Computation of Time.*
*§29.9. Service of Pleadings and Motions.*
*§29.10. Parties-in-Interest.*
*§29.12. Appearances Personally or by Representative.*
*§29.13. Sufficiency of Pleadings.*
*§29.14. Motions.*
*§29.15. Trial Amendments.*

*§29.16. Incorporation of Department Records by Reference.*
*§29.17. Consolidation and Severance.*
*§29.18. Informal Disposition.*
*§29.19. Motions for Continuance Made During the Course of a Hearing.*
*§29.22. Rules of Evidence.*
*§29.23. Offer of Proof.*
*§29.25. Discovery Motions and Sanctions.*
*§29.26. Subpoena.*
*§29.28. Filing of Exceptions, Briefs and Replies.*
*§29.34. Effective Date.*
*§29.201. Reimbursement of Witnesses at Public Safety Commission Hearings.*

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 December 11, 2020.

TRD-202005433
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 424-5848

♦ ♦ ♦

# CHAPTER 38. FUSION CENTER OPERATIONS
## SUBCHAPTER A. GENERAL PROVISIONS

**37 TAC §§38.1 - 38.3**

The Texas Department of Public Safety (the department) proposes new §§38.1 - 38.3, concerning General Provisions. Section 421.084(a) of the Texas Government Code directs the department to adopt rules to govern the operations of fusion centers in this state, including the establishment of a common concept of operations to provide baseline standards to protect privacy, civil rights, civil liberties and promote consistency and interoperability between the fusion centers in the state. Sections 38.1, 38.2 and 38.3 define terms related to the operation of fusion centers, and provide a common concept for operations for fusion centers, including a required annual capabilities assessment.

Suzy Whittenton, Assistant Director, Finance, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rules are in effect, the public benefit anticipated as a result of these rules will be additional transparency with respect to the baseline standards under which fusion centers operate in this state.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does create new regulations. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rule is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Texas Department of Public Safety, Intelligence and Counter Terrorism Division, Attn: Chief Dale Avant, P.O. Box 4087, MSC-0450, Austin, Texas 78773-0450. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §421.084, which authorizes the department to adopt rules to govern the operations of the fusion centers in this state.

Texas Government Code, §411.004(3) and Texas Government Code, §421.084 are affected by this proposal.

*§38.1. Definitions.*

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

(1) All-crimes approach--An operational approach that incorporates terrorism and other high-risk threats into existing crime-fighting frameworks to ensure that possible precursor crimes are screened and analyzed for linkages to larger-scale terrorist or other crimes.

(2) Baseline fusion center capabilities--The baseline functional capabilities and standards for state and major urban area fusion centers as identified and published by U.S. Department of Justice's Global Justice Information Sharing Initiative found here: https://it.ojp.gov/documents/d/baseline%20capabilities%20for%20state%20and%20major%20urban%20area%20fusion%20centers.pdf.

(3) Department--The Texas Department of Public Safety.

(4) Director--The director of the Texas Department of Public Safety or the designee of the director.

(5) Fusion center--A fusion center as defined in Texas Government Code, §421.001(2-a).

(6) Texas Fusion Center--The fusion center designated by the Office of the Governor as the Category 1 - primary fusion center for the state.

(7) Recognized fusion center--A recognized fusion center as defined in Texas Government Code, §421.001(5) that has been designated by the Office of the Governor as a Category 2 - recognized fusion center in this state in accordance with applicable federal guidelines.

(8) Suspicious activity report--Official documentation of reported or observed activity or behavior that based on fusion center personnel's training and experience is believed to be indicative of intelligence gathering or preoperational planning related to terrorism, criminal, or other illicit intention.

(9) Texas suspicious activity reporting network--The statewide network developed by the department to receive, process, document, analyze, and share suspicious activity reporting for the state in order to create a holistic view of terrorism or crime-related suspicious activity in Texas, in a manner consistent with the findings and recommendations of the Suspicious Activity Report Support and Implementation Project and that complies with the Information Sharing Environment-Suspicious Activity Reporting Functional Standard adopted by the Office of the Director of National Intelligence.

