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 10. DEPARTMENT OF INFORMATION RESOURCES

CHAPTER 201. GENERAL ADMINISTRATION

1 TAC §201.6

The Texas Department of Information Resources (the Department) proposes amendments to 1 TAC Chapter 201, §201.6, concerning Contract Approval Authority and Responsibilities, to clarify the processes and policies of current practices.

In 1 TAC §201.6, the Department proposes clarifying the definition for significant statewide impact. The definition provides clearer criteria for which types of contract documents the Board will be required to approve and those that can be approved by DIR management without board approval.

The changes to the chapter do not apply to state agencies or institutions of higher education. The assessment of the impact of the adopted changes on institutions of higher education was prepared in consultation with the Information Technology Council for Higher Education (ITCHE) in compliance with §2054.121(c), Texas Government Code.

John Hoffman, Chief Technology Officer, has determined during the first five-year period following the amendment to 1 TAC Chapter 201 there will be no fiscal impact on state agencies, institutions of higher education and local governments.

Mr. Hoffman has further determined for each year of the first five years following the adoption of the amendments to 1 TAC Chapter 201 there are no anticipated additional economic costs to persons or small businesses required to comply with the amended rule. Final adoption of this rule will result in more efficient processes for government agencies to the benefit of the public.

Written comments on the proposed amendments may be submitted to Martin Zelinsky, General Counsel, 300 West 15th Street, Suite 1300, Austin, Texas 78701, or to martin.zelinsky@dir.texas.gov. Comments will be accepted for 30 days after publication in the *Texas Register.*

The amendments are proposed pursuant to §2054.052(a), Texas Government Code, which authorizes the department to adopt rules as necessary to implement its responsibilities under Chapter 2054, Texas Government Code; and 2255.01, Texas Government Code, which authorizes state agencies to develop rules;

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

§201.6. Contract Approval Authority and Responsibilities.

(a) Purpose. The purpose of this rule is to establish the approval authority and responsibilities for executing contracts required by the department.

(b) Applicability. This rule applies to all contracts entered into by the department.

(c) Definitions. As used in this section, the following terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) Board--The governing board of the department.

(2) Contract--A written agreement between the department and a contractor for goods or services. As used in this section, "contract" includes the following: letters of agreement; interagency/interlocal agreements with other government entities; and other documents in which state funds or services allocated to the department are exchanged for the delivery of other goods or services.

(3) Major Outsourced Contract--A contract the department executes with entities other than this state or a political subdivision of this state that:

(A) is authorized under Government Code, Chapter 2054, Subchapter I or Subchapter L, or Chapter 2170; or

(B) exceeds the monetary threshold in subsection (d)(1)(A) of this section, other than those contracts described in subparagraph [~~subsection~~] (A) of this paragraph.

(4) Value--The department adopts by reference the determination of contract value set forth in the State of Texas Contract Management Guide. The determination of contract value shall include, in addition to compensation to a contractor from funds allocated to the department, an amount deposited into the State general revenue fund or other state fund in a revenue sharing contract arrangement with a contractor.

(d) Approval Authority.

(1) Board Approval. The executive director or his/her designee shall present certain contracts to the board for approval. After a contractor is selected, a majority of the board shall provide final approval of the contract with the selected contractor. The board shall consider for final approval:

(A) any contract or amendment with a value expected to exceed $1,000,000;

(B) any major outsourced contract;

(C) any amendment to a major outsourced contract if the amendment has significant statewide impact. Significant statewide impact is defined as affecting critical state contractual objectives, assumptions or constraints, rising to the level of substantive impact fiscally, programmatically or otherwise at a statewide level and not as an isolated incident. Examples of situations with significant statewide

impact include, but are not limited to, contract renewal, contract termination, and vendor changes. Examples of situations that do not rise to the level of significant statewide impact include but are not limited to, revisions to existing services, addition of optional services, contract language clarifications, changes in definitions, service provider locations, key personnel, and addition of new customers;

(D) any other contract deemed appropriate for board approval as determined by the executive director.

(2) Agency Approval.

(A) The board delegates authority to the executive director or his/her designee to approve all contracts not listed in paragraph (1) of this subsection.

(B) The board delegates authority to the executive director to approve a purchase request or contract listed in paragraph (1) of this subsection for an emergency as such is defined in 34 TAC §20.32, or to avoid undue material additional cost to the state. The executive director shall report any purchase requests or contracts executed by the executive director pursuant to the authority in this subsection to the board chair prior to execution of any such purchase requests or contracts subject to this rule.

(e) Authority to Execute Contracts. The board delegates authority to the executive director to execute all contracts for the department. This authority may be delegated by the executive director to the deputy executive director or other designee.

(f) Contract Planning.

(1) The department will present to the Board for approval a contract plan for the next fiscal year that outlines the agency's anticipated contracting actions that exceed $100,000.

(2) As deemed necessary by the executive director or his/her designee, updates to the contract plan will be provided to the board for approval periodically throughout the fiscal year.

(g) Contract Monitoring

(1) Each contract identified as a major outsourced contract under subsection [~~subparagraph~~] (c)(3)(A) above shall be subject to enhanced contract and performance monitoring.

(2) Information about contracts subject to such monitoring shall be regularly presented to the board and the executive director of the department.

(3) The department will immediately notify the board of any serious issue or risk that is identified with a contract subject to such monitoring.

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

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Martin Zelinsky
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CHAPTER 203. MANAGEMENT OF ELECTRONIC TRANSACTIONS AND SIGNED RECORDS

The Texas Department of Information Resources (department) proposes amendments to 1 TAC Chapter 203, §§203.1, 203.23, and 203.43 and proposes the repeal to §203.26 and §203.46, related to the Management of Electronic Transactions and Signed Records to clarify the difference between electronic and digital signatures.

In 1 TAC §203.1, the Department proposes amendment to the definition of digital signature. This amendment clarifies the difference between a digital and electronic signature. The Department has received questions and requests for clarification between the definitions. The new definitions provide the clarity needed for state agencies and institutions of higher education. The Department proposes deletion of the definition of "Signature Dynamics."

In 1 TAC §203.23, the Department proposes amending the language regarding digital and electronic signatures. The Department clarified agencies are not required to use digital signatures.

In 1 TAC §203.26, the Department proposes repeal of the section regarding Signature Dynamics in its entirety.

In 1 TAC §203.43, the Department proposes amending the language regarding digital and electronic signatures. The Department clarified institutions of higher education are not required to use digital signatures. Department proposes adding language ""To the extent of any conflict of rules and procedures adopted under the Texas Education Code Section 51.9336 with that of rules adopted under 1 TAC 203, the former would prevail" in consultation with the Information Technology Council for Higher Education (ITCHE).

In 1 TAC §203.46, the Department proposes repeal of the section regarding Signature Dynamics in its entirety.

The changes to the chapter apply to state agencies and institutions of higher education. The assessment of the impact of the adopted changes on institutions of higher education was prepared in consultation with the Information Technology Council for Higher Education (ITCHE) in compliance with §2054.121(c), Texas Government Code.

John Hoffman, Chief Technology Officer, has determined that during the first five-year period following the amendments to 1 TAC Chapter 203 there will be no fiscal impact on state agencies, institutions of higher education and local governments.

Mr. Hoffman has further determined that for each year of the first five years following the adoption of the amendments to 1 TAC Chapter 203 there are no anticipated additional economic costs to persons or small businesses required to comply with the proposal.

Written comments on the proposal may be submitted to Martin Zelinsky, General Counsel, 300 West 15th Street, Suite 1300, Austin, Texas 78701, or to martin.zelinsky@dir.texas.gov. Comments will be accepted for 30 days after publication in the *Texas Register.*

SUBCHAPTER A. DEFINITIONS

1 TAC §203.1

The amendments are proposed under §2054.052(a), Texas Government Code, which authorizes the department to adopt

rules as necessary to implement its responsibilities under Chapter 2054; §2054.060(a) and (b), Texas Government Code, which reference rules created by the department regarding digital signatures; and §322.017 et. seq., Texas Business and Commerce Code, which allows the department to specify the management of electronic records.

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

§203.1. Applicable Terms and Technologies for Management of Electronic Transactions and Signed Records.

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

(1) Asymmetric cryptosystem--A computer-based system that employs two different but mathematically related keys with the following characteristics:

(A) one key encrypts a given message;

(B) one key decrypts a given message; and

(C) the keys have the property that, knowing one key, it is computationally infeasible to discover the other key.

(2) Certificate--A message which:

(A) identifies the certification authority issuing it;

(B) names or identifies its subscriber;

(C) contains the subscriber's public key;

(D) identifies its operational period;

(E) is digitally signed by the certification authority issuing it; and

(F) conforms to ISO X.509 Version 3 standards.

(3) Certificate Manufacturer--A person that provides operational services for a Certification Authority or PKI Service Provider. The nature and scope of the obligations and functions of a Certificate Manufacturer depend on contractual arrangements between the Certification Authority or other PKI Service Provider and the Certificate Manufacturer.

(4) Certificate Policy--A document prepared by a Policy Authority that describes the parties, scope of business, functional operations, and obligations between and among PKI Service Providers and End Entities who engage in electronic transactions in a Public Key Infrastructure.

(5) Certification Authority--A person who issues a certificate.

(6) Certification practice statement--Documentation of the practices, procedures, and controls employed by a Certification Authority.

(7) Digital signature--An electronic identifier that currently provides higher levels of security and universal acceptance. Digital signatures are based on Public Key Infrastructure (PKI) technology, and guarantee signer identity and intent, data integrity, and the non-repudiation of signed records. The digital signature cannot be copied, tampered with or altered. [~~An electronic identifier intended by the person using it to have the same force and effect as the use of a manual signature, and that complies with the requirements of this chapter.~~]

(8) Digitally signed communication--A message that has been processed by a computer in such a manner that ties the message to the individual that signed the message.

(9) Electronic--Relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(10) Electronic record--A record created, generated, sent, communicated, received, or stored by electronic means.

(11) Electronic signature--An electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. Digital signatures are a subset of electronic signatures.

(12) End Entities--Subscribers or Signers and Relying Parties.

(13) Escrow agent--A person who holds a copy of a private key at the request of the owner of the private key in a trustworthy manner.

(14) Expert--A person with demonstrable skill and knowledge based on training and experience who would qualify as an expert under Rule 702 of the Texas Rules of Evidence.

(15) Handwriting measurements--The metrics of the shapes, speeds and/or other distinguishing features of a signature as the person writes it by hand with a pen or stylus on a flat surface.

(16) Key pair--A private key and its corresponding public key in an asymmetric cryptosystem. The keys have the property that the public key can verify a digital signature that the private key creates.

(17) Local government--A county, municipality, special district, or other political subdivision of this state or another state, or a combination of two or more of those entities, but excluding an agency in the judicial branch of local government.

(18) Message--A digital representation of information.

(19) Person--An individual, state agency, institution of higher education, local government, corporation, partnership, association, organization, or any other legal entity.

(20) PKI--Public Key Infrastructure; A set of policies, processes, server platforms, software and workstations used for the purpose of administering certificates and public-private key pairs, including the ability to issue, maintain, and revoke public key certificates.

(21) PKI Service Provider--A Certification Authority, Certificate Manufacturer, Registrar, or any other person that performs services pertaining to the issuance or verification of certificates.

(22) Policy Authority--A person with final authority and responsibility for specifying a Certificate Policy.

(23) Private key--The secret part of an asymmetric key pair that is used to digitally sign or decrypt data.

(24) Proof of Identification--The document or documents or other evidence presented to a Certification Authority to establish the identity of a subscriber.

(25) Public key--The public part of an asymmetric key pair that is used to verify signatures or encrypt data.

(26) Public Key Cryptography--A type of cryptographic technology that employs an asymmetric cryptosystem.

(27) Record--Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(28) Registrar--A person that gathers evidence necessary to confirm the accuracy of information to be included in a Subscriber's certificate.

(29) Relying Party--A state agency, including an institution of higher education, that has received an electronic message that has been signed with a digital signature and is in a position to rely on the message and signature.

(30) Role-based key--A key pair issued to a person to use when acting in a particular business or organizational capacity.

[~~(31) Signature Dynamics--Measuring the way an individual writes his or her signature by hand on a flat surface and binding the measurements to a message through the use of cryptographic techniques.~~]

(31) [~~(32)~~] Signer--The person who signs a digitally signed communication with the use of an acceptable technology to uniquely link the message with the person sending it.

(32) [~~(33)~~] Subscriber--A person who:

(A) is the subject listed in a certificate;

(B) accepts the certificate; and

(C) holds a private key which corresponds to a public key listed in that certificate.

(33) [~~(34)~~] Technology--The computer hardware and/or software-based method or process used to create digital signatures.

(34) [~~(35)~~] Transaction--An action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs, where one of the persons is a state agency, including an institution of higher education.

(35) [~~(36)~~] Written electronic communication--A message that is sent by one person to another person.

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

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SUBCHAPTER B. STATE AGENCY USE OF ELECTRONIC TRANSACTIONS AND SIGNED RECORDS

1 TAC §203.23

The amendments are proposed under §2054.052(a), Texas Government Code, which authorizes the department to adopt rules as necessary to implement its responsibilities under Chapter 2054; §2054.060(a) and (b), Texas Government Code, which reference rules created by the department regarding digital signatures; and §322.017 et. seq., Texas Business and Commerce Code, which allows the department to specify the management of electronic records.

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

§203.23. Digital Signatures.

(a) This section applies to all written electronic communications which are sent to a state agency over the Internet or other electronic network or by another means that is acceptable to the state agency, for which the identity of the sender or the contents of the message must be authenticated, and for which no prior agreement between the sender and the receiving state agency regarding message authentication existed as of the effective date of this section. This section does not apply to or supersede the use and expansion of existing systems:

(1) for the receipt of electronically filed documents pursuant to the Texas Business and Commerce Code or other applicable statutory law where the purpose of the written electronic communication is to comply with statutory filing requirements and the receiving state agency or local government is not a party to the underlying transaction which is the subject of the communication; or

(2) for the electronic approval of payment vouchers under rules adopted by the comptroller of public accounts pursuant to applicable law.

(b) Prior to accepting an electronic [~~a digital~~] signature, a state agency shall ensure that the level of security used to identify the signer of a message and to transmit the signature is sufficient for the transaction being conducted. A state agency that accepts digital signatures may not effectively discourage the use of electronic [~~digital~~] signatures by imposing unreasonable or burdensome requirements on persons wishing to use electronic [~~digital~~] signatures to authenticate written electronic communications sent to the state agency.

(c) A state agency that accepts electronic [~~digital~~] signatures shall not be required to accept a digital signature that has been created by means of a particular acceptable technology described in §203.24 of this chapter. [~~if the state agency:~~]

[~~(1) determines that the expense that would necessarily be incurred by the state agency in accepting such a digital signature is excessive and unreasonable; and~~]

[~~(2) provides reasonable notice to all interested persons of the fact that such digital signatures will not be accepted and of the basis for the determination that the cost of digital signature acceptance is excessive and unreasonable.~~]

(d) A state agency shall review and consider any applicable guidelines as described in §203.20 of this chapter and recommendations that have been adopted by the department in determining whether and for what purposes the state agency shall accept a digital signature. A copy of such guidelines and recommendations may be obtained directly from the department, or may be obtained electronically via the department's website.

(e) A state agency shall ensure that all written electronic communications received by the state agency and authenticated by means of a digital signature in accordance with this section, as well as any information resources necessary to permit access to the written electronic communications, are retained by the state agency as necessary to comply with applicable law pertaining to audit and records retention requirements.

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

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1 TAC §203.26

The repeal is proposed under §2054.052(a), Texas Government Code, which authorizes the department to adopt rules as necessary to implement its responsibilities under Chapter 2054; §2054.060(a) and (b), Texas Government Code, which reference rules created by the department regarding digital signatures; and §322.017 et. seq., Texas Business and Commerce Code, which allows the department to specify the management of electronic records.

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

§203.26. Signature Dynamics.

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

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SUBCHAPTER C. INSTITUTIONS OF HIGHER EDUCATION USE OF ELECTRONIC TRANSACTIONS AND SIGNED RECORDS

1 TAC §203.43

The amendments are proposed under §2054.052(a), Texas Government Code, which authorizes the department to adopt rules as necessary to implement its responsibilities under Chapter 2054; §2054.060(a) and (b), Texas Government Code, which reference rules created by the department regarding digital signatures; and §322.017 et. seq., Texas Business and Commerce Code, which allows the department to specify the management of electronic records.

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

§203.43. Digital Signatures.

(a) This section applies to all written electronic communications which are sent to an institution of higher education over the Internet or other electronic network or by another means that is acceptable to the institution of higher education, for which the identity of the sender or the contents of the message must be authenticated, and for which no prior agreement between the sender and the receiving institution of higher education regarding message authentication existed as of the effective date of this section. This section does not apply to or supersede the use and expansion of existing systems:

(1) for the receipt of electronically filed documents pursuant to the Texas Business and Commerce Code or other applicable statutory law where the purpose of the written electronic communication is to comply with statutory filing requirements and the receiving institution of higher education is not a party to the underlying transaction which is the subject of the communication; or

(2) for the electronic approval of payment vouchers under rules adopted by the comptroller of public accounts pursuant to applicable law.

(b) Prior to accepting an electronic [~~a digital~~] signature, an institution of higher education shall ensure that the level of security used to identify the signer of a message and to transmit the signature is sufficient for the transaction being conducted. An institution of higher education that accepts electronic [~~digital~~] signatures may not effectively discourage the use of electronic [~~digital~~] signatures by imposing unreasonable or burdensome requirements on persons wishing to use electronic [~~digital~~] signatures to authenticate written electronic communications sent to the institution of higher education.

(c) An institution of higher education that accepts electronic [~~digital~~] signatures shall not be required to accept a digital signature that has been created by means of a particular acceptable technology described in §203.44 of this chapter. [~~if the institution of higher education:~~]

[~~(1) determines that the expense that would necessarily be incurred by the institution of higher education in accepting such a digital signature is excessive and unreasonable; and~~]

[~~(2) provides reasonable notice to all interested persons of the fact that such digital signatures will not be accepted, and of the basis for the determination that the cost of digital signature acceptance is excessive and unreasonable.~~]

(d) An institution of higher education shall review and consider any applicable guidelines as described in §203.40 of this chapter and recommendations that have been adopted by the department in determining whether and for what purposes the institution of higher education shall accept a digital signature. A copy of such guidelines and recommendations may be obtained directly from the department, or may be obtained electronically via the department's website.

(e) An institution of higher education shall ensure that all written electronic communications received by it and authenticated by means of a digital signature in accordance with this section, as well as any information resources necessary to permit access to the written electronic communications, are retained by the institution of higher education as necessary to comply with applicable law pertaining to audit and records retention requirements.

(f) To the extent of any conflict of rules and procedures adopted under the Texas Education Code Section 51.9336 with that of rules adopted under 1 TAC 203, the former will prevail.

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

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1 TAC §203.46

The repeal is proposed under §2054.052(a), Texas Government Code, which authorizes the department to adopt rules as necessary to implement its responsibilities under Chapter 2054; §2054.060(a) and (b), Texas Government Code, which reference rules created by the department regarding digital signatures; and §322.017 et. seq., Texas Business and Commerce Code, which allows the department to specify the management of electronic records.

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

§203.46. Signature Dynamics.

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

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CHAPTER 212. PURCHASES OF COMMODITY ITEMS
SUBCHAPTER B. REQUIRED PURCHASES

1 TAC §212.11

The Texas Department of Information Resources (department) proposes amendment to 1 TAC Chapter 212, §212.11 concerning purchases of commodity items, to modify the thresholds and cap for purchases via DIR's cooperative contracts program.

The proposed amendment applies to state agencies. Neither the current rule nor the proposed amendment apply to institutions of higher education.

The department proposes to revise the current text of Chapter 212, §212.11 to conform the dollar limits for such purchases to the new limits enacted by the 85th Legislature, Regular Session (2017), in Senate Bill 533.

Kelly Parker, Director, Cooperative Contracts, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal impact on state agencies and institutions of higher education to comply with the revisions to the rule. It is anticipated that amended rule will have a positive fiscal impact from increased availability of cooperative contracts for agency procurements, resulting in greater procurement efficiency for state agencies. There is no impact on local government as a result of enforcing or administering the amended rule as proposed as they are not subject to the limits enacted by the Legislature.

Written comments on the proposed amendments may be submitted to David Brown, Assistant General Counsel, 300 West 15th Street, Suite 1300, Austin, Texas 78701, or to david.brown@dir.texas.gov. Comments will be accepted for 30 days after publication in the *Texas Register.*

The amendment is proposed pursuant to §2157.068(f), Texas Government Code, which authorizes the department to adopt rules as necessary to implement its responsibilities under Chapter 2157, Texas Government Code.

§212.11. List of Commodity Items.

The department shall compile and maintain a list of commodity items available for purchase through the department. The department shall make the list available on the department's website.

(1) For a contract with a value of no more than $50,000, the state agency may directly award the contract to a vendor or reseller included in the category to which the contract relates without submission of a price request to other vendors in the same category;

(2) For a contract with a value of more than $50,000 but not more than $1 million [~~$150,000~~], the state agency must submit a request for pricing to at least three vendors or resellers included in the category to which the contract relates or all vendors in the category if the category has fewer than three vendors;

(3) For a contract with a value of more than $1 million [~~$150,000~~] but not more than $5 million [~~$1 million~~], the state agency must submit a request for pricing to at least six vendors or resellers included in the category to which the contract relates or all vendors in the category if the category has fewer than six vendors; and

(4) Prior to issuing a solicitation for a commodity item that is estimated to exceed $5 million, [~~$1 million~~] the state agency may request pricing from six vendors or resellers in the category in order to document qualification for the blanket exemption for purchases over $5 million [~~$1 million~~].

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

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CHAPTER 216. PROJECT MANAGEMENT PRACTICES
SUBCHAPTER B. PROJECT MANAGEMENT PRACTICES FOR STATE AGENCIES

1 TAC §216.11

The Texas Department of Information Resources (the Department) proposes amendments to 1 TAC Chapter 216, §216.11, concerning Requirements, to clarify the processes and policies of current quality assurance team practices. The new rules are necessary as a result of the passage of House Bill 3275 (85R).

In 1 TAC §216.11, the Department proposes adding a subsection (b) requiring the Department to monitor and report on performance indicators for each major information resources project for state agencies to ensure compliance with Texas Government Code §2054.159.

The changes to the chapter only apply to state agencies and not institutions of higher education. The assessment of the impact of the adopted changes on institutions of higher education was

prepared in consultation with the Information Technology Council for Higher Education (ITCHE) in compliance with §2054.121(c), Texas Government Code.

John Hoffman, Chief Technology Officer, has determined during the first five-year period following the amendment to 1 TAC Chapter 201 there will be no fiscal impact on state agencies, institutions of higher education and local governments.

Mr. Hoffman has further determined for each year of the first five years following the adoption of the amendments to 1 TAC Chapter 201 there are no anticipated additional economic costs to persons or small businesses required to comply with the amended rule. Mr. Hoffman has further determined that for the first five years the section is effect, the public benefit anticipated as a result of the amended rule will result in compliance with new statutory requirements.

Written comments on the proposed amendments may be submitted to Martin Zelinsky, General Counsel, 300 West 15th Street, Suite 1300, Austin, Texas 78701, or to martin.zelinsky@dir.texas.gov. Comments will be accepted for 30 days after publication in the *Texas Register.*

The amendments are proposed pursuant to §2054.052(a), Texas Government Code, which authorizes the department to adopt rules as necessary to implement its responsibilities under Chapter 2054, Texas Government Code; and §2255.01, Texas Government Code, which authorizes state agencies to develop rules.

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

§216.11. Requirements.

(a) Each state agency shall manage information resources projects based on project management practices that meet the following criteria:

(1) Include a standardized and repeatable method for delivery of information resources projects that solve business problems;

(2) Include a method for governing application of project management practices;

(3) Be documented and include a single reference source (e.g., handbook, guide, repository);

(4) Include a project classification method developed by DIR the agency, or another source that:

(A) Differentiates and categorizes projects according to level of complexity and risk (e.g., technology, size, budget, time to deliver); and

(B) Defines how to use the project classification method to establish, scale, and execute the appropriate level of processes;

(5) Include a method to periodically review, assess, monitor, measure, and improve the impact of organizational project management practices on the agency's ability to achieve its strategic objectives and deliver business value;

(6) Align with use of the Texas Project Delivery Framework for major information resources projects;

(7) Accommodate use of other practices and methods that align with application of project management practices; and

(8) Be reviewed and updated at least every two years to facilitate continuous process improvement.

(b) For major information resources projects:

(1) The quality assurance team shall monitor and report on performance indicators for each state agency project, including schedule, cost, scope, and quality for the entire project life cycle.

(2) The department shall develop the performance indicators required to monitor under paragraph (1) of this subsection in consideration of applicable information technology industry standards.

(3) Each state agency engaged in a major information resources project will regularly report, according to quality assurance team directed frequency, the performance indicator metrics defined in paragraph (2) of this subsection for each major information resources project.

(4) If a state agency major information resources project is determined not likely to achieve the performance objectives for the project, the quality assurance team shall place the project on a list for more intense monitoring by the quality assurance team.

(5) The quality assurance team shall closely monitor monthly reports for each major information resources project identified under paragraph (3) of this subsection and, based on the performance indicator metrics developed by the department, determine whether to recommend to the department the need to initiate corrective action for the project.

(6) The department shall create and maintain on the department's website a user-friendly data visualization tool that provides an analysis and visual representation of the performance indicators developed under paragraph (2) of this section for each state agency major information resources project.

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

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Martin Zelinksy
General Counsel
Department of Information Resources
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For further information, please call: (512) 936-7577

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 23. TEXAS COMMODITY LAW

The Texas Department of Agriculture (the Department) proposes new Chapter 23, Texas Commodity Law, Subchapter A, General Provisions, Division 1, General Rules, §23.1; Division 2, Certification of Commodity Organizations, §§23.21 - 23.26; Division 3, Budget Approval and Commodity Assessments, §§23.40 - 23.44; Subchapter B, Texas Beef Promotion and Research Council, §§23.100 - 23.107; Subchapter C, Texas Grain Producer Indemnity Board, Division 1, General Provisions, §23.200 and §23.201; Division 2, Elections and Referendum, §23.220 and §23.221; Division 3, Board Members and Meetings, §§23.230 - 23.234; Division 4, Producer Assessments, §§23.240 - 23.248; Division 5, Claims, §§23.260 - 23.266; Division 6, Appeals and Remedies, §23.280 and §23.281. The proposed new Chapter 23 relocates all rules related to

commodity boards, which the Department regulates pursuant to authority granted under Chapter 41 of the Agriculture Code.