*§38.2. Common Concept of Operations for Fusion Centers.*

(a) A fusion center shall achieve and maintain the baseline fusion center capabilities and follow the baseline standards in this section to protect privacy, civil rights, civil liberties and promote consistency and interoperability between the fusion centers in the state.

(b) A fusion center must have oversight and management by a state or local government criminal justice agency as defined by 28 CFR §20.3(g).

(c) A fusion center shall receive and maintain certification from the United States Department of Homeland Security that the fusion center has privacy, civil rights and civil liberties protections in place that are determined to be at least as comprehensive as the Information Sharing Environment Privacy Guidelines published by the Office of the Director of National Intelligence.

(d) A fusion center shall maintain an all-crimes approach to recognize there is a nexus between certain types of criminal activity. A fusion center shall develop routine threat and risk assessments to assist in prioritizing specific crimes or hazards a region or the state should address and to identify other sources of information that may be useful to examine possible connections with other crimes.

(e) A fusion center shall process, document, analyze and share all vetted suspicious activity reported to or identified by fusion center personnel with the Texas Suspicious Activity Reporting Network. A fusion center must begin the suspicious activity report vetting process within the Texas Suspicious Activity Reporting Network within twenty-four hours of receiving a report or identifying the suspicious activity.

(f) A fusion center shall respond to a request from the Texas Fusion Center for information relevant to a statewide or regional threat assessment.

*§38.3. Annual Capabilities Assessment.*

(a) All recognized fusion centers shall participate in an annual risk and vulnerability assessment process identified by the department to verify the achievement and maintenance of baseline fusion center capabilities, additional recommended fusion center capabilities documented by the U.S. Department of Homeland Security and the capabilities in §38.2 of this title (relating to Common Concept of Operations for Fusion Centers).

(b) The director shall report the findings of the annual fusion center assessments to the Office of the Governor.

(c) The department may audit a recognized fusion center's adherence to the processes identified in the annual baseline capability assessment and the authenticity and accuracy of information reported during the annual baseline capability assessment.

(d) The annual capabilities assessment submitted by a recognized fusion center to the department is collected and reported by the department to the Office of the Governor for the purpose of identifying risk and vulnerability of the state's homeland security and information sharing and analytical network and shall be considered confidential under Texas Government Code, §418.177.

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 December 11, 2020.

TRD-202005436
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 424-5848

♦ ♦ ♦

# TITLE 43. TRANSPORTATION

## PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

### CHAPTER 1. MANAGEMENT

### SUBCHAPTER F. ADVISORY COMMITTEES

**43 TAC §1.85**

The Texas Department of Transportation (department) proposes amendments to §1.85, concerning Department Advisory Committees.

EXPLANATION OF PROPOSED AMENDMENTS

The Texas Transportation Commission (commission) charged the TxDOT Bicycle Advisory Committee (BAC) with reviewing and making recommendations on "...expanding the charge of the committee to address a wider range of related transportation service options, including pedestrian options and personal mobility devices..." through Minute Order 115565 - August 29, 2019.

The BAC discussed both the complementary elements and unique differences between the bicycle, pedestrian, and personal mobility modes including their function, funding, use of infrastructure, and representation. After careful deliberation, the BAC determined that including representatives of and discussion on these additional modes during committee efforts would lead to a better understanding of issues and more balanced, inclusive recommendations for all modes.

The commission is amending §1.85, Department Advisory Committees, to expand the scope of the BAC to include pedestrian

issues and the consideration of personal mobility devices, which are also referred to as micromobility devices, as they relate to bicycle and pedestrian issues. Currently, no TxDOT advisory committee is specifically charged with considering pedestrians or personal mobility devices. Additionally, revisions to the BAC's duties are proposed to provide committee input on the current federal bicycle and pedestrian infrastructure funding program.

Amendments to §1.85(a)(3), Bicycle Advisory Committee, make various changes to the paragraph.

Subparagraph (A), Purpose, is amended to change the committee's name to Bicycle and Pedestrian Advisory Committee, to add pedestrians' issues as part of the committee's purpose, and to change the name of the funding program to reflect the current federal bicycle and pedestrian infrastructure funding source.

Amendments to subparagraph (B), Duties, make various changes to organization and content of the current subparagraph. Clauses (i) and (iii) are interchanged. The content of former clause (iii), which is now clause (i), is amended to include pedestrians' issues. Clause (ii) is amended to reflect the current federal bicycle and pedestrian infrastructure funding program. Clause (iii) is former clause (i) with no change to its substance. Clause (iv) is new and adds the duty to review and consider how personal mobility devices relate to bicycling and pedestrian issues and to other road users.

A new subparagraph (C), Committee membership composition, is added to provide guidelines for the composition of the committee's membership reflecting a diverse mix of bicycle and pedestrian stakeholders, including stakeholders representing the interest of persons with disabilities, and people knowledgeable about personal mobility device issues.

Current subparagraph (C), Manner of reporting, is redesignated as subparagraph (D) and amended to reflect the current federal bicycle and pedestrian infrastructure funding program.

FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined, in accordance with Government Code, §2001.024(a)(4), that as a result of enforcing or administering the rules for each of the first five years in which the proposed rules are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Eric Gleason, has determined that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed rules and therefore, a local employment impact statement is not required under Government Code, §2001.022.

PUBLIC BENEFIT

Eric Gleason has determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in which the proposed rules are in effect, the public benefit anticipated as a result of enforcing or administering the rules will be a better understanding of pedestrian and personal mobility device issues resulting in more balanced, inclusive recommendations for all modes within the BAC's scope.

COSTS ON REGULATED PERSONS

Eric Gleason has also determined, as required by Government Code, §2001.024(a)(5), that for each year of that period there are no anticipated economic costs for persons, including a state agency, special district, or local government, required to comply with the proposed rules and therefore, Government Code, §2001.0045, does not apply to this rulemaking.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities, as defined by Government Code, §2006.001, and therefore, an economic impact statement and regulatory flexibility analysis are not required under Government Code, §2006.002.

GOVERNMENT GROWTH IMPACT STATEMENT

Eric Gleason has considered the requirements of Government Code, §2001.0221 and anticipates that the proposed rules will have no effect on government growth. He expects that during the first five years that the rule would be in effect:

(1) it would not create or eliminate a government program;

(2) its implementation would not require the creation of new employee positions or the elimination of existing employee positions;

(3) its implementation would not require an increase or decrease in future legislative appropriations to the agency;

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

(5) it would not create a new regulation;

(6) it would not expand, limit, or repeal an existing regulation;

(7) it would not increase or decrease the number of individuals subject to its applicability; and

(8) it would not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

Eric Gleason has determined that a written takings impact assessment is not required under Government Code, §2007.043.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §1.85 may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line *"Bicycle Advisory Committee Scope Rule Revisions."* The deadline for receipt of comments is 5:00 p.m. on January 25, 2021. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.117, which provides the commission with the authority to establish advisory committees.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

Transportation Code, §201.117.

*§1.85. Department Advisory Committees.*

(a) Creation.

(1) Project advisory committees.

(A) Purpose. The executive director may authorize a district engineer to create, by written order, an ad hoc project advisory committee composed of the following members as may be deemed appropriate by the district engineer: department staff; affected property owners and business establishments; technical experts; professional consultants representing the department; and representatives of local governmental entities, the general public, chambers of commerce, and the environmental community. A project advisory committee shall serve the purpose of facilitating, evaluating, and achieving support and consensus from the affected community and governmental entities in the initial stages of a transportation project. Advice and recommendations of a committee provide the department with an enhanced understanding of public, business, and private concerns about a project from the development phase through the implementation phase, thus facilitating the department's communications and traffic management objectives, resulting in a greater cooperation between the department and all affected parties during project development and construction.

(B) Duties. A project advisory committee shall:

*(i)* maintain community and local government communication; and

*(ii)* respond in a timely fashion to affected parties' concerns about project development and construction.