At the time of this submission, Title 4, Part 1, Chapter 17, Subchapter A relating to Texas Commodity Referendum Law (Chapter 17), and Title 4, Part 6, Chapter 90, Texas Grain Producer Indemnity Fund Program (Chapter 90), are proposed for repeal and will be published in the September 8, 2017, issue of the *Texas Register.*

Chapter 23, Subchapter A, General Provisions, is proposed without substantive changes to the current form in Chapter 17, Subchapter A, Division 1, relating to General Rules. The new sections are proposed to reorganize existing rules and present them to the public and the regulated industry in a more easily understandable format.

Chapter 23, Subchapter B, relating to the Texas Beef Promotion Research Council (Council), is proposed with changes to §§23.105 - 23.107. The new sections are added and amended from the original form in Chapter 17 to clarify when an assessment is considered timely and prescribe penalties for the late payment of assessments to the Council. The proposed changes have been recommended by the Council. The Council is the organization certified to plan, implement, and operate research, education, promotion, and marketing programs and is authorized to administer the state beef checkoff program, under Chapter 41 of the Agriculture Code. No other substantive changes are proposed to Subchapter B.

Proposed Chapter 23, Subchapter C, Texas Grain Producer Indemnity Board (TGPIB), is made without substantive changes. Subchapter C incorporates Chapter 90, Subchapters A-E, relating to program rules governing membership and meetings of the TGPIB, as well as the operation of the Grain Producer Indemnity Fund, including producer assessments, claims and appeals. Chapter 17, Subchapter A, Division 3 is also incorporated and relates to provisions related to referenda conducted by the Board. The rules have been moved from Chapters 17 and 90 to proposed Subchapter C to present them in one location for the ease of access by the public and industry stakeholders.

Patrick Dudley, Coordinator for Agriculture Commodity Boards and Producer Relations, has determined that for the first five-year period the proposed new sections are in effect, there will be no fiscal impact for state government. There is no fiscal impact for local governments.

Mr. Dudley has also determined that for each year of the first five years the proposed new sections are in effect, there will be minimal impact on the public. The benefit to the public will be ease of locating all rules relating to Texas commodity boards. Only those beef collection points where assessments are collected from beef producers shall be affected by proposed late fees for failure to timely submit assessments monthly. There will be a cost benefit to Texas beef producers as the rules will help to ensure that collection points submit all assessments collected. By collecting assessments in full and in a timely manner, the Council will be able to promote the Texas beef industry by utilizing funds for the purpose of research, education, promotion, and marketing.

Comments on the proposal may be submitted to Patrick Dudley, Coordinator for Agriculture Commodity Boards and Producer Relations, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711, or by email to *Patrick.Dudley@texasagriculture.gov.* Comments must be received no later than 30 days from the date of publication on the proposal in the *Texas Register.*

SUBCHAPTER A. GENERAL PROVISIONS
DIVISION 1. GENERAL RULES

4 TAC §23.1

The proposal is made pursuant to Chapter 41 of the Agriculture Code, which provides the Department with the authority to adopt rules to administer its duties under the Code.

The code affected by the proposal is Chapter 41 of the Texas Agriculture Code.

§23.1. Definitions.

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

(1) Chapter 41--Chapter 41 of the Texas Agriculture Code relating to Commodity Producers Boards certified by the Texas Department of Agriculture.

(2) Board--A commodity producer board certified by the Department and subject to Chapter 41, Texas Agriculture Code and this Chapter.

(3) Commissioner--The Commissioner of the Texas Department of Agriculture or designee.

(4) County agent--An agent of the Texas A&M AgriLife Extension Service.

(5) Department--The Texas Department of Agriculture.

(6) Legislation--Action with respect to Acts, bills, resolutions, or similar items by the Congress, any state legislature, any local council, or similar governing body, or by the public in a constitutional amendment or other similar procedure, including Acts providing appropriations to state or federal entities.

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

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Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
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DIVISION 2. CERTIFICATION OF COMMODITY ORGANIZATIONS

4 TAC §§23.21 - 23.26

The proposal is made pursuant to Chapter 41 of the Agriculture Code, which provides the Department with the authority to adopt rules to administer its duties under the Code.

The code affected by the proposal is Chapter 41 of the Texas Agriculture Code.

§23.21. Hearing Required for Certification.

(a) To be certified as a Board, a nonprofit organization of agriculture producers must petition the Commissioner for certification as

the organization authorized to conduct an assessment referendum and an election of a commodity producers board. A hearing must be held by the Department within 30 days.

(b) Within 21 days of the hearing, the Commissioner may certify the organization by issuing an official certificate, ask for additional information, or deny certification in writing. If certification is denied, the organization must wait 120 days before petitioning the Commissioner again.

(c) Upon certification, a certified organization may conduct a referendum of the producers of an agricultural commodity on the proposition of whether or not the producers shall levy an assessment on themselves to finance programs of research, disease and insect control, predator control, education, and promotion designed to encourage the production, marketing, and use of the commodity. At the same time, the certified organization may conduct an election of members to a commodity producers board for the commodity.

§23.22. Election Plan Required.

(a) Prior to an election or referendum, an election plan must be submitted to the Department for approval. The election plan must include:

(1) the notice to be printed in newspaper and industry publications, as prescribed or approved by the Commissioner;

(2) a list of newspapers and industry publications where notices will be published, giving preference to the areas of the greatest production of the specific commodity;

(3) an election timeline, including publication of newspaper and industry notices, notices to county agents, referendum date and canvassing date;

(4) draft ballot;

(5) draft press release announcing referendum;

(6) draft board member petition; and

(7) information on whether balloting will be conducted by mail or in person.

(b) The Commissioner must be notified of biennial board elections and/or referenda to increase assessments at least 90 days prior to the election date. All election and referendum notices must be made in the same manner described in the initial referendum. In the case of a referendum adding new territory, notices will be handled in the same manner as the original referendum.

§23.23. Notice of Referendum and/or Election.

(a) The certified organization or board, once established, shall give public notice of a referendum and/or board election. Notice shall be published at least once in one or more newspapers published and distributed within the boundaries in which the board operates.

(b) All notices shall be published at least 60 days before the date of the referendum and/or election and, except as provided in subsection (c) of this section, and shall include:

(1) the date, hours, and polling places for voting, if held by physical balloting, or, if held by mail balloting, the manner in which ballots will be distributed and deadline for submission of ballots;

(2) the estimated amount and basis of the assessment proposed to be collected;

(3) whether a producer exemption is to be allowed, or will be collected on a refund-only basis; and

(4) a description of the manner in which the assessment is to be collected and the proceeds administered and used.

(c) The items listed in subsection (b)(2) - (4) of this section are not required to be included in a notice for biennial board elections.

(d) In addition to the publication requirement in this section, at least 60 days prior to the date of the election, the certified organization or board, once established, shall give written notice to each county agent in any county within the boundaries in which the election or referendum shall be held.

§23.24. Geographic Representation of Board Members.

If geographic representation for board members is desired in the original referendum, it must be stated in the original certified petition to the Department and hearing. An existing board may adopt a geographic or district representation plan which must be approved by the Commissioner at the time the election plan is submitted for approval.

§23.25. Conduct of Elections.

(a) In the case of a mail election, no ballots will be valid if postmarked after midnight on the last day of the election. In physical ballot elections, no absentee ballot will be valid if postmarked after midnight three days before the election.

(b) In physical balloting, balloting locations must be open at hours prescribed by the Commissioner and an election official must be present at all times unless otherwise prescribed by the Commissioner. Ballot boxes must be locked and unopened until the canvassing committee supervises such opening.

(c) A ballot must bear a signature and the address of the producer to be valid.

(d) Instructions for election officials and voters will be available in each election from the certified commodity organization and approved by the Commissioner.

(e) Ballots will be counted by a canvassing committee consisting of a county judge (or representative) from the area, a representative of the Texas AgriLife Extension Service, a representative of the certified commodity organization or board, and a representative of the Department.

(f) In all elections, results must be certified and submitted to the Commissioner for verification.

(g) All ballots shall be locked in a container and stored with the county clerk's office in the county designated by the certified organization. If no contests or investigations arise out of the election within 45 days after the day of such election, the clerk shall destroy by shredding or burning and notify the organization and the Commissioner by mail.

(h) Whereas the closed stored container cannot be opened during a 45 day period without a court order, any contest of the election or investigation must be filed in district court in the area of the referendum and election within 30 days after the day ballots are counted.

(i) In any case, if a recount is allowed by the district judge, the judge shall have the power to impound said locked ballot boxes and appoint a new canvassing committee consisting of four new members from the same background of the original canvassing committee and a fifth member being a representative from the Attorney General's Office of the State of Texas.

§23.26. Certification of the Board.

After the Commissioner certifies the elected board, the board shall have all board powers authorized by Chapter 41, relating to Commodity Producers Boards, and described in this Chapter.

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

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Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
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DIVISION 3. BUDGET APPROVAL AND COMMODITY ASSESSMENTS

4 TAC §§23.40 - 23.44

The proposal is made pursuant to Chapter 41 of the Agriculture Code, which provides the Department with the authority to adopt rules to administer its duties under the Code.

The code affected by the proposal is Chapter 41 of the Texas Agriculture Code.

§23.40. Budget Approval Required.

No money can be expended without prior budget approval by the Commissioner.

§23.41. Assessment of Funds.

(a) Assessments will be officially enacted the day the board notified appropriate collection points of the commodity by registered or certified mail of the date the assessment will be collected on all production of that commodity within the assessment area, and remitted as prescribed by the Board.

(b) No assessment money can be expended by the board, other than refund payments, until 60 days after the assessment has been in force.

§23.42. Restrictions on Use of Producer Assessments.

(a) General statement. Except as otherwise provided in this section, funds assessed or collected by a board organized under Chapter 41, may not be expended to directly or indirectly promote or oppose the election of any candidate for public office or to influence legislation.

(b) Actions to influence legislation. Except as otherwise provided in this section, the term "influence legislation" includes, but is not limited to:

(1) any attempt to affect the opinions of the general public or any segment thereof regarding pending or anticipated legislation;

(2) communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of pending or anticipated legislation;

(3) contacting or urging the public or commodity producers covered by a board to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation;

(4) actively advocating the adoption or rejection of legislation by filing formal comments in support of or in opposition to pending or anticipated legislation; or

(5) any communication with members made for the purpose of encouraging members or producers to do any of the actions identified in paragraphs (1) - (4) of this subsection.

(c) Actions not influencing legislation. The term "influence legislation" does not include the following:

(1) the development and recommendation to the legislature of amendments to Chapter 41;

(2) communication to appropriate government officials of information relating to the conduct, implementation, or results of promotion, research, consumer information, or industry information activities under Chapter 41;

(3) any action designed to market a commodity or commodity products directly to a foreign government or political subdivision thereof;

(4) making the results of nonpartisan analysis, study, or research available to the public or producers;

(5) providing technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision thereof, including appearances before any such body, committee or subdivision, in response to a request by such body, committee or subdivision, as the case may be;

(6) appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties or tax-exempt status;

(7) communications between the board and commodity producers represented by the board with respect to legislation or proposed legislation of direct interest to the organization and such producers, other than communications described in subsection (b) of this section;

(8) any communication with a government official or employee, other than a communication with a member or employee of a legislative body where such communication would otherwise constitute the influencing of legislation; and

(9) publication of newsletter articles regarding pending legislative issues of interest to members or producers which contain neutral, factual reports.

(d) Promoting or opposing election of candidates for public office. Activities that constitute promoting or opposing election of candidates for public office include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.

(e) Prohibition against indirect funding of actions to influence legislation or promoting or opposing the election of candidates for public office.

(1) Entities and individuals receiving funding from a board organized under Chapter 41 shall not use any such funds to influence legislation, as defined in this section, or for supporting or opposing election of a candidate for public office.

(2) Producer assessments may not be used to fund research which shall be utilized solely to influence legislation, as that term is defined in this section.

§23.43. Discontinuance of Assessment.

If a referendum is held for the discontinuance of an assessment and the Commissioner verifies the results in favor of discontinuance, then the assessment collection shall become void immediately. All collection points shall be notified by registered or certified mail by the board within 10 days to discontinue collection of the assessment. The board must submit to the Commissioner within 90 days a plan of disbandment. All remaining money after obligations have been paid shall be expended for projects of research, disease and insect control, predator control, education, and promotion, designated to encourage the production marketing and use of the commodity upon which the assessment

was levied. Books will be audited by a state auditor and will be filed with the Commissioner.

§23.44. Penalty and Remedies.

If a person licensed by the Department commits a violation of Chapter 41, in addition to other remedies provided by law, the Department may suspend, revoke, or deny a license. Suspension or revocation of a license shall be conducted in accordance with rules prescribed by the Department and the Administrative Procedure Act, Chapter 2001, Texas Government Code.

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

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SUBCHAPTER B. TEXAS BEEF PROMOTION AND RESEARCH COUNCIL

4 TAC §§23.100 - 23.107

The proposal is made pursuant to Chapter 41 of the Agriculture Code, which provides the Department with the authority to adopt rules to administer its duties under the Code.

The code affected by the proposal is Chapter 41 of the Texas Agriculture Code.

§23.100. Scope and Conflict of Law.

Texas Agriculture Code, Chapter 41, Subchapter H and this subchapter govern the Texas Beef Promotion and Research Council and the Texas Beef Check-off referendum program. To the extent that there is a conflict with other sections of Chapter 23 of this title, this subchapter shall control.

§23.101. Definitions.

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

(1) Cattle--Live domesticated bovine animals regardless of age.

(2) Collection Point--The person or entity prescribed by the Council that is responsible for collecting and remitting an assessment pursuant to Texas Agriculture Code, Chapter 41.

(3) Council--The Beef Promotion and Research Council of Texas, as established under Texas Agriculture Code, Chapter 41, Subchapter H.

(4) Extension--Texas A&M Agrilife Extension Service.

(5) Headquarters--The principal office of the Texas Department of Agriculture located in Austin, Texas.

(6) Physical Balloting--A designated location determined by the Commissioner where an eligible producer may vote in person.

(7) Producer--Any person who owns or acquires ownership of cattle; provided, however, that a person shall not be considered a producer within the meaning of this subchapter if:

(A) the person's only share in the proceeds of a sale of cattle or beef is a sales commission, handling fee, or other service fee; or

(B) the person:

(i) acquired ownership of cattle to facilitate the transfer of ownership of such cattle from the seller to a third party;

(ii) resold such cattle no later than ten days from the date on which the person acquired ownership; and

(iii) certified, as required by procedures prescribed by the Council, that the requirements of this provision have been satisfied.

§23.102. Voter Eligibility.

A cattle producer, as defined in §23.101 of this subchapter (relating to Definitions) who has owned cattle in the last 12 months before the date of the referendum is eligible to vote in a referendum conducted under these rules.

§23.103. Conduct of Referendum.

(a) Upon request of the Council, the Commissioner shall conduct and prescribe the manner to conduct a referendum as authorized under Chapter 41 of the Texas Agriculture Code.

(b) The Commissioner shall propose in a referendum the:

(1) maximum assessment to be paid by cattle producers; and

(2) the manner in which the assessment will be collected.

(c) With the Commissioner's approval, the Council may set the assessment at a level less than the maximum assessment approved by the referendum.

(d) Notice of the referendum shall be published at least once in one or more newspapers published and distributed within the boundaries in which the Council operates. The notice shall be published at least 60 days before the date of the referendum. In addition, at least 60 days before the date of the referendum, the Department will give direct written notice to each county cooperative extension office in the state.

(e) Notice provided in accordance with subsection (d) of this section shall include:

(1) the date of the referendum;

(2) the manner in which the referendum is to be conducted and the assessment collected;

(3) the purpose of the referendum;

(4) if an assessment referendum is being conducted, the maximum assessment to be paid by cattle producers;

(5) if held by physical balloting, the date, hours, and polling places for voting in the referendum and election, and the manner in which ballots will be distributed and deadline for submission of ballots;

(6) whether a producer exemption is to be allowed, or whether the assessment shall be collected on a refund-only basis; and

(7) who to contact for more information.

(f) An eligible producer may vote only once in a referendum and each vote is of equal weight.

(g) A referendum is approved if a simple majority of votes cast are cast in favor of the referendum.

(h) All voter information, including a producer's vote in a referendum conducted under this section, is confidential and not subject to disclosure under Chapter 552, Government Code.

(i) Ballots must bear the signature and the address of the producer to be valid. A producer's signature on the ballot certifies that the voter owned cattle in the last 12 months before the date of the referendum.

(j) Ballots for the referendum will be counted in a manner determined by the Commissioner.

(k) A canvassing committee appointed by the Commissioner shall count the ballots and verify the referendum results to the Commissioner for certification. Referendum results will be certified by the Commissioner.

(l) After the ballots are counted and the results verified by the Commissioner, the ballots shall be locked in a container and stored at the Headquarters for a period of 30 days. The closed stored container containing referendum ballots cannot be opened for the 30-day period without a court order or written request for recount. If no contests or investigations arise out of the referendum within 30 days after certification of such referendum, the Commissioner shall destroy the ballots by shredding.

(m) The Department will be reimbursed by the Council for all costs associated with conducting a referendum under this subchapter.

(n) The referendum will be conducted in person and ballots will be available for eligible producers to vote at all county Extension offices. Eligible producers may vote during normal office hours of the county Extension offices during the voting period.

(1) An eligible producer who is unable to access a county Extension office to vote may request a mail ballot by contacting Headquarters. No eligible producer requesting a mail ballot shall be refused a ballot.

(2) Ballots will be mailed to Headquarters, by the county Extension offices via paid postage and by a deadline to be determined by the Department;

(3) Ballots submitted to the Department by mail shall be maintained at Headquarters.

(o) A watcher may be present at Headquarters for the purpose of observing the processing of election results and until members of the canvassing committee complete their duties. Written notice of intent to be present during processing must be submitted to the Department at least 3 days prior to the count.

(p) Request for Recount. A request for recount submitted under this division must:

(1) be in writing;

(2) state the grounds for the recount;

(3) be submitted to the Commissioner within 10 calendar days of canvass results; and

(4) be signed by the person requesting the recount or, if there is more than one person, any 1 or more of them and state each requesting person's name and residence address. If the request is made on behalf of an organization or association, the person submitting the request must state that they are authorized to request a recount on behalf of the organization or association.

(q) Conduct of Recount. A recount will be conducted by the Department, under the supervision of a representative of the Office of the Secretary of State.

§23.104. Requirements of the Council.

(a) The Council shall have an annual independent audit of the books, records of account and minutes of proceedings maintained by the Council prepared by an independent certified public accountant or firm of independent certified public accountants. The audit shall be filed with the Council, the Commissioner and shall be made available to the public by the Council or the Commissioner. The state auditor or the Department may examine any work papers from the independent audit or may audit the transactions of the Council if the state auditor or the Department's internal auditor determines that an additional audit is necessary.

(b) Not later than the 30th day after the last day of the fiscal year the Council shall submit to the Commissioner a report itemizing all income and expenditures and describing all activities of the Council during the preceding fiscal year. The annual report shall include, at a minimum:

(1) a balance sheet of assets and liabilities;

(2) an itemization of income/expenditures;

(3) a statement of Council activities carried out in the year covered by the report; and

(4) copies of any resolutions adopted by the Council regarding the program.

(c) The Department may allow for late filings of the report required by subsection (b) of this section for good cause.

(d) The Council shall provide fidelity bonds in amounts determined by the Council for employees or agents who handle funds for the Council.

(e) Prior to any expenditure of funds, the Council shall submit its annual budget to the Commissioner for approval. The Department shall act on the Council's budget submission within 45 days of the Department's receipt of the submission.

§23.105. Collection of Assessments.

(a) The assessment shall be collected at collection points determined by the Council. Except as provided by subsection (b) of this section, the collection point shall collect the assessment by deducting the appropriate amount from the purchase price of the cattle or from any funds advanced for that purpose.

(b) If the producer and collecting person are the same legal entity, or if the producer retains ownership after processing, the collecting person shall collect the assessment directly from the producer at the time of processing/sale.

(c) The secretary-treasurer of the Council, by registered or certified mail, shall notify each known collection point of the duty to collect the assessment, the manner in which the assessment is to be collected, and the date on or after which the collection point is to begin collecting the assessment.

(d) The amount of the assessment collected shall be clearly shown on the sales invoice or other document evidencing the transaction. The collecting person shall furnish a copy of the document to the producer.

(e) Unless otherwise provided by the original referendum, no later than the 15th day of each month, the collection point shall remit

the amount collected during the previous month to the secretary-treasurer of the Council, along with a completed form prescribed by the board reflecting such amount.

(f) The timeliness of a payment to the Council shall be based on the applicable postmark date or the date actually received by the Council, whichever is earlier.

§23.106. Refunds.

(a) A producer who has paid an assessment in accordance with §23.105 of this title, relating to Collection of Assessments, may obtain a refund of the amount paid by filing an application for refund with the secretary-treasurer within 60 days after the date of payment. The application must be in writing, on a form prescribed by the Council for that purpose, and accompanied by proof of payment of the assessment.

(b) Providing that the assessment has been remitted to the Council by the collection point, the secretary-treasurer shall pay the refund to the producer before the 11th day of the month following the month in which the application for refund and proof of payment are received.

§23.107. Penalties for Late Payment.

(a) Any unpaid assessments due to the Council pursuant to §23.105 of this title, relating to Collection of Assessments, shall be increased 2.0 percent each month beginning with the day following the date such assessments were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purposes of this section, any assessment that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Council when due shall be considered to have been payable by the date it would have been due if the report had been filed when due.

(b) Violations of this subchapter may be referred to the Department for assessment of administrative penalties, civil or criminal penalties, or the suspension or revocation of a Department issued license in accordance with Chapter 41 of the Agriculture Code.

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

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SUBCHAPTER C. TEXAS GRAIN PRODUCER INDEMNITY BOARD

DIVISION 1. GENERAL PROVISIONS

4 TAC §23.200, §23.201

The proposal is made pursuant to Chapter 41 of the Agriculture Code, which provides the Department with the authority to adopt rules to administer its duties under the Code.

The code affected by the proposal is Chapter 41 of the Texas Agriculture Code.

§23.200. Scope and Applicability.

Chapter 41 of the Texas Agriculture Code, Subchapter I, governs the Texas Grain Producer Indemnity Board. To the extent that there is a conflict with other sections of Chapter 23 of this title, this subchapter shall control.

§23.201. Definitions.

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

(1) Balloting--Procedure in which ballots are available to eligible producers at designated locations and then returned to the Department with the producer's indication of vote and signature indicating voter eligibility as a bona fide producer.

(2) Board--The members of the Texas Grain Producer Indemnity Board as established by Texas Agriculture Code, Chapter 41.

(3) Claimant--A grain producer who satisfies the requirements of Texas Agriculture Code, §41.208 and files an indemnification claim with the Board.

(4) Code--The Texas Agriculture Code.

(5) Customary deductions--Typical monetary deductions made by a grain buyer from the sales price of grain, due to differences in weight, grade, quality, or other factors that influence price, as supported by general industry standards.

(6) Delivery point--The location at which grain is to be delivered under the terms of a contract, or if the grain is not sold pursuant to a contract, the location at which grain is to be transferred from the grain producer to the first grain buyer.

(7) Extension--Texas A&M Agrilife Extension Service.

(8) Final sales price--The price to be paid by the grain buyer at the first point of sale to the grain producer, based on the terms of the contract between the buyer and producer, or if no contract, based on customary market standards for reaching a price.

(9) First point of sale--The initial buyer of grain from a grain producer.

(10) FOB--"Free on board," referring to that designated location, or FOB point, where title to grain passes from the grain producer to the grain buyer.

(11) Fund--The Grain Producer Indemnity Fund. The fund is a trust fund outside the state treasury held and administered by the board. The fund is made up of assessments collected at the first point of grain sale and any interest or income derived from the investment of the fund.

(12) Grain--Means corn, soybeans, wheat, and grain sorghum, and includes that grain which is grown for seed.

(13) Grain buyer--A person who buys cultivated grain or seed from a grain producer, or stores unsold grain or seed for a grain producer. The term includes a purchaser, seed dealer, warehouseman, processor, or a commercial handler.

(14) Grain producer--A person, including the owner of a farm on which grain, or grain seed, is produced, or the owner's tenant or sharecropper, engaged in the business of producing grain or causing grain to be produced for commercial purposes.

(15) Grain sorghum--Any grain harvested from Sorghum bicolor (L.) Moench or any related species of the genus Sorghum of the family Poaceae, including, but not limited to, hybrid sorghum seeds, inbred sorghum line seed, sorghum cultivar seed, and all other sorghum seed that is grown for commercial production.

(16) Headquarters--The principal office of the Texas Department of Agriculture located in Austin, Texas.

(17) Indemnification claim--A claim filed with the Board by a producer under Chapter 41, Subchapter I of the Texas Agriculture Code, seeking payment from the Board because a grain producer has suffered a loss due to a financial failure of a grain buyer.

(18) Judgment--As it pertains to "claim initiation date" and "financial failure" definitions, means a judgment entered by a court in the state of Texas having jurisdiction, with such judgment ordering the buyer to pay the claimant producer for grain that was delivered by the producer but not paid for by the buyer.

(19) Legislation--Any action with respect to Acts, bills, resolutions, or similar items by the Congress, any state legislature, any local council, or similar governing body, or by the public in a constitutional amendment or other similar procedure, including Acts providing appropriations to state or federal entities.

(20) Refund allotment--A payment issued by the Board to all grain producers who submitted an assessment in a given year, upon the Board's determination that the financial condition of the indemnity fund supports such a return of assessment dollars to participating grain producers.

(21) Reinsurance--An insurance product purchased by the Board to reduce the financial risk and capital balance associated with the function of the Board.

(22) Service charge--A charge or fee that a grain producer may pay a grain buyer for activities related to the receipt, processing, holding, and shipment of grain.

(23) Warehouseman--A person who stores grain in a house, building, or other room, and is meant to include "public warehouse operators" and "warehouse operators," as those terms are defined in the Texas Agriculture Code.

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

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DIVISION 2. ELECTIONS AND REFERENDUM

4 TAC §23.220, §23.221

The proposal is made pursuant to Chapter 41 of the Agriculture Code, which provides the Department with the authority to adopt rules to administer its duties under the Code.

The code affected by the proposal is Chapter 41 of the Texas Agriculture Code.

§23.220. Voter Eligibility.

A grain producer, as defined in §23.201 of this subchapter (relating to Definitions), who has sold grain to a grain buyer in the 36 months before the date of the referendum is eligible to vote in a referendum conducted under this subchapter.

§23.221. Conduct of Referendum.

(a) The Commissioner shall conduct a referendum as authorized under Chapter 41 of the Code.