(C) Manner of reporting. A project advisory committee shall report its advice and recommendations to the district engineer.

(D) Duration. A project advisory committee may be abolished at any stage of project development, but in no event may a committee continue beyond completion of the project.

(2) Rulemaking advisory committees.

(A) Purpose. The commission, by order, may create ad hoc rulemaking advisory committees pursuant to Government Code, Chapter 2001, §2001.031, for the purpose of receiving advice from experts, interested persons, or the general public with respect to contemplated rulemaking.

(B) Duties. A rulemaking advisory committee shall provide advice and recommendations with respect to a specific contemplated rulemaking.

(C) Manner of reporting. A rulemaking advisory committee shall report its advice and recommendations to the division responsible for the development of the rules.

(D) Duration. A rulemaking committee shall be abolished upon final adoption of rules by the commission.

(3) Bicycle and Pedestrian Advisory Committee.

(A) Purpose. The purpose of the Bicycle and Pedestrian Advisory Committee is to advise the commission on bicycle and pedestrian issues. The committee will also advise the commission on [and] matters related to the Transportation Alternatives [Safe Routes to School] Program. By involving representatives of the public, including bicyclists, pedestrians, and other interested parties, the department helps ensure effective communication with the bicycle and pedestrian communities [community], and that the bicyclist's and pedestrian's perspectives [perspective] will be considered in the development of departmental policies affecting bicycle use and pedestrian activity, including the design, construction, and maintenance of highways. [The committee will also provide recommendations to the department on the Safe Routes to School Program].

(B) Duties. The committee shall:

*(i)* review and make recommendations on items of mutual concern between the department and the bicycling and pedestrian communities; [in accordance with Transportation Code §201.9025, advise and make recommendations to the commission on the development of bicycle tourism trails;]

*(ii)* provide recommendations on the selection criteria for project applications for funding [of projects] under Chapter 11 [25], Subchapter G [H] of this title (relating to Transportation Alternatives Set-Aside [Safe Routes to School] Program); [and]

*(iii)* in accordance with Transportation Code, §201.9025, advise and make recommendations to the commission on the development of bicycle tourism trails; and [review and make recommendations on items of mutual concern between the department and the bicycling community]

*(iv)* review and consider how personal mobility, or micromobility, devices relate to bicycling and pedestrian issues and to other road users .

(C) Committee membership composition. Committee membership will reflect a diverse mix of bicycle and pedestrian stakeholders, including stakeholders representing the interests of persons with disabilities, and people knowledgeable about micromobility issues.

(D) (C) Manner of reporting. The committee shall report its advice and recommendations to the commission, except for matters relating to the Transportation Alternatives [Safe Routes to School] Program. Under the Transportation Alternatives [Safe Routes to School] Program, the committee shall report [reports] its recommendations to the director of the division responsible for administering the program.

(4) Freight Advisory Committee.

(A) Purpose. The purpose of the Freight Advisory Committee is to serve as a forum for discussion regarding transportation decisions affecting freight mobility and promote the sharing of information between the private and public sectors on freight issues. The committee's advice and recommendations will provide the department with a broad perspective regarding freight transportation matters and assist in identifying potential freight transportation facilities that are critical to the state's economic growth and global competitiveness.

(B) Duties. The committee shall:

*(i)* provide advice regarding freight-related priorities, issues, projects and funding needs;

*(ii)* make recommendations regarding the creation of statewide freight transportation policies and performance measures;

*(iii)* make recommendations regarding the development of a comprehensive and multimodal statewide freight transportation plan; and

*(iv)* communicate and coordinate regional priorities with other organizations as requested by the department.

(C) Manner of reporting. The committee shall report its advice and recommendations to the executive director or a department employee designated by the executive director and shall make reports to the commission as requested.

(b) Operating procedures.

(1) Membership. Except as otherwise specified in this section, an advisory committee shall be composed of not more than 24

members to be appointed by the division or official to whom the committee is to report. When applicable to the purpose and duties of the committee, the membership shall provide a balanced representation between:

(A) industries or occupations regulated or directly affected by the department; and

(B) consumers of services provided either by the department or by industries or occupations regulated by the department.

(2) Meetings.

(A) An advisory committee shall meet once a calendar year and at such other times as requested by the division to which it reports.

(B) A majority of the membership of an advisory committee constitutes a quorum. A committee may take formal action only by majority vote of its membership.

(3) Officers. Each committee shall elect a chair and vice-chair by majority vote of the members of the committee.

(c) Reimbursement. The department may, if authorized by law and the executive director, reimburse a member of a committee for reasonable and necessary travel expenses. Current rules and laws governing reimbursement of expenses for state employees shall govern reimbursement of expenses for advisory committee members.

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 December 10, 2020.

TRD-202005408
Becky Blewett
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 463-8630

♦ ♦ ♦

## CHAPTER 9. CONTRACT AND GRANT MANAGEMENT

The Texas Department of Transportation (department) proposes amendments to §9.130, Purpose, and §9.131, Definitions, the repeal of §§9.132 - 9.139, and new §§9.132 - 9.135, all concerning the remedies for failure to comply with applicable federal or state law, conditions, or contractual agreements related to grants.

EXPLANATION OF PROPOSED AMENDMENTS, REPEAL, AND NEW SECTIONS

The department is required by federal and state law to monitor grantee compliance. For example, Title 2, Code of Federal Regulations, Part 200 states that non-federal entities that provide grants to carry out part of a federal program must monitor the activities of the grantee to ensure the grant is used for authorized purposes, in compliance with federal statutes and regulations and the terms and conditions grant. The non-federal entity must also consider taking enforcement action against noncompliant grantees as described in Title 2, Code of Federal Regulations, §200.339, Remedies for noncompliance.

Amendments to §9.130, Purpose, and §9.131, Definitions, replace language regarding grant sanctions with remedies for noncompliance to align with federal regulations and other department rules. Proposed rules repeal current §§9.132 - 9.139 regarding grant sanctions and replace them with new §§9.132 - 9.135 regarding department remedies for grantee noncompliance. The new proposed sections align with updated federal regulations on additional award conditions and remedies that may be imposed for noncompliance with grant requirements. The proposed rules apply to all grants issued by the department and are needed to ensure accountability for the expenditure of public funds.

New §9.132, Additional Award Conditions, outlines additional award conditions the department may impose to ensure compliance with applicable laws and standard grant conditions and requirements. Under §9.132, if the department imposes one or more additional award conditions, the department will provide the grantee notice of the condition, the reason for the additional condition, time allowed for completing the additional condition, if applicable, and the action, if any, the grantee may take to end the application of the additional condition.

New §9.133, Remedies for Noncompliance, lists the remedies for noncompliance the department may impose if the department determines the grantee failed to comply with federal or state law, a grant condition, or the grant agreement. The list of remedies for noncompliance align with the remedies available to the department under federal grant regulations.

New §9.134, Notice of Remedies, states that if the department takes an action under §9.133, the department will notify the grantee in writing of the action being taken, a summary of the facts and circumstances underlying the action being taken, and an explanation of how the action was selected.

New §9.135, Appeal of Decision on Remedies, outlines the process by which a grantee may appeal a determination under §9.133 to the executive director of the department. The executive director may delegate the powers and duties assigned under §9.135. A decision on the appeal is final.

The title of Subchapter H is changed to Remedies for Noncompliance to reflect the content of the subchapter, as changed by this rulemaking.

FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined, in accordance with Government Code, §2001.024(a)(4), that as a result of enforcing or administering the rules for each of the first five years in which the proposed rules are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Kristin Alexander, Compliance Division Director, has determined that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed rules and therefore, a local employment impact statement is not required under Government Code, §2001.022.

PUBLIC BENEFIT

Kristin Alexander, Compliance Division Director, has determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in which the proposed rules are in effect, the public benefit anticipated as a result of enforcing or administering the rules will be improved integrity in

the department's grant management processes and department remedies for grantee's noncompliance with state and federal requirements.