(b) Based upon decisions of the Board, the Commissioner shall propose in a referendum:

(1) The maximum assessment to be paid by grain producers; and

(2) The manner in which the assessment will be collected.

(c) Legal notice must be published 90 days prior to the referendum in one or more statewide or regional newspapers that provide reasonable notice throughout the state. In addition, at least 90 days before the date of the referendum, the Department will give direct written notice of the referendum to each Extension office in the state.

(d) Notices required pursuant to subsection (c) of this section shall include:

(1) the date, hours and polling places for voting in the referendum;

(2) the maximum estimated amount of the assessment proposed to be collected, and the basis of collection;

(3) the manner in which the referendum is to be conducted and the proceeds administered and used; and

(4) who to contact for more information.

(e) An eligible grain producer may vote only once in a referendum and each vote is of equal weight, regardless of the grain producer's volume of production.

(f) A referendum is approved if the Commissioner finds that:

(1) two-thirds or more of those voting in the election voted in favor of the referendum proposition; or

(2) those voting in favor of the proposition produced at least 50 percent of the volume of production of the commodity during the relevant production period.

(g) All voter information, including a producer's vote in a referendum conducted under this section, is confidential and not subject to disclosure under Chapter 552, Texas Government Code.

(h) Ballots must bear the signature and the address of the producer to be valid. A producer's signature on the ballot certifies that the voter sold grain to a grain buyer in the 36 months before the date of the referendum and that the production volume provided on the ballot is accurate.

(i) Ballots for the referendum will be counted in a manner determined by the Commissioner.

(j) A canvassing committee(s) appointed by the Commissioner shall verify the referendum results to the Commissioner for certification.

(k) The Department will be reimbursed by the Board for all costs associated with conducting a referendum under this subchapter.

(l) The referendum will be conducted in-person with ballots submitted by mail to the Department by the grain producer. Ballots will be available to eligible producers at all county Extension offices. Eligible producers may pick up ballots during normal office hours of the county Extension offices during the voting period.

(1) An eligible producer who is unable to access a county Extension office to pick up a ballot may request a mail ballot by contacting Headquarters. No eligible producer requesting a mail ballot who verifies eligibility to vote shall be refused a ballot.

(2) Ballots must be returned to the Department at the address indicated on the ballot, postage prepaid. Ballots not postmarked by midnight on the final day of the voting period will not be counted.

(3) Mail ballots submitted to the Department shall be maintained at Headquarters.

(m) A watcher may be present at Headquarters for the purpose of observing the processing of election results and until members of the canvassing committee complete their duties. Written notice of intent to be present during processing must be submitted to the Department at least three days prior to the count.

(n) After the ballots are counted and the results verified by the Commissioner, the ballots shall be locked in a container and stored at the Headquarters for a period of 30 days. The closed, stored container containing referendum ballots cannot be opened for the 30-day period without a court order or written request for recount. If no contests or investigations arise out of the referendum within 30 days after certification of such referendum, the Commissioner shall destroy the ballots by shredding.

(o) Request for Recount. A request for recount submitted under this subchapter must:

(1) be in writing;

(2) state the grounds for the recount;

(3) be submitted to the Commissioner within 10 calendar days of canvass results; and

(4) be signed by the person requesting the recount or, if there is more than one person, any one or more of them and state each requesting person's name and residence address. If the request is made on behalf of an organization or association, the person submitting the request must state that they are authorized to request a recount on behalf of the organization or association.

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DIVISION 3. BOARD MEMBERS AND MEETINGS

4 TAC §§23.230 - 23.234

The proposal is made pursuant to Chapter 41 of the Agriculture Code, which provides the Department with the authority to adopt rules to administer its duties under the Code.

The code affected by the proposal is Chapter 41 of the Texas Agriculture Code.

§23.230. Meetings.

(a) Location, conduct and time of meetings. The Board shall meet in a location within the state of Texas, with such location of each meeting to be determined by the Chairman of the Board. The Board may also conduct meetings via teleconference or other available electronic means, if the Chairman so designates. The Board shall meet at least quarterly, on specific dates to be determined by the Board. Meetings will be conducted in accordance with Chapter 41 of the Code and the Texas Open Meetings Act.

(b) Notice of meetings. A written notice of the agenda, date, time and place of each business meeting of the Board and/or hearing conducted by the Board, shall be posted on the Secretary of State's Open Meetings website in accordance with the Open Meetings Act. In cases of emergency or urgent public necessity, notice shall be given as authorized by the Open Meetings Act.

(c) Chairman to preside. The Chairman of the Board shall preside over all meetings of the Board and shall perform all duties delegated to him or her under this subchapter. In the chairman's absence, the vice-chairman shall preside over all meetings of the Board, and shall perform all duties of the chairman.

(d) Public comment. As part of its business meetings, the Board shall include a public comment period to allow members of the public to appear and provide comment on matters within the jurisdiction of the Board. The Board, in its sole discretion, may impose a time limit on the public comment period generally or on person(s) addressing the Board. This item will be included in the agenda posted with the Secretary of State's office for the business meeting.

§23.231. Election of Officers.

Annually, the Board shall select a Chairman, Vice-Chairman, Secretary, and Treasurer among the Board members. Each officer shall be selected by a majority of Board members present at the time of the elections. Each person elected to serve as an officer shall serve in that particular office for no more than 2 years consecutively.

§23.232. Management of Budget.

(a) At each quarterly meeting, and annually, the Board shall review all of the Board's financial matters, including, but not limited to: fund income, amounts paid on claims in the preceding applicable period, and administrative costs. Based on this financial information, the Board shall prepare a budget annually.

(b) The annual budget shall set the minimum fund balance necessary to cover all anticipated administrative and operating costs, as well as a reasonable estimate for indemnity claim payments. The Board shall submit the annual budget to the Commissioner for review and approval. Upon the Commissioner's approval, the Board is authorized to make expenditures for activities authorized by Chapter 41, Subchapter I of the Code.

(c) As part of the annual financial review and budget process, the Board shall determine whether funds are available in excess of the minimum fund balance to issue refunds to producers who paid in assessments to the fund.

§23.233. Selection of Board Agents.

The Board shall have the authority to select a third party to carry out the services and administrative duties necessary to operate the indemnity fund and program, and to enter into contracts or other arrangements with such third party to operate the program described in Chapter 41, Subchapter I of the Code.

§23.234. Reporting Requirements.

(a) The Board shall have an annual independent audit of the books, records of account and minutes of proceedings maintained by the Board prepared by an independent certified public accountant or firm of independent certified public accountants. The audit shall be filed with the Board, and the Commissioner, and shall be made available to the public by the Board or the Commissioner. The state auditor or the Department may examine any work papers from the independent audit or may audit the transactions of the Board if the state auditor or the Department's internal auditor determines that an additional audit is necessary.

(b) Not later than the 30th day after the last day of the fiscal year the Board shall submit to the Commissioner a report itemizing all income and expenditures and describing all activities of the Board during the preceding fiscal year. The annual report shall include, at a minimum:

(1) a balance sheet of assets and liabilities;

(2) an itemization of income/expenditures;

(3) a statement of Board activities carried out in the year covered by the report; and

(4) copies of any resolutions adopted by the Board regarding the program.

(c) The Board shall provide fidelity bonds in amounts determined by the Board for employees or agents who handle funds for the Board.

(d) Prior to any expenditure of funds, the Board shall submit its annual budget to the Commissioner for approval. The Department shall act on the Board's budget submission within 45 days of the Department's receipt of the submission.

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DIVISION 4. PRODUCER ASSESSMENTS

4 TAC §§23.240 - 23.248

The proposal is made pursuant to Chapter 41 of the Agriculture Code, which provides the Department with the authority to adopt rules to administer its duties under the Code.

The code affected by the proposal is Chapter 41 of the Texas Agriculture Code.

§23.240. Maximum Assessment Rate.

(a) The maximum assessment rate shall be the rate approved by grain producers as set forth in Subchapter I, Chapter 41 of the Code. The Board may not exceed this rate without obtaining approval of the state's grain producers, with such approval being subject to the requirements of the initial referendum approval set forth in Subchapter I, Chapter 41 of the Code.

(b) The Board will determine the applicable assessment rate to be used by grain buyers each year. The current assessment rate shall at no time exceed the maximum assessment rate approved by the state's grain producers in the initial referendum or in subsequent votes. The maximum assessment rate is 0.2% of the final sales price of the grain. The Board shall provide the current assessment rate on its public website for all grain buyers to be able to access, or through other reasonable means available to the Board.

§23.241. Assessment Calculation.

The amount of the producer assessment, as set by the Board, shall be calculated using the final sales price of the grain, including all premiums and discounts for moisture, quality, variety, or any other characteristic of the grain. The producer assessment shall be calculated before the deduction of Board assessments, storage, drying, cleaning, or any other service charge.

§23.242. Notice to Grain Buyers.

The secretary of the Board shall notify each known grain buyer in the state by certified mail, and shall make reasonable efforts to notify all other grain buyers in the state by registered or certified mail, by electronic transmission of information, by publication in grain industry trade magazines or newsletters, or by publication in newspapers of general circulation, of the duty to collect the assessment. The initial notification shall be sent to the grain buyers within 30 days of the certification of the referendum results. The notice shall describe the manner in which the assessment is to be collected, and shall list the date on or after which the grain buyer is to begin collecting the assessment. Following the initial notification, the secretary of the Board shall submit annual notices to each grain buyer so long as the Board determines an assessment shall be collected.

§23.243. Grain Buyer Collection.

(a) Beginning upon receipt of the notification described in §23.242 of this subchapter (relating to Notice to Grain Buyers) and continuing until such time as the Board gives notice otherwise, each grain buyer within the state, shall collect the assessment at the first point of sale. The grain buyer shall collect the assessment by deducting the applicable percentage from the final sales price of the grain or from any funds advanced for that purpose.

(b) As set forth in this section, a grain buyer may retain a portion of the assessment collected, to cover the grain buyer's administrative costs in collecting the assessment. The allowable administrative cost shall be set by the Board annually. The secretary of the Board will notify the grain buyers in the state of the administrative cost that may be retained. Acceptable methods of notification include U.S. mail, facsimile, electronic mail, or posting to the Board's public website. The buyer shall select its preferred method for receiving notifications, and notify the Board upon remittance of its first quarterly assessment.

(c) The assessment funds submitted by the grain buyer shall be accompanied by a remittance form, prescribed by the Board. The buyer shall clearly indicate on the remittance form the total amount of grain purchased that quarter, the total price paid for grain that quarter, the total assessment collected and remitted to the Board for that quarter, and the dollar amount kept by the grain buyer to cover the grain buyer's administrative costs pursuant to subsection (b) of this section. In the event a buyer does not purchase any grain in any particular quarter, the buyer shall submit a report to the Board in accordance with §23.244 of this subchapter (relating to Remittance of Assessment), and no administrative cost compensation may be claimed or kept by the grain buyer for that quarter.

§23.244. Remittance of Assessment.

(a) No later than the 10th day of each quarter of the calendar year, each grain buyer shall remit to the treasurer of the Board the

producer assessments collected during the previous quarter, along with a remittance form provided by the Board and completed by the grain buyer. In the event a grain buyer does not purchase any grain in a particular quarter and therefore, collects no assessment dollars, the buyer shall submit to the Board a quarterly remittance form indicating no grain transactions occurred during that quarter. Failure to submit such a form could lead the Board to investigate the grain buyer for failure to comply with the assessment.

(b) A grain buyer shall report to the Board any change in the information submitted on the remittance form within 30 days of the quarterly remittance.

(c) Grain buyers in compliance with collecting and remitting the assessment will receive a form of acknowledgement from the Board recognizing the grain buyer's participation in the fund.

§23.245. Grain Producer Reporting.

(a) Annually, each grain producer who has submitted grain assessments to the Board through a grain buyer shall submit a producer information report to the Board on a form prescribed by the Board. The form must include the following:

(1) Name, address, annual assessment amount(s) remitted, and tax identification for each producer; and

(2) The names of all grain buyers that the producer delivered grain to in the preceding year.

(b) Producer information reports shall be submitted to the Board by March 31 each year for all grain sales that occurred and corresponding assessments that were submitted during the Board's prior fiscal year (February 1 to January 31).

(c) Each grain producer shall also submit copies of all invoices, settlement sheets, or other industry accepted documents issued by grain buyers during the preceding year, to verify the amount of assessment collected by each grain buyer for that producer. The producer information report form will be made available to grain buyers for inclusion with producers' settlement sheets or invoices, along with instructions to producers to immediately file the form with the Board, along with proof of assessment payment documents.

(d) The Board will maintain and utilize a permanent database for verifying claims made and administering refunds for the Fund. Failure to submit a producer information report, including supporting documentation may impede a grain producer's ability to successfully file an indemnity claim or receive a future refund.

§23.246. Refunds.

(a) Board determination. Annually, the Board will review its budget for the next year and its current financial status, and based on that review, will determine whether or not to issue refund allotments. If the Board determines that the Board's financial account is not sufficient to pay refund allotments and maintain a minimum fund balance, as defined in §23.232 of this subchapter (relating to Management of Budget), the Board may not issue refund allotments. In the event the Board does not issue refund allotments for more than one crop year in a row, at the time the Board does make the determination to issue a refund allotment, the grain producers who paid in assessments in the period since the last refund allotment will be eligible for the current allotment.

(b) Payment Refunds.

(1) If the Board has determined to issue refund allotments under subsection (a) of this section, each producer who paid in assessments during the period of time covered by the refund allotment designation will be eligible for the refund on a pro rata basis. The Board will notify producers of the pending refund by notifying grain buyers, posting a notice on the fund website, and advertising of the refund allotment via public notice in a manner as determined by the Board.

(2) In a year when the Board has determined to issue refund allotments, the Board will issue refunds beginning April 1. Using the data maintained in the Board's permanent database, the Board will identify the producers that submitted assessments during the period of time covered by the refund allotment. The Board will use the information submitted by grain producers, as described in §23.245 of this subchapter (relating to Grain Producer Reporting) in calculating and issuing refund allotments and sending the allotments to grain producers.

(c) Payment suspension. Following the Board's initial determination to issue refund allotments and subsequent distribution of same, the Board may, at any time, decide to suspend any further refund allotment payments if issuing such payments would cause the Board's deposit account to fall below its minimum fund balance. All refund allotment payments shall remain suspended until such time as the Board determines that its deposit account is sufficient to pay one full year of refund allotments and maintain a minimum fund balance, and refund allotments will continue in accordance with this subsection.

§23.247. Discontinuance of Assessment.

If in such case a referendum is held for discontinuing of assessment and the Commissioner verifies the results in favor of discontinuance, then the assessment collection shall become void immediately. All grain buyers shall be notified by registered or certified mail by the Board within 10 days to discontinue assessment collection. The Board will submit to the Commissioner within 90 days a plan of disbandment. Books will be audited by a state auditor and will be filed with the Commissioner.

§23.248. Restrictions on Use of Producer Assessments.

(a) General statement. Except as otherwise provided in this section, funds assessed or collected by the Board may not be expended to directly or indirectly promote or oppose the election of any candidate for public office or to influence legislation.

(b) Actions to influence legislation. Except as otherwise provided in this section, the term "influence legislation" includes, but is not limited to:

(1) any attempt to affect the opinions of the general public or any segment thereof regarding pending or anticipated legislation;

(2) communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of pending or anticipated legislation;

(3) contacting or urging the public or producers of the commodity covered by the Board to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation;

(4) actively advocating the adoption or rejection of legislation by filing formal comments in support of or in opposition to pending or anticipated legislation; or

(5) any communication with members made for the purpose of encouraging members or producers to do any of the actions identified in paragraphs (1) - (4) of this subsection.

(c) Actions not influencing legislation. The term "influence legislation" does not include the following:

(1) the development and recommendation to the legislature of amendments to Chapter 41 of the Code;

(2) communication to appropriate government officials of information relating to the conduct, implementation, or results of promotion, research, consumer information, or industry information activities under Chapter 41 of the Code;

(3) any action designed to market a commodity or commodity products directly to a foreign government or political subdivision thereof;

(4) making available to the public or producers the results of nonpartisan analysis, study, or research;

(5) providing technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision thereof, including appearances before any such body, committee or subdivision, in response to a request by such body, committee or subdivision, as the case may be;

(6) appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties or tax-exempt status;

(7) communications between the Board and producers of the commodity represented by the Board with respect to legislation or proposed legislation of direct interest to the organization and such producers, other than communications described in subsection (b) of this section;

(8) any communication with a government official or employee, other than a communication with a member or employee of a legislative body where such communication would otherwise constitute the influencing of legislation; and

(9) publication of newsletter articles regarding pending legislative issues of interest to members or producers which contain neutral, factual reports.

(d) Promoting or opposing election of candidates for public office. Activities that constitute promoting or opposing election of candidates for public office include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.

(e) Prohibition against indirect funding of actions to influence legislation or promoting or opposing the election of candidates for public office.

(1) Entities and individuals receiving funding from a Board organized under Chapter 41 of the Code shall not use any such funds to influence legislation or for supporting or opposing election of a candidate for public office.

(2) Producer assessments may not be used to fund research whose results are to be utilized solely to influence legislation, as that term is defined in this section.

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

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DIVISION 5. CLAIMS

4 TAC §§23.260 - 23.266

The proposal is made pursuant to Chapter 41 of the Agriculture Code, which provides the Department with the authority to adopt rules to administer its duties under the Code.

The code affected by the proposal is Chapter 41 of the Texas Agriculture Code.

§23.260. Initiation of Claims.

(a) Eligibility and Filing Date. A grain producer who has satisfied the requirements of §41.208(a) - (b) of the Code, may file an indemnification claim with the Board. A claim must be filed with the Board within 60 days of the claim initiation date. Eligible claims are limited to those claims for losses of grain where the grain was delivered to the grain buyer not more than 1 year before the applicable claim initiation date.

(b) Claim Requirements. In order to be accepted by the Board as a complete claim ready to be reviewed, a producer must submit the following to the Board:

(1) A completed claim form. Claim forms shall be made available on the Board's website and the Board shall also provide a claim forms to any producer who requests it. The claimant must indicate the type of financial failure that has occurred to give rise to the claim. If the financial failure is due to a buyer's bankruptcy filing or other judicial procedure, the claimant must also provide the Board with the case name, number, date of filing the proceeding, and location of filing.

(2) Delivery Documentation. A claimant must provide the Board with all necessary documentation to show that grain was delivered to the buyer and no payment has been issued. This may be in the form of scale tickets, warehouse receipts, or other similar documentation that is generally used and accepted in the grain industry. The documents submitted must provide, at a minimum, the following information: date of delivery, type of grain, amount delivered, person delivering grain, and any quality, or grade, information that the producer may have.

(3) Pricing Documentation. A claimant must supply the Board with copies of any contracts or other documentation that shows the price at which the grain was sold. In the event the submitted documentation indicates pricing based on a figure or system other than market price, all documents must be signed by both the producer and the buyer in order to be considered by the Board.

(4) Court Filings. If the claim is based on a buyer's bankruptcy filing or other judicial procedure, the claimant must also provide the Board with copies of all notices and other court documents that the claimant has received in connection with the judicial proceeding. In addition, the claimant must continue to immediately provide the Board with all subsequent notices and other court documents that the claimant may receive after filing the initial claim with the Board; such documentation must be filed with the Board upon receipt by the claimant.

§23.261. Claim Review and Determination.

Upon receipt of a completed claim, the Board will review all claim materials and will conduct an investigation to determine the validity of the claim. The Board shall make a determination as to whether to approve or deny the claim within a reasonable time frame from receipt of all claim materials. Within 30 days following the Board's final determination, the Board shall issue notification to the claimant of the Board's decision. If the indemnification claim has been approved, the Board shall also remit payment to the claimant at this time, depending on availability of funds.

§23.262. Denial of Claim.

(a) The Board may deny a grain producer's claim in whole, or in part, for those reasons listed in §41.209(f) of the Code, and a denial may also be based on the following factors:

(1) The producer knowingly delivered grain to a grain buyer that has failed to comply with Chapter 41, Subchapter I of the Code.

(2) The producer failed to act in accord with standard industry practices, and as determined by the Board, such failure prevents the producer from qualifying for indemnification under Chapter 41 of the Code.

(3) The producer did not make a reasonably diligent attempt to secure payment from the grain buyer.

(b) Any producer whose claim has been denied by the Board may appeal that decision of the Board, according to the procedures outlined in division 6 of this subchapter (relating to Appeals, Remedies).

§23.263. Award.

(a) For all claims that are approved by the Board, the Board will determine the amount of the indemnification award based on the Board's current operating budget and the number of claims that are filed with the Board based on the event of financial failure. The Board may award the claimant 85% of the value of the grain, less the value of the assessment submitted by the producer for that grain, delivered to the buyer but not paid for.

(b) The value of the grain will be determined by the Board, based on the following.

(1) For all grain that was delivered to the buyer under a grain contract:

(A) for all contracts where the price was specified and the grain has been sold by the buyer but no payment has been issued to the claimant, the value of the grain shall be the contract price of the grain, less customary deductions, as established by the claimant's complete indemnification claim filed with the Board;

(B) for fixed basis contracts where the underlying futures price has not been fixed the value of the grain shall be that price on the date of the close of the futures contract denoted in the contract on the claim initiation date plus or minus the cash basis as set out in the contract, less customary deductions, as established by the claimant's complete indemnification claim filed with the Board;

(C) for futures only contracts that have been priced in the futures market but have not had the cash basis fixed, the value of the grain shall be the fixed futures price, plus or minus the cash basis at the delivery point on the claim initiation date, less customary deductions, as established by the claimant's complete indemnification claim filed with the Board;

(D) for all other types of contracts (e.g., cash basis, futures closing price, local cash price, or other pricing mechanism), the value of the grain will be established by the Board, FOB the delivery point on the claim initiation date, unless a specific date is provided in the contract.

(2) For all grain that was delivered to the buyer without a contract, and the grain has not been sold by the buyer, the value of the grain shall be the value of the grain FOB the delivery point as of the claim initiation date. The Board will establish the value, considering the following factors.

(A) All futures prices will be the futures price as of the close of business on the claim initiation date, with prices for each commodity based on the following respective exchanges, and the final price determined by taking into consideration and including all local basis adjustments applicable to each commodity:

(i) corn--Chicago Board of Trade;

(ii) wheat--Kansas City Board of Trade;

(iii) sorghum--Chicago Board of Trade, Corn Board;

(iv) soybeans--Chicago Board of Trade.

(B) For grain that is not priced, the value of the grain shall be the local producer's cash price net of all discounts, as determined by the Board, as of the claim initiation date. The amount of the producer cash price, as set by the Board, shall be calculated using the gross sales price of the grain, net of all premiums and discounts for moisture, quality, variety, or any other characteristic of the grain.

(C) Recognizing that some locations may not have sufficient volume or liquidity to determine a local cash price or basis adjustment, the Board will use its best efforts to determine a fair price for the delivery point based on available information.

§23.264. Subrogation.

(a) Grain Buyer. In accordance with §41.210 of the Code, in the event the Board approves and pays an indemnification claim, the Board is subrogated to all rights of the grain producer against the grain buyer whose financial failure gave rise to the grain producer's indemnification claim.

(b) Other organizations. In the event the Board approves and pays an indemnification claim under §41.210, the Board is subrogated to all rights of the grain producer against any other entity authorized to submit a payment to the producer for the grain buyer's financial failure causing the producer's loss, and giving rise to the indemnification claim.

(c) Limitation of Board. In any reimbursement event, the Board's subrogation rights are limited to the amount the Board paid to the grain producer in an indemnification claim award, due to the financial failure that gave rise to the grain producer's claim.

(d) Reinsurance. The Board shall have the authority to investigate the availability and, if available at a reasonable price as determined by the Board, purchase reinsurance contracts or policies to mitigate the risk that, despite the authorization for the Board to be reimbursed and subrogated, the Board will suffer severe financial losses in the event of multiple financial failure events in any given year.

(e) Funds. Any reimbursement and subrogation funds that may be recovered under §41.210 and this subchapter shall be deposited in the Board's depository bank.

§23.265. Borrowing Funds.

The Board may borrow money as needed to implement and operate the fund.

(1) The Board must receive approval of the Commissioner prior to entering into a formal commitment with the lender(s).

(2) A majority of the Board must approve the borrowing of funds.

(3) The chairman of the Board shall be the signatory for all loan documentation with the treasurer being secondary signatory, if required by lender(s).

§23.266. Use of Reinsurance.

(a) The Board may purchase re-insurance policies to mitigate the Board's financial risks. The Board will be the owner of the policies on behalf of the fund.

(b) On an annual basis, the Board will select a reinsurance provider from whom to obtain coverage. At the reinsurance provider's request, the Board will provide notice to grain buyers that the reinsurance provider has requested information from each grain buyer, including, but not limited to, certain items of financial information and performance measures. All responsive information shall be submitted directly to the reinsurance provider; the Board will not handle or maintain the information in any manner whatsoever. Submitting the requested information to the reinsurance provider shall be voluntary.

(c) In the event of a grain buyer financial failure in which the reinsurance company indemnifies the Board for a portion of the ensuing financial losses, the Board subrogates its rights as outlined in §23.264 of this subchapter (relating to Subrogation) to the insurance company. The reinsurance company's subrogation rights are limited to the amount paid by the reinsurance company to the Board in response to the grain buyer financial failure.

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 August 31, 2017.

TRD-201703455
Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: October 15, 2017
For further information, please call: (512) 463-4075

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DIVISION 6. APPEALS AND REMEDIES

4 TAC §23.280, §23.281

The proposal is made pursuant to Chapter 41 of the Agriculture Code, which provides the Department with the authority to adopt rules to administer its duties under the Code.

The code affected by the proposal is Chapter 41 of the Texas Agriculture Code.

§23.280. Administrative Review.

(a) Filing of request.

(1) Any person who believes they have been aggrieved in connection with a determination made by the Board under division 5 of this subchapter (relating to Claims) may file a request for administrative review by the Department.

(2) A request must be in writing and received by the Department within 90 days after the action of which the person is complaining occurred. Formal requests must comply with the following requirements, and shall be resolved in accordance with the procedure set forth below. Copies of the request and any supporting documentation must be mailed or delivered by the requesting party to the Department and the Board.

(b) Contents of request. A request filed under this section must be sworn and contain:

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

(2) a specific description of each act alleged to have violated the statutory or regulatory provision(s) identified in paragraph (1) of this subsection, including an identification of the issue or issues to be resolved;

(3) a precise statement of the relevant facts;

(4) argument and authorities in support of the allegations made;

(5) any supporting documentation available; and

(6) a statement that a copy of the request has been mailed or delivered to the Board.

(c) Informal Review.

(1) Once a request is received by the Department, it shall be forwarded to the Department's Office of General Counsel for review.

(2) The General Counsel, or his or her designee, shall have the authority, prior to appeal to the Commissioner, to settle and resolve the complaint that is the subject of the request, and may solicit additional information regarding the matters alleged in the request for review from the requester, the Board or any other relevant party. Copies of any additional information received shall be provided to both the requester and the Board.

(3) If the issues raised in the request are not resolved by mutual agreement, the General Counsel will issue a written determination on the request for review as follows.

(A) If the General Counsel determines that no violation of rules or statutes has occurred, he or she shall so inform the requesting party and the Board by letter, setting forth the reasons for the determination.

(B) If the General Counsel determines that a violation of the rules or statutes has occurred, he or she shall so inform the requesting party and the Board by letter, setting forth the reasons for the determination and the appropriate remedial action.

(4) If the General Counsel's determination is not appealed, that determination shall serve as the final agency determination on the complaint.

(d) Appeal to Commissioner.

(1) The General Counsel's determination on a complaint may be appealed to the Commissioner by the requester, or his or her designee, or the Board. An appeal of the General Counsel's determination must be in writing and must be received by the Department no later than 15 days after the date of the General Counsel's determination. The appeal shall include specific reasons why the requester or the Board disagrees with the General Counsel's determination. Copies of the appeal must be mailed or delivered by the party appealing to the other party.

(2) The Commissioner, shall review the request, any supporting documentation, the General Counsel's determination, and the appeal and issue a determination on the request. The appeal shall be limited to review of the General Counsel's determination and documentation presented by parties in support of their positions.

(3) The Commissioner's determination of the appeal shall be the final administrative action of the agency and is subject to judicial review under Chapter 2001, Government Code.

(e) Appropriate remedial actions. If the Department, or the Commissioner on appeal, determines that the Board acted in a manner that warrants action by the Department, the Department may prescribe corrective action to be carried out by the Board. The Department is not authorized to award monetary damages to a person filing a request under this section.

§23.281. Penalties and Remedies.

If any grain buyer violates Chapter 41, Subchapter I of the Code by failing to promptly remit assessments, the Commissioner is authorized to suspend, revoke, or deny a Department issued license that the grain buyer may hold, and in any case in which he determines, after opportunity for a hearing, that there has been violation of or failure to comply with the Code.

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

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Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 24. SUBSTANTIVE RULES APPLICABLE TO WATER AND SEWER SERVICE PROVIDERS

SUBCHAPTER B. RATES, RATE-MAKING, AND RATES/TARIFF CHANGES

16 TAC §24.21

The Public Utility Commission of Texas (commission) proposes amendments to 16 Texas Administrative Code §24.21 (TAC) for a revision of the minor tariff change portion of the rule to correct an example in the pass-through provision formula and to clarify what constitutes an acceptable amount of line-loss in the pass-through portion of the rule, as well as to implement House Bill 1083 (HB 1083) which amended Texas Water Code §13.182 and §13.189 (TWC) to allow a utility to establish reduced water utility rates funded by donations for elderly customers.

Specifically, this project proposes an amendment to the current pass-through provision in 16 TAC §24.21(b)(2)(D) to correct an error in a formula and to clarify that unless good cause is shown, line loss used in the formula shall be limited to the lesser of actual line loss experiences, or 15%.

Additionally, HB 1083 allows retail water utility companies to offer a reduced water rate for a minimal life-line level of retail water service to elderly customers ages 65 or older to ensure those customers receive that level of service at a more affordable rate of retail water service. In addition, HB 1083 allows a retail water utility to create a separate fund for receiving donations to help recover the costs of providing reduced rates to the elderly. HB 1083 specifies that a retail water utility may not recover those costs through charges to its other customer classes. HB 1083 added new TWC §13.189(c) to clarify that a reduced rate authorized under new TWC §13.182(b-1) does not give an unreasonable preference or advantage to any corporation or person; subject a corporation or person to an unreasonable prejudice or disadvantage; or constitute an unreasonable difference as to rates of service between customer classes. The proposed rule implements all of these provisions of HB 1083.

Finally, non-substantive changes were made to renumber the rules based on these edits. Project Number 47303 is assigned to this proceeding.

Debi Loockerman, Financial Manager, of the commission's Water Utility Regulation Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the section.

Debi Loockerman has determined that, for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be implementation of HB 1083 and clarification of the pass-through rule. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section because the legislation allows for reduced water rates for the elderly, but does not require the reduced rates. Therefore, no regulatory flexibility analysis is required. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Debi Loockerman has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on October 13, 2017. The request for a public hearing must be received by October 10, 2017.

Comments on the proposed amendment may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, by October 13, 2017. Sixteen copies of comments to the proposed amendment are required to be filed pursuant to 16 TAC §22.71(c). Comments should be organized in a manner consistent with the organization of the proposed rules. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed amendment. The commission will consider the costs and benefits in deciding whether to amend the identified section. All comments should refer to Project Number 47303.

The amendments are proposed under TWC §13.041(b), which provides the commission with the authority to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Reference to Statutes: TWC §13.041(b).

§24.21. Form and Filing of Tariffs.

(a) (No change.)

(b) Requirements as to size, form, identification, minor changes, and filing of tariffs.

(1) (No change.)

(2) Minor tariff changes. Except for an affected county or a utility under the original rate jurisdiction of a municipality, a utility's approved tariff may not be changed or amended without commis-

sion approval. Minor tariff changes shall not be allowed for any fees charged by affiliates. The addition of a new extension policy to a tariff or modification of an existing extension policy is not a minor tariff change. An affected county may change rates for retail water or sewer service without commission approval, but shall file a copy of the revised tariff with the commission within 30 days after the effective date of the rate change.

(A) The commission, or regulatory authority, as appropriate, may approve the following minor changes to utility tariffs [~~under the original rate jurisdiction of the commission~~]:

(i) - (ix) (No change.)

(B) The commission, or other regulatory authority, as appropriate, may approve a minor tariff change for a utility to establish reduced rates for a minimal level of retail water service to be provided solely to a class of elderly customers 65 years of age or older to ensure that those customers receive that level of retail water service at more affordable rates. The regulatory authority shall allow a retail water utility to establish a fund to receive donations to recover the costs of providing the reduced rates. A retail water utility may not recover those costs through charges to its other customer classes.

(i) To request a rate as defined in this subparagraph, the utility must file a proposed plan for review by the commission. The plan shall include:

(I) A proposed plan for collection of donations to establish a fund to recover the costs of providing the reduced rates.

(II) The National Association of Regulatory Utility Commissioners (NARUC) account or subaccount name and number in which the donations will be accounted for.

(III) An effective date of the clause and a sample annual accounting for donations received and calculation of all lost revenues and the journal entries that transfer the funds from the account in this subparagraph of this clause to the utility's revenue account. The annual accounting should be available to audit by the commission upon request.

(IV) An example bill with the contribution line item, if requesting contributions from customers.

(V) A provision limiting the elderly person applying for the plan to a total annual income (for all household members) of $100,000 or less and eligible for at least one of the following programs:

(-a-) Medicaid Program;

(-b-) Supplemental Nutrition Assistance Program (SNAP);

(-c-) Children's Health Insurance Program (CHIP);

(-d-) Telephone Lifeline Program;

(-e-) Travis County Compressive Energy Assistance Program (CEAP);

(-f-) Medical Access Program (MAP);

(-g-) Supplemental Security Income (SSI); or

(-h-) Veterans Affairs Supportive Housing (VASH).

(ii) For the purpose of clause (i) of this subparagraph, the costs of providing the reduced rates shall only include the lost revenues due to the difference in the utility's tariffed retail water rates and the reduced rates established by this subparagraph.

(iii) The minimal level of retail water service requested by the utility shall be no more than 3,000 gallons per month per connection. Additional gallons used shall be billed at the utility's tariffed rates.

(iv) For purposes of the provision in this subparagraph, a reduced rate authorized under this section does not:

(I) Make or grant an unreasonable preference or advantage to any corporation or person;

(II) Subject a corporation or person to an unreasonable prejudice or disadvantage; or

(III) Constitute an unreasonable difference as to retail water rates between classes of service.

(C) [~~(B)~~] If a utility has provided proper notice as required in subparagraph (F) [~~(E)~~] of this paragraph, the commission may approve a pass-through provision as a minor tariff change, even if the utility has never had an approved pass-through provision in its tariff. A pass-through provision may not be approved for a charge already included in the utility's cost of service used to calculate the rates approved by the commission in the utility's most recently approved rate change under TWC §13.187 or TWC §13.1871. A pass-through provision may only include passing through of the actual costs charged to the utility. Only the commission staff or the utility may request a hearing on a proposed pass-through provision or a proposed revision or change to a pass-through provision. A pass-through provision may be approved in the following situation(s):

(i) A utility that purchases water or sewage treatment and whose rates are under the original jurisdiction of the commission may include a provision in its tariff to pass through to its customers changes in such costs. The provision must specify how it is calculated.

(ii) A utility may pass through a temporary water rate provision implemented in response to mandatory reductions in water use imposed by a court, government agency, or other authority. The provision must specify how the temporary water rate provision is calculated.

(iii) A utility may include the addition of a production fee charged by a groundwater conservation district, including a production fee charged in accordance with a groundwater reduction plan entered in to by a utility in response to a groundwater conservation district production order or rule, as a separate line item in the tariff.

(iv) A utility may pass through the costs of changing its source of water if the source change is required by a governmental entity. The pass-through provision may not be effective prior to the date the conversion begins. The pass-through provision must be calculated using an annual true-up provision.

(v) A utility subject to more than one pass-through cost allowable in this section may request approval of an overall combined pass-through provision that includes all allowed pass-through costs to be recovered in one provision under subparagraph (D) [~~(C)~~] of this paragraph. The twelve calendar months (true-up period) for inclusion in the true-up must remain constant, *e.g.,* January through December.

(vi) A utility that has a combined pass-through provision in its approved tariff may request to amend its tariff to replace the combined pass-through provision with individual pass-through provisions if all revenues and expenses have been properly trued up in a true-up report and all over-collections have been credited back to the customers. A utility that has replaced its previously approved combined pass-through provision with individual provisions may not request another combined pass-through until three years after the replacement has been approved unless good cause is shown.

(D) [~~(C)~~] A change in the combined pass-through provision may only be implemented once per year. The utility must file a true-up report within one month after the end of the true-up period. The report must reconcile both expenses and revenues related to the combined pass-through charge for the true-up period. If the true-up report reflects an over-collection from customers, the utility must change its combined pass-through rate using the confirmed rate changes to charges being passed through and the over-collection from customers reflected in the true-up report. If the true-up report does not reflect an over-collection from the customers, the implementation of a change to the pass-through rate is optional. The change may be effective in a billing cycle within three months after the end of the true-up period as long as the true-up clearly shows the reconciliation between charges by pass-through entities and collections from the customers, and charges from previous years are reconciled. Only expenses charged by the pass-through provider(s) shall be included in the provision. The true-up report shall include:

(i) a list of all entities charging fees included in the combined pass-through provision, specifying any new entities added to the combined pass-through provision;

(ii) a summary of each charge passed through in the report year, along with documentation verifying the charge assessed and showing the amount the utility paid;

(iii) a comparison between annual amounts billed by all entities charging fees included in the pass-through provision with amounts billed for the usage by the utility to its customers in the pass-through period;

(iv) all calculations and supporting documentation;

(v) a summary report, by year, for the lesser of all years prior or five years prior to the pass-through period showing the same information as in clause (iii) of this subparagraph with a reconciliation to the utility's booked numbers, if there is a difference in any year; and

(vi) any other documentation or information requested by the commission.

(E) [~~(D)~~] For any pass-through provision granted under this section, all charges approved for recovery of pass-through costs shall be stated separately from all charges by the utility to recover the revenue requirement. Except for a combined pass-through provision, the calculation for a pass-through gallonage rate for a utility with one source of water may be made using the following equation, which is provided as an example: R=G/(1-L), where R is the utility's new proposed pass-through rate, [~~G = {G/(1-L)}, where~~] G equals the new gallonage charge by source supplier or conservation district, and L equals the line loss reflected as a percentage expressed in decimal format (for example, 8.5% would be expressed as 0.085). Unless good cause is shown, L (line loss) shall be limited to the lesser of the actual line loss experienced or 15%.

(F) [~~(E)~~] A utility that wishes to revise or implement an approved pass-through provision shall take the following actions prior to the beginning of the billing period in which the revision takes effect:

(i) file [~~submit~~] a written notice with [~~to~~] the commission that must [~~shall~~] include:

(I) the affected CCN number(s);

(II) a list of the affected subdivision(s), public water system name(s) and corresponding number(s) issued by the TCEQ, and the water quality system name(s) and corresponding number(s) issued by the TCEQ, if applicable;

(III) a copy of the notice to the customers;

(IV) documentation supporting the stated amounts of any new or modified pass-through costs;

(V) historical documentation of line loss for one year;

(VI) all calculations and assumptions for any true-up of pass-through costs;

(VII) the calculations and assumptions used to determine the new rates; and

(VIII) a copy of the pages of the utility's tariff that contain the rates that will change if the utility's application is approved; and

(ii) e-mail (if the customer has agreed to receive communications electronically), mail, or hand-deliver notice to the utility's customers. Notice may be in the form of a billing insert and must contain:

(I) the effective date of the change;

(II) the present calculation of customer billings;

(III) the new calculation of customer billings;

(IV) an explanation of any corrections to the pass-through formula, if applicable;

(V) the change in charges to the utility for purchased water or sewer treatment or ground water reduction fee or subsidence, if applicable; and

(VI) the following language: "This tariff change is being implemented in accordance with the minor tariff changes allowed by 16 Texas Administrative Code §24.21. The cost to you as a result of this change will not exceed the costs charged to your utility."

(G) [~~(F)~~] The following provisions apply to surcharges:

(i) A surcharge is an authorized rate to collect revenues over and above the usual cost of service.

(ii) If authorized by the commission or the municipality exercising original jurisdiction over the utility, a surcharge to recover the actual increase in costs to the utility may be collected over a specifically authorized time period without being listed on the approved tariff for:

(I) sampling fees not already recovered by rates;

(II) inspection fees not already recovered by rates;

(III) production fees or connection fees not already recovered by rates charged by a groundwater conservation district; or

(IV) other governmental requirements beyond the control of the utility.

(iii) A utility shall use the revenues collected through a surcharge approved by the commission only for the purposes noted in the order approving the surcharge. A utility shall handle the funds in the manner specified in the order approving the surcharge. The utility may redirect or use the revenues for other purposes only after first obtaining the approval of the commission.

(iv) The commission may require a utility to file periodic and/or final accounting information to show the collection and disbursement of funds collected through an approved surcharge.

(3) - (5) (No change.)

(c) - (n) (No change.)

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

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Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 95. TRANSPORTATION NETWORK COMPANIES

16 TAC §§95.1, 95.2, 95.10, 95.20 - 95.23, 95.30, 95.31, 95.40, 95.50, 90.51, 95.70 - 95.72, 95.80, 95.90, 95.91, 95.100

The Texas Department of Licensing and Regulation (Department) proposes new rules at 16 Texas Administrative Code (TAC), Chapter 95, §§95.1, 95.2, 95.10, 95.20 - 95.23, 95.30, 95.31, 95.40, 95.50, 95.51, 95.70 - 95.72, 95.80, 95.90, 95.91 and 95.100, regarding the Transportation Network Companies program.

The Texas Legislature enacted House Bill 100 (H.B. 100), 85th Legislature, Regular Session (2017), which established Chapter 2402 of the Texas Occupations Code that requires statewide regulation of Transportation Network Companies by the Texas Commission of Licensing and Regulation (Commission) and the Department. The proposed new rules are necessary to implement H.B. 100.

The Department held stakeholder meetings on July 6, 2017, with the Texas Travel Industry Association and Texas Commercial Airports Association; July 13, 2017, with Coalition of Texas with Disabilities, ADAPT, Governor's Committee on Disability, and Disability Rights Texas; July 14, 2017, with Coalition of Texas with Disabilities, ADAPT, Governor's Committee on Disability, and Disability Rights Texas; and July 31, 2017, with Fasten, Uber, Lyft, Ride Austin, Get Me, Pronto Rides and GLT, in Austin, Texas to get initial input about the industry and their concerns.

The proposed new §95.1 provides the statutory authority for the Commission and the Department.

The proposed new §95.2 identifies the definitions to be used under this chapter.

The proposed new §95.10 clarifies the scope and construction of this chapter.

The proposed new §95.20 requires a transportation network company to obtain a permit to operate in this state.

The proposed new §95.21 explains the terms of the permit.

The proposed new §95.22 establishes the initial permit application for transportation network companies.

The proposed new §95.23 provides for the permit renewal notice and application for transportation network companies.

The proposed new §95.30 allows for the issuance of a permit when requirements are met.

The proposed new §95.31 allows for the department to deny a permit.

The proposed new §95.40 establishes the responsibilities of the Department.

The proposed new §95.50 establishes reporting requirements for transportation network companies.

The proposed new §95.51 requires transportation network companies to provide notification of operations at airports and cruise ship terminals.

The proposed new §95.70 requires a permit holder to maintain a current and valid email address.

The proposed new §95.71 establishes requirements for data integrity, name changes, address changes and address additions.

The proposed new §95.72 prohibits deceptive practices.

The proposed new §95.80 establishes the fees for the transportation network company program.

The proposed new §95.80 allows the Department authority to investigate.

The proposed new §95.91 provides for administrative sanctions when necessary.

The proposed new §95.100 requires transportation network company permit holders to comply with the program statute, Texas Occupations Code, Chapter 2402.

Brian E. Francis, Executive Director, has determined that for the first five-year period the proposed new rules are in effect, there will be no cost to local government as a result of enforcing or administering the proposed rules. However, the state will incur additional costs to regulate and administer this program. The agency will require 1.0 additional full-time-equivalent (FTE) employee to administer the new permitting and regulatory responsibilities of the program, computer equipment and website configuration costs for data submission to begin operations, and other operating expenses totaling $104,458 the first year. For the subsequent four years of the first five year period the Department estimates a costs of $74,171 per year.

The proposed rules will have no direct adverse impact on the costs or revenue of local governments or on rural communities.

Mr. Francis also has determined that for each year of the first five-year period the proposed rules are in effect, the public will benefit by having statewide standards that will reduce confusion amongst local entities and establish consistency in regulation across the state, the industry and the public.

Texas Government Code §2001.0045 requires state agencies to determine if a proposed rule has a fiscal impact that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Because the proposed rules are necessary to implement legislation, §2001.0045 does not apply to the proposed rules.

Mr. Francis has determined that for each year of the first five-year period the proposed new rules are in effect, approximately 10 businesses, roughly 6 of them being small businesses or micro-businesses will operate in the state. The small or micro-busi-

nesses will pay an initial application fee of $10,500 and a renewal application fee of $7,500. The Department has also included standard program fees of $25 for a duplicate permit, $25 for a permit amendment, $25 for an address change, $25 for a name change, and late renewal fees twice the amount of the renewal.

Pursuant to Texas Government Code §2006.002, the agency has determined that the proposed new rules may have an adverse economic effect on small or micro-businesses and has prepared an Economic Impact Statement and a Regulatory Flexibility Analysis.

Although the permit fee may have an adverse economic effect on small and micro-businesses applying for or renewing a permit, the permit fees are set in the minimum amount which is reasonable and necessary for the Department to cover its costs of administering the program, as required by §51.202, Occupation Code. An estimated six small or micro-businesses might have an adverse economic impact from the proposed fees, with the projected economic impact being the amount of the fees, but no alternative regulatory methods can be employed to achieve the purpose of the fees. To achieve the health, safety and welfare of H.B. 100, the Department is required to assess these fees. Over the first five year period the fees cover the costs of regulating the program, and the costs for the program have been set at the minimum amount necessary to administer the program.

Comments on the proposal may be submitted by mail to Pauline Easley, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711; or by facsimile to (512) 475-3032, or electronically to erule.comments@tdlr.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register.*

The new rules are proposed under Texas Occupations Code, Chapters 51 and 2402, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 2402. No other statutes, articles, or codes are affected by the proposal.

§95.1. Authority.

This chapter is promulgated under Texas Occupations Code, Chapters 51 and 2402.

§95.2. Definitions.

Unless otherwise defined in this chapter, each term used in this chapter has the meaning assigned by Texas Occupations Code, Chapter 2402 and Texas Government Code, Chapter 2001.

(1) Airport- means an airport owner or operator.

(2) Cruise Ship Terminal- means a governing body of a governmental entity with jurisdiction over a cruise ship terminal.

§95.10. Rule Construction.

(a) Nothing in these rules shall be construed to:

(1) prohibit an airport or cruise ship terminal from imposing regulations including a reasonable fee or enforcing those regulations in a manner consistent with any compliance, assurances, and obligations under federal law, rules, regulations, and policies; or

(2) authorize an airport or cruise ship terminal to compel data sharing or to impose additional requirements on a personal vehicle or driver; including, tracking of the vehicle or driver when logged into the digital network.

(b) For purposes of this section, a reasonable fee means a fee:

(1) imposed on May 29, 2017, by an airport or cruise ship terminal;

(2) determined by conducting a full cost-of-service fee study by an airport or cruise ship terminal. The rates resulting from the cost-of-service fee study must be based on costs incurred by and allocated to Transportation Network Companies; or

(3) of an airport or cruise ship terminal that did not have fees imposed on the date referenced in (b)(1), and that adopts the fees imposed on the date in (b)(1) by an airport or cruise ship terminal with a similar number of passengers boarding annually, or performs a cost-of-service study under (b)(2).

(c) A reasonable fee established under this section includes an adjustment escalator option based on an index published by the United States Department of Transportation.

§95.20. Permit Required.

A person may not operate a transportation network company in this state without first obtaining and maintaining a transportation network company permit.

§95.21. Permit Terms.

A transportation network company permit issued under this chapter is:

(1) valid for one year from the date of issuance;

(2) valid throughout the state; and

(3) nontransferable.

§95.22. Transportation Network Company Permit Initial Application.

To be eligible for a transportation network company permit, an applicant must:

(1) submit a completed application on a form and in the manner prescribed by the department;

(2) provide electronic proof of insurance with the policy coverage required by Texas Occupations Code, Chapter 2402;

(3) certify that the applicant meets the requirements of Texas Occupations Code, Chapter 2402; and

(4) pay the fee set out under §95.80.

§95.23. Transportation Network Company Permit Renewal Notice and Application.

(a) The department will send written notice to permit holders at least thirty (30) days before the permit expires. The notice will be emailed to the permit holder's last known email address in the department's licensing records.

(b) To be eligible to renew a permit, a permit holder must:

(1) submit a completed application on a form and in the manner prescribed by the department;

(2) provide electronic proof of insurance with the coverage required by Texas Occupations Code, Chapter 2402;

(3) certify that the applicant continues to meet the requirements of Texas Occupations Code, Chapter 2402; and

(4) pay the fee set out under §95.80.

(c) Late Renewal.

(1) To maintain continuous licensure, the renewal requirements under this section must be completed prior to the expiration of the permit.

(2) A late renewal means the permit holder will have an unlicensed period from the expiration date of the expired permit to the issuance date of the renewed permit. During the unlicensed period, a transportation network company must block drivers access to the digital network.

(3) Non-receipt of a permit renewal notice from the department does not exempt a permit holder from the requirements of this chapter.

§95.30. Permit Issuance.

The department will issue a permit under this chapter to an applicant who meets the eligibility requirements for a permit.

§95.31. Permit Denial.

The department may deny an application or revoke a permit if the applicant, a partner, principal, officer, or general manager of the applicant has:

(1) violated an order of the commission or executive director, including an order for sanctions or administrative penalties; or

(2) submitted false or incomplete information on the application.

§95.40. Responsibilities of the Department.

(a) Unless otherwise provided by statute or this chapter, the department may send notice of department proposed actions and decisions through email sent to the last email address designated by the permit holder in the department's licensing records.

(b) At licensure, the department will provide the permit holder with the requirements for the accessibility pilot program report required by Texas Occupation Code, Chapter 2402.

§95.50. Reporting Requirements.

(a) For purposes of this paragraph "Market" means the legal boundaries of a municipality as defined in §1.005 of the Local Government Code or the metropolitan statistical area as defined by the Office of Management and Budget.

(b) A permit holder must electronically file the following reports with the department:

(1) Disability Compliance Report. A report under this paragraph must include:

(2) Accessibility Pilot Program Report.

(A) Criteria for determining the four largest markets that the transportation company operates in this state;

(i) Identify the market(s) the transportation network company implemented the Accessibility Pilot Program; and

(ii) Explain the reason(s) for selecting the market(s) that the transportation network company used to implement the Accessibility Pilot Program.

(B) The services offered to disabled persons, including disabled persons using a fixed-frame wheelchair.

(C) A step-by-step explanation demonstrating the process for an individual to join and utilize the accessibility functions of their transportation network service Accessibility Pilot Program.

(D) A detailed plan that ensures referrals to alternate providers of fixed-frame wheelchair-accessible service are made in a manner that does not unreasonably delay the provision of service. The detailed plan must at a minimum:

(i) explain why the alternate provider of fixed-frame wheelchair-accessible service will not cause unreasonable delay in service;

(ii) include the initial number of alternate providers;

(iii) provide the average number of vehicles equipped to provide fixed-frame wheelchair-accessible service and available to each alternate provider;

(iv) state the hours each alternate provider of fixed frame wheelchair-accessible service is available for service; and

(v) describe the procedures to monitor and ensure alternate providers meet and maintain service levels that do not unreasonably delay fixed-frame wheelchair-accessible service.

(E) A report submitted under this subsection that fails to demonstrate compliance will be considered incomplete and subject to correction and resubmission.

(F) The report must contain a table of contents with each section of the report marked to identify the content cross referenced to each paragraph and subparagraph of this section.

(3) Accessibility Pilot Program Report.

(A) The report required by this paragraph must be aggregated in ninety (90) day increments. The report must include final values for the entire period of the Accessibility Pilot Program and at a minimum include:

(i) The number of vehicles equipped to accommodate a passenger with a fixed-frame wheelchair that were available through the company's digital network in the pilot program market.

(ii) The number of fixed-frame wheelchair requests.

(iii) The number of rides provided to fixed-frame wheelchair-bound passengers.

(iv) The number of rides not provided to fixed-frame wheelchair-bound passengers by the permit holder or its alternate provider.

(v) Percentage of total fixed-frame wheelchair requests provided by the zip code for the passengers requested pick-up location.

(vi) Percentage of total fixed-frame wheelchair requests provided by the zip code for the passengers requested drop-off location.

(vii) Percentage of fixed-frame wheelchair requests provided by the time of day, delineated by hour.

(B) The number of instances in which the company referred a fixed-frame wheelchair-bound passenger to an alternate provider because the passenger could not be accommodated by the company.