COSTS ON REGULATED PERSONS

Kristin Alexander has also determined, as required by Government Code, §2001.024(a)(5), that for each year of that period there are no anticipated economic costs for persons, including a state agency, special district, or local government, required to comply with the proposed rules and therefore, Government Code, §2001.0045, does not apply to this rulemaking.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities, as defined by Government Code, §2006.001, and therefore, an economic impact statement and regulatory flexibility analysis are not required under Government Code, §2006.002.

GOVERNMENT GROWTH IMPACT STATEMENT

Kristin Alexander has considered the requirements of Government Code, §2001.0221 and anticipates that the proposed rules will have no effect on government growth. She expects that during the first five years that the rule would be in effect:

(1) it would not create or eliminate a government program;

(2) its implementation would not require the creation of new employee positions or the elimination of existing employee positions;

(3) its implementation would not require an increase or decrease in future legislative appropriations to the agency;

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

(5) it would not create a new regulation;

(6) it would not expand, limit, or repeal an existing regulation;

(7) it would increase the number of individuals subject to its applicability as the proposed rules would apply to all grants while the current rules apply to certain grant programs; and

(8) it would not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

Kristin Alexander has determined that a written takings impact assessment is not required under Government Code, §2007.043.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§9.130 and 9.131, the repeal of §§9.132 - 9.139, and new §§9.132 - 9.135 may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "Remedies for noncompliance." The deadline for receipt of comments is 5:00 p.m. on January 25, 2021. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

## SUBCHAPTER H. REMEDIES FOR NONCOMPLIANCE[~~GRANT SANCTIONS~~]

**43 TAC §§9.130 - 9.135**

STATUTORY AUTHORITY

The amendments and new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

*§9.130. Purpose.*

The department is required by law to monitor grantee [~~subgrantee~~] compliance with federal and state laws. The department may impose remedies [~~sanctions~~] on a grantee [~~subgrantee~~] if the department determines that the grantee [~~subgrantee~~] has failed to comply with federal or state law, standard or special grant [~~or subgrant~~] conditions, or contractual agreements on which the grant [~~or subgrant~~] award is predicated. The remedies [~~sanctions~~] provided under this subchapter are in addition to any enforcement provisions of an award document, description of a specific grant [~~or subgrant~~], or rules governing a specific grant program or any other remedy legally available. [~~The proposed sections will only apply to agreements signed or extended on or after the effective date of the rules.~~]

*§9.131. Definitions.*

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

[~~(1) Assistant executive director--The assistant executive director of the Texas Department of Transportation or the assistant executive director's designee not below the level of district engineer, division director, or office director.~~]

(1) [~~(2)~~] Executive director--The executive director of the Texas Department of Transportation.

[~~(3) Sanction--A penalty imposed under this subchapter. The term includes the withholding of funds or disallowance of costs under a grant or subgrant, the suspension or termination of all or part of a subgrant or projects under a subgrant, and being determined temporarily or permanently ineligible for a subgrant award.~~]

(2) Grant [~~(4) Subgrant~~]--An award of funds or property in lieu of funds made by the department to a grantee [~~an eligible subgrantee~~] or by the grantee [~~eligible subgrantee~~] to another individual or entity. The term does not include:

(A) procurement purchases;

(B) technical assistance;

(C) assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, or insurance; [~~or~~]

(D) assistance for which no accounting by the grantee [~~subgrantee~~] is required; or[~~.~~]

(E) payments that are made to a contractor for the purpose of obtaining goods and services and that create a procurement relationship between the department and the contractor.

(3) Grantee[~~(5) Subgrantee~~]--An individual or entity to which a grant [~~subgrant~~] is awarded. The term includes[~~, including~~] an individual or entity that receives an award that is for the purpose of carrying out a part of a federal or state award and that creates a

federal or state assistance relationship between the department and that individual or entity [~~a subgrant from a subgrantee. Subgrantee is synonymous with subrecipient~~].