(C) Average wait times for Accessibility Pilot Program market area. The permit holder must track and report by zip code the average time elapsed between the time a passenger initially requested a ride and the time the ride began for each:

(i) fixed-frame wheelchair-bound passenger serviced by the permit holder;

(ii) fixed-frame wheelchair-bound passenger referred to an alternate provider; and

(iii) non-wheelchair accessible requested ride.

§95.51. Notification of Operations at Airports and Cruise Ship Terminals.

A permit holder must provide the controlling authority of each airport or cruise ship terminal written notice of its operations or its intent to operate within their jurisdiction. Notification must be provided within thirty (30) days after receipt of a permit issued under this chapter.

§95.70. Maintain Current Email Address.

A permit holder must provide to the department a valid email address and must keep the email address current during the term of the permit.

§95.71. Data Integrity, Name Changes, Address Changes, and Address Additions.

(a) A permit holder is obligated to ensure and maintain the accuracy of all information it provides to the department pursuant to this chapter.

(b) A permit holder must notify the department in writing of any change to trade name, mailing address, physical address, email address, or telephone number on file with the department within fifteen (15) days of making such change.

(1) The notification shall identify the person making the change and the affected permit number.

(2) A notice of name change including trade name changes and trade name additions shall include supporting documentation from the Texas Secretary of State.

(c) In the event of a trade name change or an address change, the permit holder shall submit on forms approved by the department, a request for this change and pay, if any, the fee required by §95.80.

(d) A change requested under this section shall not be effective until approved by the department.

§95.72. Deceptive Practices Prohibited.

A permit holder may not conduct business or advertise under a name that is deceptively similar to a name used by any other licensed transportation network company licensed under this chapter unless specifically approved in writing by the executive director.

§95.80. Fees.

(a) All fees are nonrefundable except as provided for by commission rules or statute.

(b) Transportation Network Company Permit Fees:

(1) Original Application--$10,500

(2) Renewal--$7,500

(3) Permit Amendment--$25

(4) Address change--$25

(5) Name change--$25

(c) Late renewal fees for licenses and permits issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

§95.90. Authority to Investigate.

For purposes of investigating compliance with, or a violation of, these rules or applicable law, a permit holder must make records, drivers and vehicles logged into the transportation network service available to the department within ten (10) days of the request or within the time agreed to by the department.

§95.91. Administrative Sanctions.

The department may suspend or revoke a permit issued to a transportation network company that violates a provision of Occupations Code, Chapter 2402, or impose administrative penalties, sanctions and civil remedies authorized by Occupations Code, Chapter 51 for violating a rule under this chapter or regulation adopted by an airport or cruise ship terminal.

§95.100. Statutory Compliance.

A permit holder must implement and follow all technical and operational requirements in Texas Occupations Code, Chapter 2402 including the timely filing of reports.

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 September 1, 2017.

TRD-201703495
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: October 15, 2017
For further information, please call: (512) 463-8179

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER JJ. COMMISSIONER'S RULES CONCERNING AUTOMATIC COLLEGE ADMISSION

19 TAC §61.1201

The Texas Education Agency proposes an amendment to §61.1201, concerning notification of automatic college admission. The proposed amendment would update the rule to align with requirements of House Bill (HB) 5, 83rd Texas Legislature, 2013.

Texas Education Code (TEC), §28.026, requires each high school in a school district to post appropriate signs in each counselor's office, in each principal's office, and in each administrative building indicating the substance of TEC, §51.803, regarding automatic college admission. Senate Bill 175, 81st Texas Legislature, 2009, amended the TEC, §28.026, requiring the commissioner to adopt procedures to ensure that school districts provide high school students and the students' parents or guardians with written notification of the substance of the TEC, §51.803, relating to automatic college admission. TEC, §28.026, also requires the commissioner to adopt forms for districts to use in providing notice to students and parents.

Section 61.1201 was adopted effective May 9, 2010, to establish in rule procedures for consistent implementation of the statutorily required written notification. It also adopted in rule the appropriate form for use by school districts.

HB 5, 83rd Texas Legislature, 2013, amended TEC, §28.026, to explicitly require open-enrollment charter schools, in addition to school districts, to provide notification relating to automatic

college admission to students and the students' parents or guardians. The legislation also required that notification of curriculum requirements for automatic college admission and financial aid be provided. The notification form must be signed by the student's counselor in addition to being signed by the student's parent or guardian.

To align with statute, proposed amendment to §61.1201(a) would add open-enrollment charter schools to the requirement to provide students and the students' parents or guardians with certain notifications. The proposed amendment would also add language to specify that, in addition to notification of the substance of the TEC, §51.803, relating to automatic college admission, school districts and open-enrollment charter schools must provide notification of the curriculum requirements for financial aid under TEC, Title 3, and the benefits of completing the requirements for automatic admission and financial aid. The proposal would add new Figure: 19 TAC §61.1201(a)(1), the required form to provide notice to all students of the substance of TEC §51.803, at the time the student first registers for one or more classes required for high school graduation. Additionally, the proposal would require the form to be signed by the student, the student's parent or guardian, and the school counselor.

Also in alignment with statute, proposed amendment to §61.1201(b) would add open-enrollment charter schools to the requirement to provide written notification of eligibility for automatic college admission to each senior student eligible for automatic admission, each student enrolled in the junior year of high school who has a grade point average in the top ten percent of the student's high school class, and the student's parent or guardian. The proposed amendment would also update Figure: 19 TAC §61.1201(b)(1) to add the Foundation High School Program to the explanation of notification of eligibility form.

Finally, the title of §61.1201 would be amended to reflect that the required notifications include both notification of automatic college admission and notification of curriculum requirements for financial aid.

The proposed amendment would have no procedural or reporting implications.

School districts and open-enrollment charter schools will be required to obtain written acknowledgement of receipt of the notification forms for automatic college admission and curriculum requirements for financial aid.

FISCAL NOTE. Monica Martinez, associate commissioner for standards and support services, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment. There is no effect on local economy for the first five years that the proposed amendment is in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022. The proposed amendment does not impose a cost on regulated persons and, therefore, is not subject to Texas Government Code, §2001.0045.

PUBLIC BENEFIT/COST NOTE. Ms. Martinez has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be ensuring school districts and open-enrollment charter schools consistently notify students of the substance of the automatic college admission policy and curriculum requirements for financial aid. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. There is no direct adverse economic impact for small businesses, microbusinesses, and rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins September 15, 2017, and ends October 16, 2017. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Comments may also be submitted electronically to *rules@tea.texas.gov.* 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 September 15, 2017.

STATUTORY AUTHORITY. The amendment is proposed under the Texas Education Code (TEC), §28.026, which requires school districts and open-enrollment charter schools to provide each district or school student, at the time the student first registers for one or more classes required for high school graduation, with a written notification, including a detailed explanation in plain language, of the substance of TEC, §51.803, concerning automatic admissions; the curriculum requirements for financial aid authorized under TEC, Title 3; and the benefits of completing the requirements for that automatic admission and financial aid. The commissioner is required to adopt forms to use in providing notice of eligibility for automatic admission to eligible junior and senior high school students.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, §28.026.

§61.1201. Notification of Automatic College Admission and Curriculum Requirements for Financial Aid.

(a) In accordance with the Texas Education Code (TEC), §28.026, a school district or open-enrollment charter school shall provide each student, at the time the student first registers for one or more classes required for high school graduation, with a written notification of the substance of the TEC, §51.803, concerning automatic college admission, the curriculum requirements for financial aid under TEC, Title 3, and the benefits of completing the requirements for automatic admission and financial aid.

(1) The notification form to be used by school districts and open-enrollment charter schools, entitled "Explanation of Automatic College Admission and Curriculum Requirements for Financial Aid for High School Students," is provided in this paragraph.
Figure: 19 TAC §61.1201(a)(1)

(2) A school district or open-enrollment charter school shall obtain written acknowledgement of receipt of the notification from each eligible student and the student's parent or guardian.

(3) The notification form under subsection (a)(1) of this section must be signed by the student's school counselor in addition to being signed by the student and the student's parent or guardian.

(b) Not later than the 14th day after the last day of classes for the fall semester or an equivalent date in the case of a school operated on a year-round system, a school district or open-enrollment charter

school shall provide each [~~eligible~~] senior student eligible under the TEC, §51.803, [~~and~~] each student enrolled in the junior year of high school who has a grade point average in the top ten percent of the student's high school class, and the student's parent or guardian[~~,~~] with a written notification of the student's eligibility for automatic college admission. The written notification shall provide a detailed explanation in plain language of the substance of the TEC, §51.803, using the form developed by the Texas Education Agency.

(1) The notification form to be used by school districts and open-enrollment charter schools, entitled "Notification of Eligibility for Automatic College Admission," is provided in this paragraph. [~~entitled "Notification of Eligibility for Automatic College Admission."~~]
Figure: 19 TAC §61.1201(b)(1)
[~~Figure: 19 TAC §61.1201(b)(1)~~]

(2) A school district shall obtain written acknowledgement of receipt of the notification from each eligible student and the student's parent or guardian.

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

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: October 15, 2017
For further information, please call: (512) 475-1497

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CHAPTER 74. CURRICULUM REQUIREMENTS

SUBCHAPTER AA. COMMISSIONER'S RULES ON COLLEGE AND CAREER READINESS

19 TAC §74.1003

The Texas Education Agency proposes new §74.1003, concerning industry-based certifications for public school accountability. The proposed new section would implement the requirements of the Texas Education Code (TEC), §39.053, as amended by House Bill (HB) 22, 85th Texas Legislature, Regular Session, 2017.

HB 22, 85th Texas Legislature, Regular Session, 2017, amended the TEC, §39.053, to adopt a set of indicators to measure and evaluate school districts and campuses with respect to ensuring students attain the appropriate skills and learning to be prepared for success in subsequent grade levels and in entering the workforce, the military, or postsecondary education. For evaluating the performance of high school campuses and districts that include high school campuses, statute incorporates recognition of students who earn industry certifications under the student achievement domain of the academic accountability system and authorizes the commissioner to adopt rules to implement the academic accountability system.

Statute lacks a workable definition of what constitutes an industry certification. TEC, §28.025, authorizes performance acknowledgements on students' diplomas for those who earn industry certifications. In 19 TAC §74.14(e)(2)-(3), the State Board of Education has recognized certain attributes that qualify various attestations of achievement as recognized industry certifications. This ensures that the achievement represents the acquisition of foundational skills and learning to ensure meaningful educational attainment. This also fulfills the public education goal of preparing students for success in postsecondary endeavors, whether they are succeeding directly in the workplace or pursuing higher educational opportunities.

Similarly, the list of industry certifications in proposed new 19 TAC §74.1003 would recognize in the academic accountability system public schools that establish structures where students acquire the skills and learning needed for success in business and industry. In determining the list adopted as Figure: 19 TAC §74.1003, the commissioner considered the following factors:

1. State-, nationally-, or internationally-recognized: Recognition through a national or international business, an industry, a professional organization, a state agency, a government entity, or a state-based industry association.

2. End of Program: Represents a culmination of knowledge and skills achieved through completion of a program of study in a high school career and technical education program.

3. Stackable: Attainable by high school students and transfers seamlessly to postsecondary work through acceptance for credit or hours at an institution of higher education or to additional industry certifications and opportunities through acceptance by industry as a validated credential for workplace entry and advancement.

4. Valuable for Industry: Demonstrates the skills and abilities necessary to secure entry into high-skill occupations as demonstrated through attributes such as high-wage jobs with growth potential.

The proposed new section would have no procedural and reporting implications. The proposed new section would have no locally maintained paperwork requirements.

FISCAL NOTE. Lily Laux, executive director for school programs, has determined that for the first five-year period the new section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the new section. There is no effect on local economy for the first five years that the proposed new section is in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022. The proposed new section does not impose a cost on regulated persons and, therefore, is not subject to Texas Government Code, §2001.0045.

PUBLIC BENEFIT/COST NOTE. Ms. Laux 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 enforcing the new section will be implementing statute and providing clarity regarding the recognition of industry certifications for academic accountability purposes. There is no anticipated economic cost to persons who are required to comply with the proposed new section.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. There is no direct adverse economic impact for small businesses, microbusinesses, and rural communities; therefore, no regulatory flexibility anal-

ysis, specified in Texas Government Code, §2006.002, is required.

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins September 15, 2017, and ends October 16, 2017. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Comments may also be submitted electronically to *rules@tea.texas.gov.* 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 September 15, 2017.

STATUTORY AUTHORITY. The new section is proposed under the Texas Education Code (TEC), §39.001, as added by House Bill (HB) 22, 85th Texas Legislature, Regular Session, 2017, which authorizes the commissioner to adopt rules to implement the state academic accountability system; and TEC, §39.053, as amended by HB 22, 85th Texas Legislature, Regular Session, 2017, which authorizes the inclusion of industry certifications in the accountability system to recognize the performance of high school campuses and districts that include high school campuses for establishing educational programs where students earn industry certifications.

CROSS REFERENCE TO STATUTE. The new section implements the Texas Education Code, §39.001, as added by House Bill (HB) 22, 85th Texas Legislature, Regular Session, 2017; and §39.053, as amended by HB 22, 85th Texas Legislature, Regular Session, 2017.

§74.1003. Industry-Based Certifications for Public School Accountability.

The list of certifications provided in this paragraph will be recognized for the purpose of accounting for students who earn industry certifications in the public school accountability system for the 2017-2018 school year.
Figure: 19 TAC §74.1003

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

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

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CHAPTER 97. PLANNING AND ACCOUNTABILITY
SUBCHAPTER EE. ACCREDITATION STATUS, STANDARDS, AND SANCTIONS

19 TAC §97.1077

The Texas Education Agency proposes new §97.1077, concerning school year under contract operating district campus. The proposed new section would clarify the provisions of Senate Bill (SB) 1882, 85th Texas Legislature, Regular Session, 2017, by specifying that a school district partnership must operate the entire school year of the campus in order to be eligible for an exemption from applicable sanctions for the first two school years of a school district partnership for the campus.

The 85th Texas Legislature, Regular Session, 2017, implemented SB 1882, which authorizes school districts to enter into partnerships for certain entities to operate school district campuses. The legislation contemplates that the campus is operated under independent management of certain third party entities to provide the students of the campus with the benefit of alternative management and educational practices from the district's normal operation. The legislation requires continued evaluation of campus performance, but when a partnership takes over operation of a poor-performing campus, the legislation provides an exemption from certain interventions for the first two school years of operation under the partnership. This allowance ensures new educational methods have a chance to improve student performance. Subsequent operation or extension of the contracts only receive the exemption from certain interventions if approved by the commissioner. This ensures that districts are utilizing the partnerships to improve student learning, not as an avenue to avoid accountability measures.

Proposed new §97.1077 would specify that to receive the exemption from certain interventions, the partnership must operate for the entire school year of the campus. The proposed new rule would require the school year to include, at a minimum, all the operational and instructional time performed at the campus to comply with statutory requirements for operating during a school year and receiving funding for a school year, as well as all the days the campus instructional workforce that provided services to the campus was employed. These provisions would fulfill the legislative purpose of ensuring students have access to alternative educational practices to improve student performance in order to remove the necessity of accountability interventions. The provisions would further prevent the use of the exemption to avoid accountability rather than improving student performance.

The exemption provided in statute applies for the first two full school years that a partnership takes over operation of an unacceptable campus. To avoid limiting the flexibility of districts and partners beginning operation of a campus, but to fulfill the purpose of the legislation of improving student performance, the proposed new rule would ensure that performance at a campus operated by a partnership for less than a full school year, while not qualifying for the exemption, could serve to meet the threshold necessary to receive the exemption from certain interventions or actions in the subsequent two school years.

Although the authorizing legislation, SB 1882, makes references to provisions contained in the Texas Education Code (TEC), Chapter 39, Subchapter E, SB 1488, 85th Texas Legislature, Regular Session, 2017, recodified the TEC, Chapter 39, Subchapter E, into Chapter 39A. Accordingly, the proposed rule text would incorporate appropriate references to the TEC, Chapter 39A, as necessary.

The proposed new section would require school districts, if requested by the commissioner, to submit additional information necessary to determine the school year that applies to a campus. This would only be done if campus average daily attendance (ADA) calendars were insufficient to determine whether the campus was operated for a school year. No standard form is required; the information requested would be provided via email.

The proposed new rule has no locally maintained paperwork requirements.

FISCAL NOTE. A.J. Crabill, deputy commissioner for governance, has determined that for the first five-year period the new section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the new section. There is no effect on local economy for the first five years that the proposed new section is in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022. The proposed new section does not impose a cost on regulated persons and, therefore, is not subject to Texas Government Code, §2001.0045.

PUBLIC BENEFIT/COST NOTE. Mr. Crabill has determined that for each year of the first five years the proposed new section is in effect the public benefit anticipated as a result of enforcing the proposed new section will be providing clarity regarding when an exemption to intervention will apply when certain entities operate a school district campus. There is no anticipated economic cost to persons who are required to comply with the proposed new section.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. There is no direct adverse economic impact for small businesses, microbusinesses, and rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins September 15, 2017, and ends October 16, 2017. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Comments may also be submitted electronically to *rules@tea.texas.gov.* 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 September 15, 2017.

STATUTORY AUTHORITY. The new section is proposed under the Texas Education Code (TEC), §11.174(a), as added by Senate Bill 1882, 85th Texas Legislature, Regular Session, 2017, which authorizes a school district to enter into a partnership to operate a school district campus under certain conditions; TEC, §11.174(e), which requires the commissioner to continue to evaluate campus performance and assign overall and domain ratings for a campus operated under a partnership; TEC, §11.174(f), which prohibits the imposition of certain interventions and sanctions based on accountability performance for the first two school years for which a school district partnership operates on the campus if the campus was unacceptable the school year prior to the partnership beginning; TEC, §11.174(g), which extends the intervention exemption to a subsequent or renewed partnership only upon approval from the commissioner; and TEC, §11.174(m), which authorizes the commissioner to adopt rules to implement the TEC, §11.174.

CROSS REFERENCE TO STATUTE. The new section implements the Texas Education Code, §11.174, as added by Senate Bill 1882, 85th Texas Legislature, Regular Session, 2017.

§97.1077. School Year Under Contract Operating District Campus.

(a) A campus is eligible under Texas Education Code (TEC), §11.174(f) or (g), for an exemption from applicable sanctions or actions under TEC, §39A.101(a) and §39A.111, if:

(1) the campus and the partnership to operate the campus meet all applicable requirements; and

(2) the campus was operated under the partnership from the first to the last day of the school year of the campus.

(b) A school year under subsection (a)(2) of this section must include, at a minimum:

(1) all minutes of operation and instructional time conducted on the campus for purposes of TEC, §25.081 and §42.005; and

(2) all the days for which the instructional workforce of the campus that provides educational services for students under paragraph(1) of this subsection was employed.

(c) While the performance of a campus operated under a partnership for less than a school year as described by subsections (a)(2) and (b) of this section may not qualify for an exemption from applicable sanctions or actions under TEC, §11.174(f), it may be used to meet the threshold necessary to receive the exemption for the following two school years of operation under a partnership.

(d) Upon request of the commissioner of education, a school district shall provide information to substantiate a school year for the campus.

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 September 1, 2017.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

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CHAPTER 101. ASSESSMENT

SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING IMPLEMENTATION OF THE ACADEMIC CONTENT AREAS TESTING PROGRAM

DIVISION 2. PARTICIPATION AND ASSESSMENT REQUIREMENT FOR GRADUATION

19 TAC §101.3022

The Texas Education Agency proposes an amendment to §101.3022, concerning assessment requirements for graduation. The proposed amendment would modify the rule to reflect changes in statute made by Senate Bill (SB) 463, 85th Texas Legislature, Regular Session, 2017, and remove dates that have passed.

Section 101.3022 requires students to achieve satisfactory performance on the end-of-course (EOC) assessments listed in the Texas Education Code (TEC), §39.023(c), to be eligible to receive a high school diploma. The rule also specifies an exception, as authorized by the TEC, §28.0258, that allows a student who has failed to achieve the EOC assessment graduation requirements for no more than two courses to receive a Texas high school diploma if the student has qualified to graduate by means of an individual graduation committee. The rule currently states that the individual graduation committee provision applies only to students in the 11th or 12th grade in the 2014-2015, 2015-2016, or 2016-2017 school years and that the provision expires on September 1, 2017.

SB 463, 85th Texas Legislature, Regular Session, 2017, amended the TEC, §28.0258, to extend the expiration date of the provision that allows eligible students to qualify to graduate by means of an individual graduation committee to September 1, 2019.

To implement SB 463, the proposed amendment would modify the rule by extending the expiration date to September 1, 2019. In addition, the proposed amendment would remove the outdated language that limited the individual graduation committee provision to students in the 11th or 12th grade in the 2014-2015, 2015-2016, or 2016-2017 school years.

Technical edits would also be made.

The proposed amendment has no procedural and reporting implications beyond those that apply to all Texas students with respect to implementation of the state assessment program. The proposed amendment has no locally maintained paperwork requirements.

FISCAL NOTE. Penny Schwinn, deputy commissioner for academics, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment. There is no effect on local economy for the first five years that the proposed amendment is in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022. The proposed amendment does not impose a cost on regulated persons and, therefore, is not subject to Texas Government Code, §2001.0045.

PUBLIC BENEFIT/COST NOTE. Ms. Schwinn has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be ensuring that the expiration dates of the provisions that allow an eligible student to be awarded a high school diploma on the basis of review by an individual graduation committee are consistent with current law. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. There is no direct adverse economic impact for small businesses, microbusinesses, and rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins September 15, 2017, and ends October 16, 2017. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Comments may also be submitted electronically to *rules@tea.texas.gov.* 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 September 15, 2017.

STATUTORY AUTHORITY. The amendment is proposed under the Texas Education Code (TEC), §28.0258, as amended by Senate Bill (SB) 463, 85th Texas Legislature, Regular Session, 2017, which establishes an individual graduation committee to determine if a student who has failed to comply with the end-of-course (EOC) assessment instrument performance requirements in the TEC, §39.025, for not more than two courses is qualified to graduate. Subsection (k) requires the commissioner to adopt rules to implement the section. The section expires September 1, 2019; and the TEC, §39.025(a-2), as amended by SB 463, 85th Texas Legislature, Regular Session, 2017, which allows a student who has failed to perform satisfactorily on EOC assessment instruments to receive a high school diploma if the student qualifies for graduation under the TEC, §28.0258. The subsection expires September 1, 2019.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, §28.0258 and §39.025, as amended by Senate Bill 463, 85th Texas Legislature, Regular Session, 2017.

§101.3022. Assessment Requirements for Graduation.

(a) Beginning with students first enrolled in Grade 9 in the 2011-2012 school year, a student must meet satisfactory performance on each end-of-course (EOC) assessment listed in the Texas Education Code (TEC), §39.023(c), except in cases as provided by subsections (b), (e), and (f) of this section and §101.3021(e) of this title (relating to Required Participation in Academic Content Area Assessments), in order to be eligible to receive a Texas diploma. The standard in place when a student first takes an EOC assessment is the standard that will be maintained throughout the student's school career.

(b) A student who was administered separate reading and writing EOC assessments under the TEC, §39.023(c), for the English I or English II course has met that course's assessment graduation requirement if the student has met the following criteria:

(1) achieved satisfactory performance on either the reading or writing EOC assessment for that course;

(2) met at least the minimum score on the other EOC assessment for that course; and

(3) achieved an overall scale score of 3750 or greater when the scale scores for reading and writing are combined for that course.

(c) Exceptions to subsection (a) of this section related to English I shall apply to English language learners who meet the criteria specified in §101.1007 of this title (relating to Assessment Provisions for Graduation).

(d) If a student failed a course but achieved satisfactory performance on the applicable EOC assessment, that student is not required to retake the assessment if the student is required to retake the course.

(e) Effective beginning with the 2014-2015 school year, a student who has taken[~~,~~] but failed to achieve the EOC assessment graduation requirements for no more than two courses may receive a Texas high school diploma if the student has qualified to graduate by means of an individual graduation committee [~~(IGC)~~] under the TEC, §28.0258.

(1) A student may not graduate under an individual graduation committee [~~IGC~~] if the student did not take each EOC assessment required by this subchapter or an approved substitute assessment in Subchapter DD of this chapter (relating to Commissioner's Rules Concerning Substitute Assessments for Graduation) for each course in which the student was enrolled in a Texas public school for which there is an EOC assessment. A school district or charter school shall determine whether the student took each required EOC assessment or an approved substitute assessment required by Subchapter DD of this chapter. For purposes of this section only, a student who does not make an attempt to take all required EOC assessments may not qualify to graduate by means of an individual graduation committee [~~IGC~~].

(2) A student who is an English language learner (ELL) and qualifies for the English I special provision in §101.1007 of this title may graduate without an individual graduation committee [~~IGC~~] if the student achieves satisfactory performance on the remaining EOC assessments that the student is required to take.

(A) The qualifying ELL becomes eligible for individual graduation committee [~~IGC~~] review by failing to achieve satisfactory performance on the English I EOC assessment and one other EOC assessment or by failing to achieve satisfactory performance on no more than two of the remaining EOC assessments if the student achieved satisfactory performance on the English I EOC assessment.

(B) If a qualifying ELL does graduate by means of an individual graduation committee [~~IGC~~], the student is required to complete individual graduation committee [~~IGC~~] requirements for each course in which the student did not achieve satisfactory performance on the EOC assessment for that course.

(3) Notwithstanding any action taken by a student's individual graduation committee [~~IGC~~], a school district or charter school must provide a student an opportunity to retake an EOC assessment under the TEC, §39.023(c), if the student has not previously achieved satisfactory performance on an assessment for that course. A student is not required to retake a course in order to be administered a retest of an EOC assessment.

~~[(4) This subsection only applies to a student classified by the school district or charter school as an 11th or 12th grade student in the 2014-2015, 2015-2016, or 2016-2017 school year.]~~

(4) [~~(5)~~] Provisions of this subsection expire September 1, 2019 [~~2017~~]. A student may graduate by means of an individual graduation committee [~~IGC~~] if the student has qualified for an individual graduation committee [~~IGC~~] under the TEC, §28.0258, and that individual graduation committee [~~IGC~~] convened prior to September 1, 2019 [~~2017~~].

(f) A student who is receiving special education services or has been dismissed from a special education program under the TEC, Chapter 29, Subchapter A, is subject to the provisions of this subsection.

(1) A student receiving special education services is not subject to the requirements in the TEC, §28.0258. As provided in §89.1070 of this title (relating to Graduation Requirements) and §101.3023 of this title (relating to Participation and Graduation Assessment Requirements for Students Receiving Special Education Services), a student's admission, review, and dismissal (ARD) committee determines whether a student is required to achieve satisfactory performance on an EOC assessment to graduate.

(2) A student dismissed from a special education program who achieved satisfactory performance on an alternate EOC assessment while enrolled in a special education program is not required to take and achieve satisfactory performance on the general EOC assessment to graduate. A student who took an EOC assessment while enrolled in a special education program is not required to retake and achieve satisfactory performance on the EOC assessment if the student's ARD committee determined that the student was not required to achieve satisfactory performance on the EOC assessment to graduate. A student dismissed from a special education program must achieve satisfactory performance on any remaining EOC assessments that the student is required to take. If the student fails to achieve satisfactory performance on no more than two of the remaining EOC assessments, the student is eligible for individual graduation committee [~~IGC~~] review under the TEC, §28.0258, and is subject to the provisions of 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 September 1, 2017.

TRD-201703482
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: October 15, 2017
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 163. LICENSURE

22 TAC §§163.2, 163.4, 163.6, 163.13

The Texas Medical Board (Board) proposes amendments to §§163.2, 163.4, 163.6, 163.13, and the repeal of §163.7, concerning Licensure.

The amendment to §163.2, concerning Full Texas Medical License, proposes to delete language under subsection (d)(5)(A) setting forth requirements related to §163.7 of this title (relating to the Ten Year Rule). The amendments are proposed to reflect the proposed repeal of §163.7 of this title, which is also published in this issue.

The amendment to §163.4, concerning Procedural Rules for Licensure Applicants, proposes to delete language under subsection (d)(5)(D) related to §163.7 of this title. The amendments are proposed to reflect the proposed repeal of §163.7 of this title.

The amendment to §163.6, concerning Examinations Accepted for Licensure, proposes to delete language under subsection (e)(1), requiring that an applicant pass the jurisprudence examination within three attempts. The changes are made pursuant to Senate Bill 674 (85th Legislature, Regular Session).

The repeal of §163.7, concerning Ten Year Rule, proposes to repeal requirements that an applicant have passed an examination listed in §163.6(a) of this title (relating to Examinations Accepted for Licensure) for licensure within the ten-year period prior to the filing date of the application. The requirements under §163.7 represent unnecessary impediments and additional steps to licensure for physicians who may have taken an approved licensing exam more than 10 years prior to an application's filing date,

yet have maintained competency through years of practice, and otherwise meet all general eligibility requirements.

The amendment to §163.13, concerning Expedited Licensure Process, proposes to add a new subsection (b), creating an expedited licensing process for out-of-state psychiatrists. The new language is proposed in accordance with Senate Bill 674, 85th Legislative Regular Session, which requires the Board to create an expedited licensing process for applicants who hold an unrestricted license to practice medicine issued in another state, are board certified in psychiatry, and meet other general eligibility requirements.

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect, the public benefit anticipated as a result of enforcing the proposal will be to have rules that comport with applicable statutes, are internally consistent and clear, address Texas's shortage of psychiatrists, and remove unnecessary impediments to licensure for qualified and experienced physicians, better enabling the Board to address Texas's increasing need for qualified physicians.

Mr. Freshour has also determined that for the first five-year period that the sections are in effect, there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018, or email comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure. The amendments are further proposed under the authority of Texas Occupations Code Annotated, Chapter 155, as amended by Senate Bill 674 (85th Leg. R.S.)(2017).

No other statutes, articles or codes are affected by this proposal.

§163.2. Full Texas Medical License.

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

(d) Alternative License Procedures for Military Service Members, Military Veterans, and Military Spouses.

(1) - (4) (No change.)

(5) Alternative Demonstrations of Competency Allowed. Applicants qualifying under this subsection, [~~:~~]

[~~(A) are not required to comply with §163.7 of this title (relating to Ten Year Rule); and~~]

[~~(B)~~] in demonstrating compliance with §163.11(a) of this title (relating to Active Practice of Medicine), must only provide sufficient documentation to the board that the applicant has, on a full-time basis, actively diagnosed or treated persons or has been on the active teaching faculty of an acceptable approved medical school, within one of the last three years preceding receipt of an Application for licensure.

(e) (No change.)

§163.4. Procedural Rules for Licensure Applicants.

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

(d) Review and Recommendations by the Executive Director.

(1) - (4) (No change.)

(5) If the Executive Director determines that the applicant is ineligible for licensure based on one or more of the statutory or regulatory provisions listed in subparagraphs (A) - (D) [~~(E)~~] of this paragraph, the applicant may appeal that decision to the Licensure Committee before completing other licensure requirements for a determination by the Committee solely regarding issues raised by the determination of ineligibility. If the Committee overrules the determination of the Executive Director, the applicant may then provide additional information to complete the application, which must be analyzed by board staff and approved before a license may be issued. Grounds for ineligibility under this subsection include noncompliance with the following:

(A) Section 155.003(a)(1) of the Act that requires the applicant to be 21 years of age;

(B) Section 155.003(b) and (c) of the Act that require that medical or osteopathic medical education received by an applicant must be accredited by an accrediting body officially recognized by the United States Department of Education, or meet certain other requirements, as more fully set forth in subsection (a)(8) of this section, §§163.5(b)(11), 163.5(c)(2)(C), 163.5(c)(2)(D), and 163.1(11)(B)(iii) and (iv) of this chapter;

(C) Sections 155.051 - 155.0511, and 155.056 of the Act that relates to required licensure examinations and examination attempts; and

[~~(D) Section 163.7 of this chapter (relating to the Ten Year Rule); and~~]

(D) [~~(E)~~] Section 163.6(e) of this chapter (relating to Examinations Accepted for Licensure) that requires passage of the Jurisprudence Examination.

§163.6. Examinations Accepted for Licensure.

(a) - (d) (No change.)

(e) Texas Medical Jurisprudence Examination (JP Exam).

(1) In this chapter, when applicants are required to pass the JP exam, applicants must pass the JP exam with a score of 75 or better. [~~within three attempts, unless the Board allows an additional attempt based upon a showing of good cause. An applicant who is unable to pass the JP exam within three attempts must appear before the Licensure Committee of the board to address the applicant's inability to pass the examination and to re-evaluate the applicant's eligibility for licensure. It is at the discretion of the committee to allow an applicant additional attempts to take the JP exam.~~]

(2) - (5) (No change.)

(f) (No change.)

§163.13. Expedited Licensure Process.

(a) Applications for licensure shall be expedited by the board's licensure division provided the applicant meets the criteria for applying for licensure under §163.2(d) of this title (relating to Full Texas Medical License) or submits an affidavit stating that:

(1) the applicant intends to practice in a rural community as determined by the Office of Rural Health Initiatives; or

(2) the applicant intends to practice medicine in a medically underserved area or health professional shortage area designated by the United States Department of Health and Human Services that has a shortage of physicians.

(b) Applications for licensure by certain psychiatrists shall be expedited by the board's licensure division.

(1) To be eligible, the applicant must meet the following criteria:

(A) holds an unrestricted license to practice medicine issued by another state;

(B) is board certified in psychiatry by the American Board of Psychiatry and Neurology or the American Osteopathic Board of Neurology and Psychiatry; and

(C) is not ineligible for licensure under §155.003(e) of the Medical Practice Act.

(2) The board's licensure division shall review all applications upon receipt to determine whether an applicant is eligible for expedited licensure.

(3) Subsection (b) of this section is effective September 1, 2017, and expires on January 1, 2022.

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 September 1, 2017.

TRD-201703483
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: October 15, 2017
For further information, please call: (512) 305-7016

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22 TAC §163.7

The repeal is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure. The amendments are further proposed under the authority of Texas Occupations Code Annotated, Chapter 155, as amended by Senate Bill 674 (85th Leg. R.S.)(2017).

No other statutes, articles or codes are affected by this proposal.

§163.7. Ten Year Rule.

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

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For further information, please call: (512) 305-7016

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CHAPTER 171. POSTGRADUATE TRAINING PERMITS

22 TAC §171.3

The Texas Medical Board (Board) proposes an amendment to §171.3, concerning Physician-in-Training Permits.

The amendment to §171.3 adds language to subsection (d)(2)(C), clarifying that a physician-in-training permit shall expire not only upon the date the permit holder obtains full licensure, but temporary or limited licensure as well. The purpose of the amendment is to align the language of §171.3 with §163.9 of this title (relating to Only One License), which provides that a person may not have more than one license or permit at the same time, and that upon the issuance of any license or permit, all previously issued licenses and permits, including postgraduate training permits, shall be considered to be terminated.

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the section as proposed is in effect, the public benefit anticipated as a result of enforcing this proposal will be to have rules that are internally consistent and clear.

Mr. Freshour has also determined that for the first five-year period that the section is in effect, there will be no fiscal implication to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018, or email comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure. The amendment is further proposed under the authority of Texas Occupations Code Annotated, Chapter 155.

No other statutes, articles or codes are affected by this proposal.

§171.3. Physician-in-Training Permits.

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

(d) Expiration of Physician-in-Training Permit.

(1) Physician-in-Training permits shall be issued with effective dates corresponding with the beginning and ending dates of the postgraduate resident's training program as reported to the board by the program director.

(2) Physician-in-training permits shall expire on any of the following, whichever occurs first:

(A) on the reported ending date of the postgraduate training program;

(B) on the date a postgraduate training program terminates or otherwise releases a permit holder from its training program; or

(C) on the date the permit holder obtains full, temporary, or limited licensure, or temporary licensure pending full, limited, or other temporary licensure pursuant to §155.002 of the Act.

(3) (No change.)

(e) (No change.)

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

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CHAPTER 172. TEMPORARY AND LIMITED LICENSES

SUBCHAPTER B. TEMPORARY LICENSES

22 TAC §172.4. §172.8

The Texas Medical Board (Board) proposes amendments to §172.4, concerning State Health Agency Temporary License and §172.8, concerning Faculty Temporary License.

The amendments to §172.4, propose to delete language under paragraphs (1)(C) and (2)(A) referencing §163.7 of this title (relating to the Ten Year Rule). The amendments are proposed to reflect the proposed repeal of §163.7 of this title, which is also published in this issue.

The amendments to §172.8, propose to delete language under subsection (a)(2), requiring that an applicant pass the jurisprudence examination within three attempts. The changes are made pursuant to Senate Bill 674 (85th Legislature, Regular Session). Further amendments are proposed to subsection (k), deleting language referencing §163.7 of this title. The amendments are proposed to reflect the proposed repeal of §163.7, which is also published in this issue.

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect, the public benefit anticipated as a result of enforcing this proposal will be to have rules that comport with applicable statutes and are internally consistent and clear.

Mr. Freshour has also determined that for the first five-year period that the sections are in effect, there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018, or email comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure. The amendments are further proposed under the authority of Texas Occupations Code Annotated, Chapter 155, as amended by Senate Bill 674 (85th Leg. R.S.)(2017).

No other statutes, articles or Codes are affected by the amendments.

§172.4. State Health Agency Temporary License.

An applicant may elect to apply for a state health agency temporary license in lieu of licensure.

(1) The executive director of the board may issue such a temporary license to an applicant:

(A) who holds a valid license in another state or Canadian province on the basis of an examination, that is accepted by the board for licensure;

(B) who has passed the Texas medical jurisprudence examination;

(C) whose application has been filed, processed, and found to be in order. The application shall be complete in every detail [~~with the exception of compliance with §163.7 of this title (relating to Ten Year Rule)~~]; and

(D) who holds a salaried, administrative, or clinical position with an agency of the State of Texas.

(2) The state health agency temporary license shall be requested by the chief administrative officer of the employing state agency and shall be issued exclusively to that agency. The chief administrative officer shall state whether the temporary license is for a:

(A) clinical position. This temporary license will be valid for a one-year period from the date of issuance and will not be renewable. The temporary license is revocable at any time the board deems necessary. [~~To practice beyond one year, the holder of the temporary license must fully comply with §163.7 of this title (relating to Ten Year Rule).~~] During the period that the state health agency clinical temporary license is in effect, the physician will be supervised by a licensed staff physician who will regularly review the temporary license holder's skill and performance. This temporary license will be marked "clinical"; or

(B) (No change.)

§172.8. Faculty Temporary License.

(a) The board may issue a faculty temporary license to practice medicine to a physician in accordance with §155.104, Texas Occupations Code. "Physician," as used in that statute and in this section, is interpreted to mean a person who holds an M.D., D.O., or equivalent degree and who is licensed to practice medicine in another state or a Canadian province or has completed at least two years of postgraduate residency, but does not hold a license to practice medicine in this state.

(1) Each medical license held in any state, territory, or Canadian province must be free of any restrictions, disciplinary order or probation.

(2) The physician must have passed the Texas medical jurisprudence examination [~~within three attempts,~~] with a score of 75 or better.[~~, unless the board allows an additional attempt based upon a showing of good cause. An applicant who is unable to pass the JP exam within three attempts must appear before the licensure committee of the~~

~~board to address the applicant's inability to pass the examination and to re-evaluate the applicant's eligibility for licensure. It is at the discretion of the committee to allow an applicant additional attempts to take the JP exam.~~]

(b) - (j) (No change.)

~~[(k) Six months under a faculty temporary license may be used to meet the requirements under §163.7(2) of this title (relating to Ten Year Rule).]~~

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

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Mari Robinson, J.D.
Executive Director
Texas Medical Board
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CHAPTER 174. TELEMEDICINE AND MENTAL HEALTH SERVICES

The Texas Medical Board (Board) proposes amendments to §§174.1 - 174.3, 174.5 - 174.9 and new §174.4, concerning Mental Health Services and the repeal of §§174.10 - 174.12, concerning Telemedicine.

The title of Chapter 174 is renamed to "Telemedicine and Mental Health Services" and creates a new Subchapter A, "Telemedicine" and a new Subchapter B, "Mental Health Services".

The amendments to §174.1, concerning Purpose, add language that the purpose of the telemedicine rules is to clarify the requirements of Chapter 111 of the Texas Occupations code related to the provision of telemedicine health services.

The amendments to §174.2, concerning Definitions, delete multiple definitions dealing with telemedicine while adding new definitions of "Prescription," "Store and forward technology," "Telehealth services," "Telemedicine medical services," and "Ultimate user" to comport with the new definitions in Senate Bill 1107 dealing with telemedicine and telehealth services.

The amendments to §174.3, concerning Prevention of Fraud and Abuse, delete the current detailed requirements for protocols to prevent fraud and abuse through the use of telemedicine services, and substitute a requirement that a consistent physician's protocols to prevent fraud and abuse must be consistent standard established by the Health and Human Services Commission pursuant to §531.02161 of the Government Code.

New §174.4, concerning Notice to Patients, adds language requiring physicians communicating with patients by electronic communications other than telephone or facsimile to provide patients with written or electronic notification of the physician's privacy practices prior to providing telemedicine services. The amendment further requires that the notices of privacy practice be consistent with federal standards under 45 CFR Parts 160 and 164. Additionally, the amendments require physicians providing telemedicine medical services to provide patients with notice of how to file a complaint with the Board.

The amendments to §174.5, concerning Issuance of Prescriptions, sets out requirements for valid prescriptions issued as a result of a telemedicine medical service and limits the treatment of chronic pain through telemedicine medical services.

The amendments to §174.6, concerning Minimum Standards for the Provision of Telemedicine Medical Services, delete multiple requirements for providing telemedicine services and substitute simplified minimum requirements for providing a health care service or procedure as a telemedicine medical service that comport with Senate Bill 1107.

The amendments to §174.7, concerning Enforcement Authority rename the section and delete language related to providing telemedicine services under the Board's former definitions and requirements. The amendments clarify the Board's enforcement authority to investigation and discipline physicians for violations of statutes and rules to telemedicine services.

The amendments to §174.8, concerning State Licensure, rename the section, delete language related to evaluation and treatment of the patient superseded by SB 1107, and add language clarifying that physicians providing telemedicine services must possess a full Texas Medical license when treating residents of Texas.

The amendments to §174.9, concerning Provision of Mental Health Services, delete former rules regarding the provision of mental health care through telemedicine services and substitute simplified requirements for providing mental health services as telemedicine services. These requirements include: a requirement of licensure or certification; establishment of a provider/patient relationship; and a requirement to conform with the standard of care. The amendments make clear that technology may be used to provide mental health services to patients in a different location from the licensed or certified provider. The amendments also make clear that the Board may investigate and discipline providers for violations of rules related to the provision of mental health services.

The Board also proposes the repeal of §174.10, concerning Medical Records for Telemedicine Medical Services, §174.11, concerning On Call Services, and §174.12, concerning State Licensure. The repeals are necessary to ensure that the Board rules comport with SB 1107 and are not duplicative of other Board rules related to the provision of telemedicine and telemedicine services.

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing this proposal will be to make clear to the public the purpose and scope of the Board's telemedicine rules; to have rules that closely comport to Senate Bill 1107 and follow the legislature's intent in regard to the regulation of telemedicine and telehealth services; to establish one clear standard, consistent with Health and Human Services Commission rules for physicians to create protocols to help avoid fraud and abuse through the use of telemedicine and telehealth services; to insure that patients have an understanding of the privacy policy of physicians utilizing telemedicine services and how to file a complaint with the board; providing physicians clear guidelines on requirements for providing privacy notices; to establish clear guidelines for the validity of prescriptions issued as a result of a telemedicine service; to follow the legislature's intent to limit the treatment of

chronic pain through telemedicine medical services and thus protect the public health; to provide clear and simple rules regarding minimum standard for providing telemedicine medical services to the public and physicians providing telemedicine services. An additional public benefit anticipated will be to increase access to healthcare by the public; to clarify to the public and Board licensees that the Board retains enforcement authority to investigate and discipline licensees' violations of statutes and rules related to telemedicine medical services; to protect the public health by insuring that physicians treating Texas residents through telemedicine services possess a full Texas Medical license and to increase public access to mental health care services while insuring public safety by Board oversight.

Mr. Freshour has also determined that for the first five-year period the sections are in effect there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018, or email comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

SUBCHAPTER A. TELEMEDICINE

22 TAC §§174.1 - 174.8

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

No other statutes, articles or codes are affected by this proposal.

§174.1. Purpose.

(a) Pursuant to Chapter 111 of the Texas Occupations Code, and §151.056, §153.001 and §157.001 of the Medical Practice Act, the Board is authorized to adopt rules relating to the practice of medicine, including telemedicine medical services.

(b) This chapter is promulgated to clarify the requirements in Chapter 111 of the Texas Occupations Code related to the provision of telemedicine medical services [~~establish standards for the use of the Internet and the provision of telemedicine medical services by physicians who are licensed to practice medicine in this State~~]. This chapter does not apply to out-of-state telemedicine licenses issued by the Board pursuant to §151.056 of the Act and §172.12 of this title (relating to Out-of-State Telemedicine License), federally qualified health centers (FQHCs), or to consultations provided by health insurance help lines.

§174.2. Definitions.

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

(1) Prescription--Any medication(s) that require a prescription issued to the ultimate user as the result of a telemedicine medical service, by:

(A) a Texas licensed physician, and if the prescription is for a controlled substance, the physician must have a current valid DEA registration number; or

(B) issued by a Texas licensed practitioner, acting under the delegated authority of a Texas licensed physician, and in accordance with the required prescriptive authority agreement or other permissible forms of delegation as set out by Chapter 157 of the Medical Practice Act, and, if the prescription is for a controlled substance, the licensed practitioner must have a current, valid DEA registration. In addition, if the prescription is for a controlled substance listed in schedule II, the licensed practitioners may only use the official prescription forms issued with their name, address, phone number, and DEA numbers, and the delegating physician's name and DEA number.

(C) The use of electronic prescriptions (e-scripts) is allowed as permitted by state and federal law.

(2) Store and forward technology--is defined in §111.001(2) of the Texas Occupations Code.

(3) Telehealth services--is defined in §111.001(3) of the Texas Occupations Code.

(4) Telemedicine medical services--is defined in §111.001(4) of the Texas Occupations Code.

(5) Ultimate user--is the same definition used in the Texas Pharmacy Act.

[~~(1) Distant site provider--A physician or a physician assistant or advanced practice nurse who is supervised by and has delegated authority from a licensed Texas physician, who uses telemedicine to provide health care services to a patient in Texas. Distant site providers must be licensed in Texas.~~]

[~~(2) Established medical site--A location where a patient will present to seek medical care where there is a patient site presenter and sufficient technology and medical equipment to allow for an adequate physical evaluation, as appropriate for the patient's presenting complaint. It requires establishing a defined physician-patient relationship, as defined by §190.8(1)(L) of this title (relating to Violation Guidelines). A patient's private home is not considered an established medical site, except as provided in §174.6(d) of this title (relating to Telemedicine Medical Services Provided at an Established Medical Site). An established medical site includes all Mental Health and Mental Retardation Centers (MHMRs), and Community Centers, as defined by Health and Safety Code, Chapter 534, where the patient is a resident and the medical services provided are limited to mental health services.~~]

[~~(3) Face-to-face visit--An evaluation performed on a patient where the provider and patient are both at the same physical location or where the patient is at an established medical site.~~]

[~~(4) In-person evaluation--A patient evaluation conducted by a provider who is at the same physical location as the location of the patient.~~]

[~~(5) Medium--Any mechanism of information transfer including electronic means.~~]

[~~(6) Patient site location--The patient site location is where the patient is physically located.~~]

[~~(7) Patient site presenter--The patient site presenter is the individual at the patient site location who introduces the patient to the distant site physician for examination and to whom the distant site physician may delegate tasks and activities. A patient site presenter must be:~~]

[~~(A) licensed or certified in this state to perform health care services or a qualified mental health professional-community services (QMHP-CS) as defined in 25 TAC §412.303(48); and~~]

[~~(B) delegated only tasks and activities within the scope of the individual's licensure or certification.~~]

[(8) Person--An individual unless otherwise expressly made applicable to a partnership, association, or corporation.]

[(9) Physician-patient e-mail--An interactive communication via an interactive electronic text messaging system between a physician (or their medical staff and patients within a professional relationship in which the physician has taken on an explicit measure of responsibility for the patient's care.]

[(10) Telemedicine medical service--The practice of medical care delivery, initiated by a distant site provider, who is physically located at a site other than the site where the patient is located, for the purposes of evaluation, diagnosis, consultation, or treatment which requires the use of advanced telecommunications technology that allows the distant site provider to see and hear the patient in real time.]

[(11) Group or Institutional Setting--These include residential treatment facilities, halfway houses, jails, juvenile detention centers, prisons, nursing homes, group homes, rehabilitation centers, and assisted living facilities.]

§174.3. Prevention of Fraud and Abuse. [Telemedicine Medical Services]

[(a)] All physicians utilizing [that use] telemedicine medical services in their practices shall adopt protocols to prevent fraud and abuse through the use of telemedicine medical services. In order to establish that a physician has made a good faith effort these protocols [These standards] must be consistent with standards [those] established by the Health and Human Services Commission pursuant to §531.02161 of the Government Code.

[(b) In order to establish that a physician has made a good faith effort in the physician's practice to prevent fraud and abuse through the use of a telemedicine medical services, the physician must implement written protocols that address the following:

[(1) authentication and authorization of users;]

[(2) authentication of the origin of information;]

[(3) the prevention of unauthorized access to the system or information;]

[(4) system security, including the integrity of information that is collected, program integrity, and system integrity;]

[(5) maintenance of documentation about system and information usage;]

[(6) information storage, maintenance, and transmission; and]

[(7) synchronization and verification of patient profile data.]

§174.4. Notice to Patients.

Privacy Practices.

(1) Physicians that communicate with patients by electronic communications other than telephone or facsimile must provide patients with written or electronic notification of the physicians' privacy practices prior to evaluation or treatment via a telemedicine medical service. In addition, a good faith effort must be made to obtain the patient's written or electronic acknowledgement, including by e-mail, of the notice.

(2) The notice of privacy practices shall include language that is consistent with federal standards under 45 CFR Parts 160 and 164 relating to privacy of individually identifiable health information.

(3) Complaints to the Board. Physicians that utilize telemedicine medical services must provide notice of how patients may file a complaint with the Board on the physician's website or with informed consent materials provided to patients prior to the telemedicine medical service. Content and method of the notice must be consistent with §178.3 of this title (relating to Complaint Procedure Notification).

§174.5. Issuance of Prescriptions [Notice to Patients]

(a) The validity of a prescription issued as a result of a telemedicine medical service is determined by the same standards that would apply to the issuance of the prescription in an in-person setting.

(b) This rule does not limit the professional judgment, discretion or decision-making authority of a licensed practitioner. A licensed practitioner is expected to meet the standard of care and demonstrate professional practice standards and judgment, consistent with all applicable statutes and rules when issuing, dispensing, delivering, or administering a prescription medication as a result of a telemedicine medical service.

(c) A valid prescription must be:

(1) issued for a legitimate medical purpose by a practitioner as part of patient-practitioner relationship as set out in §111.005, of Texas Occupations Code; and

(2) meet all other applicable laws before prescribing, dispensing, delivering or administering a dangerous drug or controlled substance.

(d) Any prescription drug orders issued as the result of a telemedicine medical service, are subject to all regulations, limitations, and prohibitions set out in the federal and Texas Controlled Substances Act, Texas Dangerous Drug Act and any other applicable federal and state law.

(e) Limitation on Treatment of Chronic Pain. Chronic pain is a legitimate medical condition that needs to be treated but must be balanced with concerns over patient safety and the public health crisis involving overdose deaths. The Legislature has already put into place laws regarding the treatment of pain and requirements for registration and inspection of pain management clinics. Therefore, the Board has determined clear legislative intent exists for the limitation of chronic pain treatment through a telemedicine medical service.

(1) For purposes of this rule, chronic pain has the same definition as used in §170.2(4) of this title (relating to Definitions).

(2) For purposes of this rule, acute pain has the same definition as used in §170.2(2) of this title.

(A) Treatment of chronic pain with scheduled drugs through use of telemedicine medical services is prohibited, unless otherwise allowed under federal and state law.

(B) Treatment of acute pain with scheduled drugs through use of telemedicine medical services is allowed, unless otherwise prohibited under federal and state law.

[(a) Privacy Practices.]

[(1) Physicians that communicate with patients by electronic communications other than telephone or facsimile must provide patients with written notification of the physicians' privacy practices prior to evaluation or treatment. In addition, a good faith effort must be made to obtain the patient's written acknowledgement, including by e-mail, of the notice.]

[(2) The notice of privacy practices shall include language that is consistent with federal standards under 45 CFR Parts 160 and 164 relating to privacy of individually identifiable health information.]

[(b) Limitations of Telemedicine. Physicians who use telemedicine medical services must, prior to providing services, give their patients notice regarding telemedicine medical services, including the risks and benefits of being treated via telemedicine, how to receive follow-up care or assistance in the event of an adverse reaction to the treatment or in the event of an inability to communicate as a result of a technological or equipment failure. A signed and dated notice, including an electronic acknowledgement, by the patient establishes a presumption of notice.]