*§9.132. Additional Award Conditions.*

(a) In addition to the standard conditions for a grant, the department may require one or more additional conditions under this section if the department determines that additional conditions are needed to ensure compliance with applicable laws and standard grant conditions and requirements.

(b) The department may:

(1) provide that grant payments will be made as reimbursements rather than advance payments;

(2) withhold authority for the grantee to proceed to the next phase until the department receives evidence of acceptable performance within a given period of performance;

(3) require additional or more detailed financial or performance reports;

(4) require additional project monitoring;

(5) require the grantee to obtain technical or management assistance;

(6) establish additional prior approvals; or

(7) require the grantee to comply with an improvement action plan that identifies specific strategies and actions to ensure the grantee's compliance with applicable laws and standard grant conditions and requirements.

(c) The department will provide to the grantee a notice of each additional condition required under this section. The notice must:

(1) describe the additional condition;

(2) state the reason for the additional condition;

(3) state the time allowed for completing the additional condition, if applicable;

(4) state the action, if any, that the grantee may take to end the application of the additional condition; and

(5) set out the procedure for the grantee to request reconsideration of the determination under subsection (a) of this section to require the additional condition.

*§9.133. Remedies for Noncompliance.*

(a) If after the award of a grant the department determines that the grantee has failed to comply with federal or state law, a grant condition, or the grant agreement, the department may:

(1) temporarily withhold cash payments pending correction of the deficiency by the grantee;

(2) disallow the cost of the activity or action that is not in compliance and take action for the repayment of those disallowed costs;

(3) require one or more of the additional conditions described in §9.132 of this subchapter (relating to Additional Award Conditions).

(b) If the department determines that the grantee's noncompliance cannot be remedied by actions under subsection (a) of this section, the department may take one or more actions under this subsection. The department may:

(1) wholly or partly suspend or terminate the award;

(2) initiate proceedings under Chapter 10, Subchapter F of this title (relating to Sanctions and Suspension for Ethical Violations by Entities Doing Business with the Department), for the suspension or debarment of the grantee;

(3) withhold other federal awards for the project or program; or

(4) take any other remedy that is legally available to the department.

*§9.134. Notice of Remedies.*

If the department decides to take an action under §9.133of this subchapter (relating to Remedies for Noncompliance), the department will notify the grantee in writing within five working days after the date of the decision. The notice must:

(1) state the action being taken and if applicable, the period for which the action will be taken;

(2) summarize the facts and circumstances underlying the action being taken; and

(3) explain how the action was selected.

*§9.135. Appeal of Decision on Remedies.*

(a) A grantee may appeal a determination under §9.133 of this subchapter (relating to Remedies for Noncompliance), by delivering to the executive director a written notice of appeal and accompanying written documentation supporting the appeal within 10 working days after the date of receipt of the notice under §9.134 of this subchapter (relating to Notice of Remedies).

(b) The executive director will make a decision on the department's determination and may impose a lesser remedy for noncompliance. The executive director will notify the grantee in writing of the executive director's decision on the appeal within 5 working days after the date of that decision.

(c) The executive director may delegate to a department employee who holds a position that is not below the level of division director any power or duty assigned to the executive director by this section.

(d) A decision under subsection (b) of this section is final and not subject to judicial review.

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 December 10, 2020.

TRD-202005409
Becky Blewett
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 463-8630

♦ ♦ ♦

## SUBCHAPTER H. GRANT SANCTIONS

**43 TAC §§9.132 - 9.139**

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commis-

sion) with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

*§9.132. Applicability.*
*§9.133. Procedure for Imposing Sanctions.*
*§9.134. Improvement Action Plan.*
*§9.135. Withholding Funds or Disallowing Costs.*
*§9.136. Suspension or Termination for Cause.*
*§9.137. Determination of Ineligibility.*
*§9.138. Appeal of Sanction.*
*§9.139. Lessening Terms or Removal of Sanction.*

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 December 10, 2020.

TRD-202005410
Becky Blewett
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 24, 2021
For further information, please call: (512) 463-8630

♦ ♦ ♦