[(c) Necessity of In-Person Evaluation. When, for whatever reason, the telemedicine modality in use for a particular patient encounter is unable to provide all pertinent clinical information that a health care provider exercising ordinary skill and care would deem reasonably necessary for the practice of medicine at an acceptable level of safety and quality in the context of that particular medical encounter, then the distant site provider must make this known to the patient prior to the conclusion of the live telemedicine encounter and advise the patient, prior to the conclusion of the live telemedicine encounter, regarding the need for the patient to obtain an additional in-person medical evaluation reasonably able to meet the patient's needs.]

[(d) Complaints to the Board. Physicians that use telemedicine medical services must provide notice of how patients may file a complaint with the Board on the physician's website or with informed consent materials provided to patients prior to rendering telemedicine medical services. Written content and method of the notice must be consistent with §178.3 of this title (relating to Complaint Procedure Notification).]

§174.6. Minimum Standards for the Provision of Telemedicine Medical Services [Provided at an Established Medical Site].

(a) A health professional providing a health care service or procedure as a telemedicine medical service:

(1) is subject to the same standard of care that would apply to the provision of the same health care service or procedures in an in person setting;

(2) must establish a practitioner-patient relationship; and

(3) must maintain complete and accurate medical records as set out in §165.1 of this title (relating to Medical Records).

(b) Adequate measures must be implemented to ensure that patient communications, recordings and records are protected consistent with Federal and State privacy laws.

[(a) Telemedicine medical services provided at an established medical site may be used for all patient visits, including initial evaluations to establish a defined physician-patient relationship between a distant site provider and a patient.]

[(b) For new conditions, a patient site presenter must be reasonably available onsite at the established medical site to assist with the provision of care. It is at the discretion of the distant site physician if a patient site presenter is necessary for follow-up evaluation or treatment of a previously diagnosed condition.]

[(1) A distant site provider may delegate tasks and activities to a patient site presenter during a patient encounter.]

[(2) A distant site provider delegating tasks to a patient site presenter shall ensure that the patient site presenter to whom delegation is made is properly supervised.]

[(c) If the only services provided are related to mental health services, a patient site presenter is not required, except in cases of behavioral emergencies, as defined by 25 TAC §415.253 (relating to Definitions).]

[(d) For the purposes of this chapter the following shall be considered to be an established medical site:]

[(1) The patient's home, including a group or institutional setting where the patient is a resident, if the medical services being provided in this setting are limited to mental health services;]

[(2) For medical services, other than mental health services, to be provided at the patient's home, including a group or institutional setting where the patient is a resident, the following requirements must be met:]

[(A) a patient site presenter is present;]

[(B) there is a defined physician-patient relationship as set out in §174.8 of this title (relating to Evaluation and Treatment of the Patient);]

[(C) the patient site presenter has sufficient communication and remote medical diagnostic technology to allow the physician to carry out an adequate physical examination appropriate for the patient's presenting condition while seeing and hearing the patient in real time. All such examinations will be held to the same standard of acceptable medical practices as those in traditional clinical settings; and]

[(D) An online questionnaire or questions and answers exchanged through email, electronic text, or chat or telephonic evaluation of or consultation with a patient do not meet the requirements for subparagraph (C) of this paragraph.]

§§174.7. Enforcement Authority [Telemedicine Medical Services Provided at Sites other than an Established Medical Site].

Complaints regarding violations of statutes and rules related to telemedicine medical services may result in an investigation and discipline under the Medical Practice Act and applicable rules and procedures, or referral to the proper regulatory authority of the practitioner proving telemedicine medical services.

[(a) A distant site provider who provides telemedicine medical services at a site other than an established medical site for a patient's previously diagnosed condition must either:]

[(1) see the patient one time in a face-to-face visit before providing telemedicine medical care; or]

[(2) see the patient without an initial face-face to visit, provided the patient has received an in-person evaluation by another physician who has referred the patient for additional care and the referral is documented in the medical record.]

[(b) Patient site presenters are not required for pre-existing conditions previously diagnosed by a physician through a face-to-face visit.]

[(c) All patients must be seen by a physician for an in-person evaluation at least once a year.]

[(d) Telemedicine medical services may not be used to treat chronic pain with scheduled drugs. at sites other than medical practice sites.]

[(e) A distant site provider may treat an established patient's new symptoms which are unrelated to a patient's preexisting condition provided that the patient is advised to see a physician in a face-to-face visit within 72 hours. A distant site provider may not provide continuing telemedicine medical services for these new symptoms to a patient who is not seen within 72 hours. If a patient's symptoms are resolved within 72 hours, such that continuing treatment for the acute symptoms is not necessary, then a follow-up face-to-face visit is not required.]

§174.8. State Licensure [Evaluation and Treatment of the Patient].

Physicians who treat and prescribe through advanced communications technology are practicing medicine and must possess a full Texas medical license when treating residents of Texas. An out-of-state physician may provide episodic consultations without a Texas medical license, as provided in Texas Occupations Code, §151.056, §172.2(g)(4) of this title (relating to Construction and Definitions), and §172.12(f) of this title (relating to Out-of-State Telemedicine License).

[~~(a)~~ Evaluation of the Patient. Distant site providers who utilize telemedicine medical services must ensure that a defined physician-patient relationship is established which at a minimum includes:]

[~~(1) establishing that the person requesting the treatment is in fact who the person claims to be;~~]

[~~(2) establishing a diagnosis through the use of acceptable medical practices, including documenting and performing patient history, mental status examination, and physical examination that must be performed as part of a face-to-face or in-person evaluation as defined in §174.2(3) and (4) of this title (relating to Definitions). The requirement for a face-to-face or in-person evaluation does not apply to mental health services, except in cases of behavioral emergencies, as defined by 25 TAC §415.253 (relating to Definitions), and appropriate diagnostic and laboratory testing to establish diagnoses, as well as identify underlying conditions or contra-indications, or both, to treatment recommended or provided;~~]

[~~(3) discussing with the patient the diagnosis and the evidence for it, the risks and benefits of various treatment options, and~~]

[~~(4) ensuring the availability of the distant site provider or coverage of the patient for appropriate follow-up care.~~]

[~~(b) Treatment. Treatment and consultation recommendations made in an online setting, including issuing a prescription via electronic means, will be held to the same standards of acceptable medical practices as those in traditional in-person clinical settings.~~]

[~~(c) An online questionnaire or questions and answers exchanged through email, electronic text, or chat or telephonic evaluation of or consultation with a patient are inadequate to establish a defined physician-patient relationship.~~]

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

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Executive Director
Texas Medical Board
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SUBCHAPTER B. MENTAL HEALTH SERVICES

22 TAC §174.9

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

No other statutes, articles or codes are affected by this proposal.

§174.9. Provision of Mental Health Services [~~Technology and Security Requirements~~].

The Board recognizes that mental health services are expressly exempt from the provisions of Section 111, Texas Occupations Code. However, these services are the practice of medicine. Pursuant to §§151.056, 153.001 and 157.001 of the Medical Practice Act, the Board has authority to promulgate rules concerning mental health services. Given that many areas of the state lack access to mental health services and providers, the use of technology can help alleviate this shortage. Therefore, the following rules are enacted to provide greater access to care, while insuring patient safety:

(1) Licensure or Certification Required--Any individual providing mental health services must be properly licensed or certified in this state to perform health care services, or be a qualified mental health professional-community services (QMHP-CS) as defined in 25 TAC §412.303(48) (relating to Definitions); and be delegated only tasks and activities within the scope of the individual's licensure or certification.

(2) Use of Technology to Provide Mental Health Services--Mental health services may be provided to a patient at a different location from the location of the licensed or certified provider using telecommunications or information technology.

(3) Establishing the Provider/Patient relationship--When providing mental health services, the provider must establish the provider-patient relationship, which can be established through use of telecommunications or information technology.

(4) Standard of Care--When providing mental health services, such services must be conducted in the same manner as those in a traditional in-person setting. This includes keeping of proper medical records, performing observations and evaluations, and treatment. If treatment involves the use of prescription medication, all applicable federal and state laws and rules apply.

(5) Investigations and Discipline--Complaints regarding violations of rules related to mental health services may result in an investigation and discipline under the Medical Practice Act and applicable board rules and procedures, or referral to the proper regulatory authority of the practitioner providing the mental health services.

(6) Chronic Pain Treatment Prohibited--Treatment of chronic pain with scheduled drugs through use of telecommunications or information technology is prohibited, unless otherwise allowed under federal and state law.

[~~(a) At a minimum, advanced communication technology must be used for all patient evaluation and treatment conducted via telemedicine.~~]

[~~(b) Adequate security measures must be implemented to ensure that all patient communications, recordings and records remain confidential.~~]

[~~(c) Electronic Communications.~~]

[~~(1) Written policies and procedures must be maintained when using electronic mail for physician-patient communications. Policies must be evaluated periodically to make sure they are up to date. Such policies and procedures must address:~~]

[~~(A) privacy to assure confidentiality and integrity of patient-identifiable information;~~]

[(B) health care personnel, in addition to the physician, who will process messages;]

[(C) hours of operation and availability;]

[(D) types of transactions that will be permitted electronically;]

[(E) required patient information to be included in the communication, such as patient name, identification number and type of transaction;]

[(F) archival and retrieval; and]

[(G) quality oversight mechanisms.]

[(2) All relevant patient-physician e-mail, as well as other patient-related electronic communications, must be stored and filed in the patient's medical record.]

[(3) Patients must be informed of alternative forms of communication for urgent matters.]

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

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CHAPTER 174. TELEMEDICINE

22 TAC §§174.10 - 174.12

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

No other statutes, articles or codes are affected by this proposal.

§174.10. Medical Records for Telemedicine Medical Services.

§174.11. On-Call Services.

§174.12. State Licensure.

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

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CHAPTER 175. FEES AND PENALTIES

22 TAC §175.1, §175.2

The Texas Medical Board (Board) proposes amendments to §175.1, concerning Application and Administrative Fees; and §175.2, concerning Registration and Renewal Fees.

The amendment to §175.1 deletes language tying fee calculation for the Prescription Drug Monitoring Program (PMP) to Article IX, §18.55 of House Bill 1, 84th Legislature, and adds language requiring fee calculation to be made in accordance with the Texas General Appropriations Act. The amendment will increase flexibility under the rules for any future PMP fee changes necessitated by amendments made to the Medical Board's cost allocation for PMP administration through the General Appropriations Act.

The amendment to §175.2 deletes language tying fee calculation for the Prescription Drug Monitoring Program to Article IX, §18.55 of House Bill 1, 84th Legislature, and adds language requiring fee calculation to be in accordance with the Texas General Appropriations Act. The amendment will increase flexibility under the rules for any future PMP fee changes necessitated by amendments made to the Medical Board's cost allocation for PMP administration through the General Appropriations Act.

Scott Freshour, General Counsel for the Board, has determined that for the first five-year period the sections are in effect there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. The effect to individuals required to comply with the rules as proposed will be the increase to PMP fees for a license affected by these changes, necessitated by increases made to the Medical Board's total cost allocation by Article VIII, Senate Bill 1, (85th Legislature, R.S.). For FY18, physician PMP fees will increase by an estimated $4.82, and then decreased by $.82 for FY 19. Physician Assistant PMP fees will increase by an estimated $2.41 for FY18, and then decrease by $.41 for FY19. There will be no effect on small or micro businesses.

Mr. Freshour has determined that for each year of the first five years the sections as proposed are in effect, the public benefit anticipated as a result of enforcing this proposal will be to allow the agency to carry out its statutory mandates related to PMP administration costs.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018 or email comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure. The amendments are also authorized by Texas Occupations Code Annotated, §156.001; §554.006, and Article VIII, Senate Bill 1, 85th Legislature, Regular Session (2017).

No other statutes, articles or codes are affected by this proposal.

§175.1. Application and Administrative Fees.

The board shall charge the following fees for processing an application for a license or permit:

(1) Physician Licenses:

(A) - (H) (No change.)

(I) In accordance with §554.006 of the Texas Occupations Code, for those physician license types that confer the authority to prescribe controlled substances and access the Prescription Drug Monitoring Program described by §§481.075, 481.076, and 481.0761 of the Texas Health and Safety Code, the Board shall charge an additional reasonable and necessary fee sufficient to cover the Board's responsible portion for costs related to the Texas Pharmacy Board's establishment and implementation of the drug monitoring program. The fee amount will be calculated in accordance with the Texas General Appropriations Act [~~appropriation match amount assigned to the Board under Article IX, §18.55 of House Bill 1, 84th Legislature, Regular Session (2015)~~].

(2) Physician Assistants:

(A) - (C) (No change.)

(D) In accordance with §554.006 of the Texas Occupations Code, the Board shall charge an additional reasonable and necessary fee sufficient to cover the Board's responsible portion for costs related to the Texas Pharmacy Board's establishment and implementation of the Prescription Drug Monitoring Program described by §§481.075, 481.076, and 481.0761 of the Texas Health and Safety Code. The fee amount will be calculated in accordance with the Texas General Appropriations Act [~~appropriation match amount assigned to the Board under Article IX, §18.55 of House Bill 1, 84th Legislature, Regular Session (2015)~~].

(3) - (9) (No change.)

§175.2. Registration and Renewal Fees.

The board shall charge the following fees to continue licenses and permits in effect:

(1) Physician Registration Permits:

(A) - (C) (No change.)

(D) In accordance with §554.006 of the Texas Occupations Code, for those physician license types that confer the authority to prescribe controlled substances and access the Prescription Drug Monitoring Program described by §§481.075, 481.076, and 481.0761 of the Texas Health and Safety Code, the Board shall charge an additional reasonable and necessary fee sufficient to cover the Board's responsible portion for costs related to the Texas Pharmacy Board's establishment and implementation of the drug monitoring program. The fee amount will be calculated in accordance with the Texas General Appropriations Act [~~appropriation match amount assigned to the Board under Article IX, §18.55 of House Bill 1, 84th Legislature, Regular Session (2015)~~].

(2) Physician Assistant Registration Permits:

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

(C) In accordance with §554.006 of the Texas Occupations Code, the Board shall charge an additional reasonable and necessary fee sufficient to cover the Board's responsible portion for costs related to the Texas Pharmacy Board's establishment and implementation of the Prescription Drug Monitoring Program described by §§481.075, 481.076, and 481.0761 of the Texas Health and Safety Code. The fee amount will be calculated in accordance with the Texas General Appropriations Act [~~appropriation match amount assigned to the Board under Article IX, §18.55 of House Bill 1, 84th Legislature, Regular Session (2015)~~].

(3) - (7) (No change.)

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

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CHAPTER 178. COMPLAINTS

22 TAC §178.3

The Texas Medical Board (Board) proposes amendments to §178.3, concerning Complaint Procedure Notification.

The amendment deletes the word "Procedure" from the title, deletes language related to the type size of printed copies of the board approved notification statement regarding complaints on billing statements and written contracts for services. The amendment adds language setting allowing telemedicine providers to provide the Board approved complaint notification statement through: a prominently displayed link on a website, in a provider app; by recording, or in a bill for services.

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing this proposal will be to insure that members of the public receiving telemedicine medical services are notified of procedures for filing complaints with the Board. The amendment provide the further benefit of allowing physicians providing telemedicine services to provide such notification through means consistent with the manner in which telemedicine services are provided.

Mr. Freshour has also determined that for the first five-year period the section is in effect there will be no fiscal implication to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure. The amendments are also proposed under the authority of Texas Occupations Code Annotated, §152.006.

No other statutes, articles or codes are affected by this proposal.

§178.3. Complaint [~~Procedure~~] Notification.

(a) Methods of Notification.

(1) Complaints against licensees. Pursuant to the Act, for the purpose of directing complaints to the board, the board and its li-

censees shall provide notification to the public of the name, mailing address, [~~and~~] telephone number and website address of the board by one or more of the following methods:

(A) displaying in a prominent location at a licensee's place of business, signs in English and Spanish of no less than 8 1/2 inches by 11 inches in size with the board-approved notification statement printed alone and in its entirety in black on white background in type no smaller than standard 24-point Times Roman print with no alterations, deletions, or additions to the language of the board-approved statement; or

(B) ~~placing the board-approved notification statement printed in English and Spanish in black type no smaller than standard 10-point 12-pitch typewriter print on each bill for services by a licensee with no alterations, deletions, or additions to the language of the board-approved statement; or~~] if providing telemedicine medical services, by a prominently displayed link on the provider website; in a provider app; by recording; or in a bill for services, the approved notification statement described in subsections (b) and (c) of this section. The notice must be no less than a 10-point easily readable font, and with no alterations, deletions, or additions to the language of the board-approved statement.

~~[(C) placing the board-approved notification statement printed in English and Spanish in black type no smaller than standard 10-point, 12-pitch typewriter print on each registration form, application, or written contract for services of a licensee with no alterations, deletions, or additions to the language of the board-approved statement.]~~

(2) A private autopsy facility, as defined under §671A.001 of the Health and Safety Code, must post notice in a conspicuous place in a public area of the facility that substantially complies with the notice of subsection (b) of this section with included language on filing complaints against physicians who perform autopsy services.

(b) - (c) (No change.)

(d) Figures 1 - 4 are the required Board approved statements to be utilized under this rule [~~samples of the type print referenced in subsection (a)(1) and (2) of this section~~].

Figure 1: 22 TAC §178.3(d) (No change.)
Figure 2: 22 TAC §178.3(d) (No change.)
Figure 3: 22 TAC §178.3(d) (No change.)
Figure 4: 22 TAC §178.3(d) (No change.)

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

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Texas Medical Board
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For further information, please call: (512) 305-7016

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CHAPTER 187. PROCEDURAL RULES

The Texas Medical Board (Board) proposes amendments to §187.16, concerning Informal Show Compliance Proceedings (ISCs), §187.18, concerning Informal Show Compliance Proceeding and Settlement Conference Based on Personal Appearance, and §187.83, concerning Proceedings for Cease and Desist Orders.

The amendments to §187.16 set out a finding that the statutory minimum requirements related to the Informal Show Compliance Proceedings (ISCs), as set out in the Texas Occupations Code, §164. et.seq., are comprehensive and complete. The amendments state that rules related to ISC proceedings will be promulgated only as necessary to be consistent with statutory requirements. The amendment deletes provisions duplicative of §164 of the Texas Occupations Code and deletes an incorrect reference to providing 30 rather than 45 days notice prior to an ISC.

The amendment to §187.18, deletes ISC requirements duplicative of those set out in §164.003 and §164.0031 of the Occupations Code and clarify the procedures for conducting an ISC.

The amendment to §187.83, corrects a typographical error in a citation to Texas Occupations Code §164.052.

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing this proposal will be to ensure that the rules regarding ISCs are more consistent with the statutory requirements for ISCs as set out in the Occupations Code and provide clear information as to the notice requirements for an ISC; to create rules that are clear and unambiguous, and better aligned with both the Board's current procedures and the Occupation Code's requirements for ISCs. The public will further benefit from a clear understanding of the procedures for conducting an ISC and to ensure the public may rely on accurate legal citations.

Mr. Freshour has also determined that for the first five-year period the sections are in effect there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

SUBCHAPTER B. INFORMAL BOARD PROCEEDINGS

22 TAC §187.16, §187.18

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure. The amendments are also proposed under the authority of Texas Occupations Code Annotated, §152.006.

No other statutes, articles or codes are affected by this proposal.

§187.16. Informal Show Compliance Proceedings (ISCs).

(a) Texas Medical Board finds that statutory minimum requirements related to the Informal Show Compliance Proceedings (ISCs) as set out in the Texas Occupations Code, §164. et.seq. are comprehensive and complete. Pursuant to §153.001 and §164.003 of the Medical Practice Act, the Board is authorized to adopt rules relating to the ISCs and how they are to be conducted. These rules are promulgated to clar-

ify the ISC process and procedures only as necessary to be consistent with the statutory requirements.

(b) [~~(a)~~] Notice of the time, date and place of the ISC shall be extended to the licensee and the complainant(s) in writing, by hand delivery, regular mail, certified mail - return receipt requested, overnight or express mail, courier service, or registered mail, to the address of record of the complainants and the address of record of the licensee or the licensee's authorized representative to [~~be sent by the Board at least 30 days prior to the date of the ISC for complaints filed before September 1, 2011. For complaints filed on or after September 1, 2011, the notice shall~~] be sent at least 45 days prior to the date of the ISC. The notice to the licensee or the licensee's authorized representative shall also include:

(1) a statement that the licensee has the opportunity to attend and participate in the informal meeting;

(2) a written statement of the nature of the allegations; and

(3) a copy of the information the board intends to use at the ISC. If the complaint includes an allegation that the licensee has violated the standard of care, the notice shall also include a copy of the Expert Physician Reviewers' Report, prepared in accordance with §154.0561, Texas Occupations Code. [~~In addition, the board will also provide the licensee with the rules governing the proceeding and guidelines to assist the licensee to prepare for the ISC, including requirements regarding requests to reschedule the ISC.~~] The information required by this section may be given in separate communications at different times, provided all of the information has been provided at least [~~30 days prior to the date of the ISC for complaints filed before September 1, 2011. For complaints filed with the board on or after September 1, 2011, the information to the licensee shall be sent at least~~] 45 days prior to the date of the ISC.

[~~(b) If the information that the board intends to use at the ISC includes only excerpts of any medical record, the licensee has a right to obtain the complete medical record within 14 days after a request is mailed.~~]

[~~(c) A licensee may be asked to respond in writing to questions from the board staff concerning the matter. If the licensee is asked to respond to written questions, the licensee shall respond within 14 days after the notice is mailed. The licensee's response may include any additional information the licensee wants the board representatives to consider.~~]

(c) [~~(d)~~] All information provided by the board staff and the licensee shall be provided to the board representatives for review prior to the board representatives making a determination of whether the licensee has violated the Act, board rules, remedial plan, or board order.

(d) [~~(e)~~] All informal show compliance proceedings shall be scheduled not later than the 180th day after the date the board's official investigation of the complaint is commenced, unless good cause is shown by the board for scheduling the informal meeting after that date. For purposes of this subsection:

(1) "Scheduled" means the act of the agency to reserve a date for the ISC.

(2) "Good cause" shall have the meaning set forth in §179.6 of this title (relating to Time Limits).

§187.18. Informal Show Compliance Proceeding and Settlement Conference Based On Personal Appearance.

(a) After referral of an investigation to the agency's legal division, the Hearings Coordinator of the board shall schedule an ISC before an ISC Panel in accordance with the requirements set forth in §164.003(b)(4) and §164.0031 of the Act[~~, composed of two or more board representatives to be held after proper notice to the licensee. One board representative must be a public member. If the matter is before the Medical Board, at least one board representative must be a physician member~~].

(b) Requests to reschedule the ISC by a licensee must be in writing and shall be referred to the Hearings Counsel for consideration. To avoid undue disruption of the ISC schedule, the Hearings Counsel should grant a request [~~only after conferring with the Hearings Coordinator and strictly~~] applying the following guidelines:

(1) A request by a licensee to reschedule an ISC must be in writing and may be granted only if the licensee provides satisfactory evidence of the following requirements:

(A) A request received by the agency within five business days after the licensee received notice of the date of the ISC, must provide details showing that:

(i) the licensee has a conflicting event that had been scheduled prior to receipt of notice of the ISC;

(ii) the licensee has made reasonable efforts to reschedule such event but a conflict cannot reasonably be avoided.

(B) A request received by the agency more than five business days after the licensee received notice of the date of the ISC must provide details showing that an extraordinary event or circumstance has arisen since receipt of the notice that will prevent the licensee from attending the ISC. The request must show that the request is made within five business days after the licensee first becomes aware of the event or circumstance.

(2) A request by a licensee to reschedule an ISC based on the failure of the agency to send timely notice before the date scheduled for the ISC, as required by §164.003 of the Act, shall be granted, provided the request is received by the agency within five business days after the late notice is received by the licensee.

(c) Prior to the ISC, the board representatives shall be provided with the information sent to the licensee by the board staff and any responses received in accordance with §164.003(f) of the Act [~~and all information timely received in response from the licensee. Information must be received from the licensee at least five business days prior to the ISC for complaints filed before September 1, 2011. For complaints filed with the board on or after September 1, 2011, the information must be received at least 15 days prior to the date of the ISC~~].

[~~(d) An ISC may be conducted by only one panelist if:~~]

[~~(1) the ISC is related to an order of the board, such as to show compliance, a probation appearance, or a request for termination or modification, or~~]

[~~(2) the affected licensee waives the requirement that at least two panelists conduct the ISC. In such situations, the panelist may be either a physician, physician assistant, or acupuncturist (depending on the licensee involved) or a member who represents the public.~~]

(d) [~~(e)~~] Informal proceedings shall be conducted in accordance with §164.003 and §164.0032 of the Act. The board representatives may [~~shall allow~~]:

[~~(1) the board staff to present a summary of the allegations and the facts that the board staff reasonably believes could be proven by competent evidence at a formal hearing;~~]

[~~(2) the licensee to reply to the board staff's presentation and present facts the licensee reasonably believes could be proven by competent evidence at a formal hearing;~~]

[(3) presentation of evidence by the board staff and the licensee, which may include medical and office records, x-rays, pictures, film recordings of all kinds, audio and video recordings, diagrams, charts, drawings, and any other illustrative or explanatory materials which in the discretion of the board representatives are relevant to the proceeding;]

[(4) representation of the licensee by an authorized representative;]

[(5) presentation of oral or written statements by the licensee or authorized representative;]

[(6) presentation of written statements by witnesses;]

[(7) questioning of the witnesses in a manner prescribed by the panel;]

(1) [(8)] ask questions [questioning] of the licensee and staff, and allow clarifying questions by staff;

(2) [(9)] allow a closing summary [statement] by both the licensee or the licensee's authorized representative and board staff.[;]

[(10) closing statement by the board's staff; and]

[(11) upon request by board representatives the board staff may propose appropriate disciplinary action and the licensee or authorized representative may respond.]

[(f) The board representatives, board staff, the licensee, and the licensee's authorized representative shall be present during the presentation of statements and testimony during the ISC.]

(e) [(g) The [Notwithstanding subsection (f) of this section, the] board representatives may allow a complainant, [or witness] to make an oral statement. Such statement may be given [testify] outside the physical presence of the licensee [to protect the person from harassment and/or undue embarrassment, for personal safety concerns, or] for a [any other] demonstrated and legitimate need. If such statement [testimony] is allowed, arrangements will be made to allow the licensee to listen to the statement [testimony] contemporaneously as it is given.

(f) [(h)] The board representatives may refuse to consider any information [evidence] not submitted in a timely manner without good cause. If the board representatives allow the licensee to submit late information [evidence], the representatives may reschedule. [and/or recommend an additional administrative penalty for the late submission.]

(g) [(i)] A board attorney, who has not been involved with the preparation of the case, shall be designated as the Hearings Counsel, and act in accordance with §164.003 and §164.0032 of the Act. [and shall be present during the ISC and the panel's deliberations to advise the panel on legal issues that arise during the ISC. The Hearings Counsel shall be permitted to ask questions of participants in the ISC to clarify any statement made by the participant. The Hearings Counsel shall provide to the ISC panel a historical perspective on comparable cases that have appeared before the board, keep the proceedings focused on the case being discussed, and ensure that the board's employees and the licensee have an opportunity to present information related to the case.]

[(j) At the ISC, the board representatives shall attempt to resolve disputed matters and the representatives may call upon the board staff at any time for assistance in conducting the ISC.]

[(k) The board representatives shall prohibit or limit access to the board's investigative file by the licensee, the licensee's authorized representative, the complainant(s), witnesses, and the public consistent with the Act, §164.007(c).]

(h) [(l)] A [On] request by a licensee to make [, the board shall make] a recording of the ISC, as allowed by §164.003(i) of the Act,[. The request] must be submitted in writing, and received by the Board at least 15 days prior to the date of the ISC. Deliberations of the ISC panel shall be excluded from any such recording. [The media format of the recording shall be determined by the board.] The recording is part of the investigative file and may not be released to a third party unless authorized under the Act. The [board may charge the] licensee may be charged a fee to cover the cost of recording the proceeding. Licensees and their representatives may not independently record an ISC.

(i) [(m)] The ISC shall be informal and shall not follow the procedures established under this title for formal board proceedings.

(j) [(n)] At the conclusion of the presentations, the board representatives shall deliberate in order to make recommendations for the disposition of the complaint or allegations. [An employee of the board who participated in the presentation of the allegation or information gathered in the investigation of the complaint, the affected licensee, the licensee's authorized representative, the complainant, the witnesses, and members of the public may not be present during the deliberations. The Hearings Counsel may be present only to advise the panel on legal issues and to provide information on comparable cases that have appeared before the board.]

(k) [(o)] The board representatives may:

(1) make recommendations to dismiss the complaint or allegations. The dismissal of any matter is without prejudice to additional investigation and/or reconsideration of the matter at any time;

(2) make recommendations regarding an agreed order and propose resolution of the issues to the licensee to be reduced to writing and processed in accordance with §187.19 of this title (relating to Resolution by Agreed Order);

(3) defer the ISC, pending further investigation;

(4) direct that a formal Complaint be filed with SOAH;

(5) recommend to the President of the board that a Disciplinary Panel be convened to consider the temporary suspension or restriction of the licensee's license;

(6) recommend the imposition of an administrative penalty pursuant to §§187.75 - 187.82 of this chapter (relating to Procedural Rules); or

(7) recommend that a remedial plan be issued to resolve the complaint pursuant to §187.9 of this chapter (relating to Board Actions).

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

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Texas Medical Board
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SUBCHAPTER I. PROCEEDINGS FOR CEASE AND DESIST ORDERS

22 TAC §187.83

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure. The amendments are also proposed under the authority of Texas Occupations Code Annotated, §152.006.

No other statutes, articles or codes are affected by this proposal.

§187.83. Proceedings for Cease and Desist Orders.

(a) - (d) (No change.)

(e) Cease and Desist Hearing.

(1) - (3) (No change.)

(4) Procedures before the panel.

(A) In accordance with the Act, §165.052 [~~§165.051~~], before a cease and desist order may be issued, the board must provide an individual with notice and opportunity for a hearing.

(B) - (C) (No change.)

(5) (No change.)

(f) (No change.)

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

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CHAPTER 190. DISCIPLINARY GUIDELINES
SUBCHAPTER B. VIOLATION GUIDELINES

22 TAC §190.8

The Texas Medical Board (Board) proposes amendments to §190.8(1)(L), concerning Violation Guidelines.

The amendment deletes language and requirements related to establishing a defined physician-patient relationship before prescribing any dangerous drug or controlled substance, and substitutes language requiring establishing a valid practitioner-patient relationship, a term defined by SB 1107 in amended Texas Occupations Code §111.005.

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing this proposal will be to treat all physicians prescribing dangerous drugs or controlled substances in the same manner while harmonizing this Board rule with the requirements of SB 1107 related to valid practitioner-patient relationships.

Mr. Freshour has also determined that for the first five-year period the section is in effect there will be no fiscal implication to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure. The amendments are also proposed under the authority of Texas Occupations Code Annotated, §152.006.

No other statutes, articles or codes are affected by this proposal.

§190.8. Violation Guidelines.

When substantiated by credible evidence, the following acts, practices, and conduct are considered to be violations of the Act. The following shall not be considered an exhaustive or exclusive listing.

(1) Practice Inconsistent with Public Health and Welfare. Failure to practice in an acceptable professional manner consistent with public health and welfare within the meaning of the Act includes, but is not limited to:

(A) failure to treat a patient according to the generally accepted standard of care;

(B) negligence in performing medical services;

(C) failure to use proper diligence in one's professional practice;

(D) failure to safeguard against potential complications;

(E) improper utilization review;

(F) failure to timely respond in person when on-call or when requested by emergency room or hospital staff;

(G) failure to disclose reasonably foreseeable side effects of a procedure or treatment;

(H) failure to disclose reasonable alternative treatments to a proposed procedure or treatment;

(I) failure to obtain informed consent from the patient or other person authorized by law to consent to treatment on the patient's behalf before performing tests, treatments, procedures, or autopsies as required under Chapter 49 of the Code of Criminal Procedure;

(J) termination of patient care without providing reasonable notice to the patient;

(K) prescription or administration of a drug in a manner that is not in compliance with Chapter 200 of this title (relating to Standards for Physicians Practicing Complementary and Alternative Medicine) or, that is either not approved by the Food and Drug Administration (FDA) for use in human beings or does not meet standards for off-label use, unless an exemption has otherwise been obtained from the FDA;

(L) prescription of any dangerous drug or controlled substance without first establishing a valid practitioner-patient [~~defined physician-patient~~] relationship.

~~[(i) A defined physician-patient relationship must include, at a minimum:]~~

~~[(I) establishing that the person requesting the medication is in fact who the person claims to be;]~~

~~[(II) establishing a diagnosis through the use of acceptable medical practices, which includes documenting and performing:]~~

~~[(-a-) patient history;]~~

~~[(-b-) mental status examination;]~~

~~[(-c-) physical examination that must be performed by either a face-to-face visit or in-person evaluation as defined in §174.2(3) and (4) of this title (relating to Definitions). The requirement for a face-to-face or in-person evaluation does not apply to mental health services, except in cases of behavioral emergencies, as defined by 25 TAC §415.253 (relating to Definitions); and]~~

~~[(-d-) appropriate diagnostic and laboratory testing.]~~

~~[(III) An online questionnaire or questions and answers exchanged through email, electronic text, or chat or telephonic evaluation of or consultation with a patient are inadequate to establish a defined physician-patient relationship;]~~

~~[(IV) discussing with the patient the diagnosis and the evidence for it, the risks and benefits of various treatment options; and]~~

~~[(V) ensuring the availability of the licensee or coverage of the patient for appropriate follow-up care.]~~

~~[(ii) A proper professional relationship is also considered to exist between a patient certified as having a terminal illness and who is enrolled in a hospice program, or another similar formal program which meets the requirements of clause (i)(I) - (IV) of this subparagraph, and the physician supporting the program. To have a terminal condition for the purposes of this rule, the patient must be certified as having a terminal illness under the requirements of 40 TAC §97.403 (relating to Standards Specific to Agencies Licensed to Provide Hospice Service) and 42 CFR 418.22].~~

[(iii)] [~~Notwithstanding the provisions of this subparagraph, establishing~~] Establishing a practitioner-patient [~~professional~~] relationship is not required for:

(i) [~~(I)~~] a physician to prescribe medications for sexually transmitted diseases for partners of the physician's established patient, if the physician determines that the patient may have been infected with a sexually transmitted disease; or

(ii) [~~(II)~~] a physician to prescribe dangerous drugs and/or vaccines for post-exposure prophylaxis of disease for close contacts of a patient if the physician diagnoses the patient with one or more of the following infectious diseases listed in subclauses (I) - (VII) of this clause [~~items (-a-) - (-g-) of this subclause~~], or is providing public health medical services pursuant to a memorandum of understanding entered into between the board and the Department of State Health Services. For the purpose of this clause, a "close contact" is defined as a member of the patient's household or any person with significant exposure to the patient for whom post-exposure prophylaxis is recommended by the Centers for Disease Control and Prevention, Texas Department of State Health Services, or local health department or authority ("local health authority or department" as defined under Chapter 81 of the Texas Health and Safety Code). The physician must document the treatment provided to the patient's close contact(s) in the patient's medical record. Such documentation at a minimum must include the close contact's name, drug prescribed, and the date that the prescription was provided.

(I) [~~(-a-)~~] Influenza;

(II) [~~(-b-)~~] Invasive Haemophilus influenzae Type B;

(III) [~~(-c-)~~] Meningococcal disease;

(IV) [~~(-d-)~~] Pertussis;

(V) [~~(-e-)~~] Scabies;

(VI) [~~(-f-)~~] Varicella zoster; or

(VII) [~~(-g-)~~] a communicable disease determined by the Texas Department of State Health Services to:

(-a-) [~~(-1-)~~] present an immediate threat of a high risk of death or serious long-term disability to a large number of people; and

(-b-) [~~(-2-)~~] create a substantial risk of public exposure because of the disease's high level of contagion or the method by which the disease is transmitted.

(M) inappropriate prescription of dangerous drugs or controlled substances to oneself, family members, or others in which there is a close personal relationship that would include the following:

(i) prescribing or administering dangerous drugs or controlled substances without taking an adequate history, performing a proper physical examination, and creating and maintaining adequate records; and

(ii) prescribing controlled substances in the absence of immediate need. "Immediate need" shall be considered no more than 72 hours.

(N) providing on-call back-up by a person who is not licensed to practice medicine in this state or who does not have adequate training and experience.

(O) delegating the performance of nerve conduction studies to a person who is not licensed as a physician or physical therapist without:

(i) first selecting the appropriate nerve conductions to be performed;

(ii) ensuring that the person performing the study is adequately trained;

(iii) being onsite during the performance of the study; and

(iv) being immediately available to provide the person with assistance and direction.

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

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

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Executive Director
Texas Medical Board
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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 9. TEXAS COMMISSION ON JAIL STANDARDS

CHAPTER 269. RECORDS AND PROCEDURES

SUBCHAPTER A. GENERAL

37 TAC §269.1

The Commission proposes amendments to §269.1, concerning Record System. The amendments affect paragraph (5) and paragraph (7), concerning Deaths in Custody and Serious Incidents Reports, as required by Senate Bill 1849, 85th Legislature. Amended paragraph (5) requires the Texas Commission on Jail Standards to appoint a law enforcement agency other than the local law enforcement agency that operates the county jail to investigate the death. Furthermore, upon conclusion of the investigation by the designated law enforcement agency, the report shall be submitted to the Texas Commission on Jail Standards. Paragraph (7) requires the sheriff/operator of each county to report each month to the Texas Commission on Jail Standards the occurrence during the preceding month of any incidents involving an inmate in the county jail as required by §511.020.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amended rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule.

Mr. Wood has determined that for each year of the first five years the proposed rule is in effect the public benefits anticipated as a result of enforcing the new rule as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposed rule may be submitted to Fred St. Amant, P.O. Box 12985, Austin, Texas 78711, fax (512) 463-3185, or e-mail at fredrick.stamant@tcjs.state.tx.us.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§269.1. Record System.

The sheriff/operator shall maintain the following records:

(1) a daily record of the number of inmates in the facility;

(2) a record on each inmate including:

(A) intake;

(B) identification;

(C) classification;

(D) property;

(E) discipline;

(F) grievance;

(G) commissary;

(H) medical;

(I) incidents or unusual occurrences;

(J) release;

(K) documentation relating to the continued custody of inmates;

(L) receipts and expenditures of inmate accounts.

(3) a separate written record of all incidents which result in physical harm or serious threat of physical harm to an employee, visitor, or inmate in a facility. Such record shall include the names of the persons involved, a description of the incident, the actions taken, and the date and time of the occurrence. Such a written record shall be prepared and submitted to the sheriff/operator within 24 hours of the incident.

(4) Escape From Custody Report

(A) The Texas Commission on Jail Standards shall be notified of all escapes from a facility within 24 hours of the escape.

(B) A report of the escape shall be made available for review by Commission staff upon request.

(5) Deaths in Custody

(A) The Texas Commission on Jail Standards shall be notified of all deaths of inmates while in the custody of sheriff/operator within 24 hours of the death.

(B) The Commission shall appoint a law enforcement agency, other than the local law enforcement agency that operates the county jail, to investigate the death. [~~Upon conclusion of the investigation by the sheriff/operator or any other designated law enforcement agency, the sheriff or operator shall forward the report to the Texas Commission on Jail Standards within 10 days.~~]

(C) Upon conclusion of the investigation by the designated law enforcement agency, the report shall be submitted to the Texas Commission on Jail Standards. [~~The report on the death shall be made available for review by Commission staff upon request.~~]

(6) Information on Licensed Jailer Turnover Report. On or before the fifth day of each month, each jail under the Commission's purview shall submit a report, on a form prescribed by the Commission, the number of licensed jailers who left employment at the jail during the previous month.

(7) Serious Incidents Report. Information on Serious Incidents Report. On or before the fifth day of each month, the sheriff/operator of each county shall report to the Commission, on a form prescribed by the Commission, regarding the occurrence during the preceding month any incidents involving an inmate in the county jail as required by §511.020.

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

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Brandon Wood
Executive Director
Texas Commission on Jail Standards
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For further information, please call: (512) 463-5505

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CHAPTER 273. HEALTH SERVICES

37 TAC §273.2

The Commission proposes an amendment to §273.2, concerning Health Services Plan. The amendment adds paragraph (12), concerning continuity of prescription medications, as required by Senate Bill 1849, 85th Legislature. The new paragraph requires a qualified medical professional to review any prescription medication a prisoner is taking when the prisoner is taken into custody.

Brandon S. Wood, Executive Director, 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 as a result of enforcing or administering the proposed rule.

Mr. Wood has determined that for each year of the first five years the proposed rule is in effect the public benefits anticipated as a result of enforcing the rule as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposed rule may be submitted to Fred St. Amant, P.O. Box 12985, Austin, Texas 78711, fax (512) 463-3185, or e-mail at fredrick.stamant@tcjs.state.tx.us.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this proposed rule are Local Government Code, Chapter 351, §351.002 and §351.015.

§273.2 Health Services Plan.

Each facility shall have and implement a written plan, approved by the Commission, for inmate medical, mental, and dental services. The plan shall:

(1) provide procedures for regularly scheduled sick calls;

(2) provide procedures for referral for medical, mental, and dental services;

(3) provide procedures for efficient and prompt care for acute and emergency situations;

(4) provide procedures for long-term, convalescent, and care necessary for disabled inmates;

(5) provide procedures for medical, mental, nutritional requirements, special housing and appropriate work assignments and the documented use of restraints during labor, delivery and recovery for known pregnant inmates. A sheriff/operator shall notify the commission of any changes in policies and procedures in the provision of health care to pregnant prisoners. A sheriff/operator shall notify the commission of any changes in policies and procedures in the placement of a pregnant prisoner in administrative separation;

(6) provide procedures for the control, distribution, secured storage, inventory, and disposal of prescriptions, syringes, needles, and hazardous waste containers;

(7) provide procedures for the distribution of prescriptions in accordance with written instructions from a physician by an appropriate person designated by the sheriff/operator;

(8) provide procedures for the control, distribution, and secured storage of over-the- counter medications;

(9) provide procedures for the rights of inmates to refuse health care in accordance with informed consent standards for certain treatments and procedures (in the case of minors, the informed consent of a parent, guardian, or legal custodian, when required, shall be sufficient);

(10) provide procedures for all examinations, treatments, and other procedures to be performed in a reasonable and dignified manner and place; [~~and~~]

(11) provide that adequate first aid equipment and patient evacuation equipment be on hand at all times; and[.]

(12) provide procedures that shall require that a qualified medical professional shall review as soon as possible any prescription medication a prisoner is taking when the prisoner is taken into custody.

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 August 31, 2017.

TRD-201703451
Brandon Wood
Executive Director
Texas Commission on Jail Standards
Earliest possible date of adoption: October 15, 2017
For further information, please call: (512) 463-5505

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 10. ETHICAL CONDUCT BY ENTITIES DOING BUSINESS WITH THE DEPARTMENT

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §10.6

The Texas Department of Transportation (department) proposes amendments to §10.6, concerning Conflict of Interest.

EXPLANATION OF PROPOSED AMENDMENTS

Amendments to §10.6, Conflict of Interest, make several changes to clarify the circumstances in which a conflict of interest arises for certain entities doing business with the department.

Amendments to §10.6(a) revise the description of the circumstances for the existence of a conflict of interest to align it with the description of the term used in other chapters of the department's rules. These amendments are needed in order to provide a fair and unbiased contracting system and to ensure high standards of ethics and fairness in the administration of the department's programs.

Senate Bill 533, 85th Legislature, Regular Session, 2017, amended restrictions on employment for former state employees who participate on behalf of a state agency in a procurement or contract negotiation to apply for two years after a contract is signed or the procurement is terminated or withdrawn, instead of two years after the employee leaves state employment. To address that statutory change, amendments to §10.6(b)(3) revise the period of a conflict of interest for a for-profit entity that hires a former department employee who participated on behalf of the department in a procurement or negotiation of a contract awarded to the entity. Currently, §10.6 restrictions on the employment of certain former department employees apply unless more than two years have elapsed since the cessation of employment with the department. As amended, the restrictions apply unless more than two years have elapsed since the contract was signed. Amendments to §10.6(b)(3) and (g) also clarify that the conflict of interest only applies to an entity to which a contract was awarded.

Amendments to §10.6(e) update the name of a division of the department.

FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined that for each of the first five years in which the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Ms. Kristin Alexander, Director, Compliance Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Alexander has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be improved integrity in the department's contracting processes. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §10.6 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 "Ethics and Conflict of Interest." The deadline for receipt of comments is 5:00 p.m. on October 16, 2017. 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 with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Government Code, Section 572.069, as amended by Section 1, Senate Bill 533, 85th Legislature, Regular Session.

§10.6. Conflict of Interest.

(a) For the purposes of this chapter, a conflict of interest is a circumstance arising out of existing or past activities, business interests, contractual relationships, or organizational structure of an entity, in [~~or a familial or domestic living relationship between a department employee and an employee of the entity, and because of~~] which:

(1) the entity is or may be unable to give impartial assistance or advice to the department;

(2) [~~(1)~~] the entity's objectivity in performing the scope of work sought by the department is or may [~~might~~] be otherwise impaired; [~~affected; or~~]

(3) the entity has an unfair competitive advantage;

(4) [~~(2)~~] the entity's performance of services on behalf of the department or participation in an agreement with the department provides or may [~~reasonably appear to~~] provide an unfair competitive advantage to [~~the entity or to~~] a third party; or[~~.~~]

(5) there is a reasonable perception or appearance of impropriety or unfair competitive advantage benefiting the entity or a third party as a result of the entity's participation in an agreement with the department.

(b) A for-profit entity, including a sole proprietorship, has a conflict of interest if:

(1) an individual who held a position at or above the level of district engineer, division director, or office director solicits business from or attempts to influence a decision of the commission or department on behalf of that entity within one year after the date of the individual's separation from the department;

(2) a former department employee whose last salary from the department was at or above the minimum amount prescribed for salary group A17 of the state position classification salary schedule performs work on behalf of that entity regarding a specific investigation, application, request for ruling or determination, contract, claim, or judicial or other proceeding in which the former employee participated, whether through personal involvement or within the former employee's official responsibility, while employed by the department; or

(3) the entity employs a former department employee who participated on behalf of the department in the procurement or negotiation of an awarded [~~procurement or~~] contract [~~negotiation~~], for which the entity was the prime contractor or an equity partner of the prime contractor, unless more than two years have elapsed since the date that the contract was signed. ~~cessation of employment with the department.~~]

(c) Subsection (b)(1) of this section does not apply to a position that is designated as an interim position.

(d) For the purpose of subsection (b)(2) of this section, an individual participated in a matter if the individual made a decision or recommendation on the matter, approved, disapproved, or gave advice on the matter, conducted an investigation related to the matter, or took a similar action related to the matter.

(e) Before submitting a bid or undertaking some other interaction with the department, a for-profit entity or a former employee of the department to whom subsection (b) of this section applies may request from the department a determination of whether the interaction would constitute a conflict of interest under subsection (b) of this section. Such a request must be made in writing and must contain a concise explanation of the relevant facts. The department will not respond to a request under this subsection before consulting with the [~~Office of~~] General Counsel Division. The department will issue a written determination in response to a valid request made under this subsection as soon as practicable.

(f) Subsection (b)(3) of this section applies only to an entity's employment of an individual whose participation in a procurement or contract negotiation occurs on or after September 1, 2015. Subsection (b)(3) does not apply to a contract awarded under a low-bid process.

(g) For purposes of subsection (b)(3) of this section, a person participated in the [~~an awarded~~] procurement or [~~contract~~] negotiation of an awarded contract only if the person played an active part in the original procurement or contract negotiation with the prime contractor or equity partner of the prime contractor by personally approving or performing a step that was materially relevant in the original procurement or contract negotiation process. An action is materially relevant if the action provides an opportunity to steer a contract toward a particular vendor, or involves the negotiation of price or contract terms with a vendor or the approval of negotiated prices or terms. Handling administrative matters and performing ministerial duties are not materially relevant steps.

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

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Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 15, 2017
For further information, please call: (512) 463-8630

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CHAPTER 21. RIGHT OF WAY
SUBCHAPTER I. REGULATION OF SIGNS ALONG INTERSTATE AND PRIMARY HIGHWAYS

The Texas Department of Transportation (department) proposes the repeal of §§21.146 - 21.149, 21.151, 21.165, 21.194, 21.196, and §§21.251 - 21.260; amendments to §§21.141 - 21.145, 21.150, 21.152 - 21.156, 21.158 - 21.164, 21.166 - 21.182, 21.184 - 21.193, 21.195, and §§21.197 - 21.204; and new §21.205 and §21.206, all concerning regulation of signs along Interstate and primary highways.

EXPLANATION OF PROPOSED REPEALS, AMENDMENTS, AND NEW SECTIONS

The Texas statutes regulating outdoor advertising were ruled unconstitutional by the Third Court of Appeals in *AusPro v. TxDOT, 506 S.W.3d 688 (2016)* (Tex.App.--Austin 2016, *pet. filed).* The court held that Texas Transportation Code, Chapter 391, Subchapters B and C were unconstitutional because the definition of "sign" was over inclusive, making it impossible for the court to determine which provisions applied to commercial speech and which applied to noncommercial speech. This decision is on appeal to the Texas Supreme Court.

The Texas Legislature passed Senate Bill No. 2006, 85th Legislature, Regular Session, 2017, to address the decision of *AusPro.* The bill removes the unconstitutional issue from the statute by replacing outdoor advertising with commercial sign. The statute defines commercial sign to mean a sign that is intended to be leased, or for which payment of any type is intended to be received. This new definition makes it clear that the regulations only affect commercial speech and not a person's First Amendment right of freedom of speech. This statutory change addresses the court's decision by eliminating the need for a review of the content of the sign to make the determination of whether the sign is regulated. The new provisions require the department to regulate commercial signs in a content neutral manner. These statutory changes required similar changes to the department's rules. Throughout the rules, the terms "outdoor advertising" and "sign" have been replaced with "commercial sign" to correspond with the statutory change.

Senate Bill No. 312, 85th Legislature, Regular Session, 2017 amended §391.038, to legalize the height of all signs as they existed on March 1, 2017, up to a height of 85 feet, and allows those signs to be maintained at that height without the need of an amended permit. This change to the height restriction required the department to take a look at the current maximum height requirement to determine how to address the discrepancy between signs erected in violation of the current rules, those that had complied with the maximum height and those that will be built in the future.

In addition, these rules include changes to address new department procedures, including the new online application process, and merge the two divisions of Chapter 21 (Division 1, Signs, and Division 2, Electronic Signs) to eliminate repetition and confusion. The word "division" has been replaced with "subchapter" throughout the amended rules to reflect the merger of the divisions.

Almost every rule regarding the Highway Beautification program has been amended to address either the statutory changes, the new streamlined procedures, or the merging of the rules on electronic signs; however, due to the pending Texas Supreme Court ruling on *Auspro,* the department also notes that any rule in Chapter 21, Subchapter I, not amended or repealed by this rulemaking continues in effect under new Transportation Code, Chapter 391.

Amendments to §21.141, Purpose, replace the term "division" with "subchapter" and "outdoor advertising" with "commercial signs" to address the changes necessary to implement SB 2006 and to reflect the elimination of Chapter 21, Subchapter I, Division 2, Electronic Signs. With the elimination of the electronic sign division there is no longer a need for references to divisions in this subchapter. The rules under the electronic sign division have been merged into the general rules. All the rules under this subchapter apply to electronic signs unless noted in the specific rule.

Amendments to §21.142, Definitions, add definitions for "commercial sign," "conforming sign," "electronic sign," "lawfully erected," "stacked sign," and "zoned commercial or industrial area." These terms are used throughout the chapter and the department has determined that providing clear definitions will

benefit the regulated community. The definition for "commercial sign" follows that of the language of new Transportation Code, §391.001. This new definition will ensure that the department is not regulating speech. The definition for "electronic sign" has been moved without change from Division 2.

In addition the department has clarified the definitions for several terms. These changes will give the regulated entities a better understanding of the department's use of these terms. The definition of "highway" was amended to include a roadway project for which the Texas Transportation Commission (commission) has authorized the purchase of right of way. With this change the department believes that we have clearly stated the time the highway is subject to sign regulations. The definition of "public park" was replaced with "public space" to include additional areas that are similar in nature to a public park.

Amendments to §21.143, Permit Required, conform to use of the term "commercial signs."

Amendments to §21.144, License Required, require the licensee to notify the department of any change to their contact information within 30 days of the change. This will provide the department with the information needed to contact the licensee for future notices.

Amendments to §21.145, Prohibited Signs, provide that a sign may not be erected or maintained on the real property of another without the property owner's permission. The property owner's permission is currently a requirement of the sign permit application. With the new online application process, the department no longer will require the property owner's signature and this change clarifies that the property owner's permission is still required. In addition, the amendments add a reference to Transportation Code §393.002, regarding the prohibition of commercial signs in the state right of way

Section 21.146, Exempt Signs, is repealed to comply with SB 2006. Because the changes result in only commercial signs being regulated under the department's Highway Beautification program, the exemption of various types of non-commercial signs is no longer needed.

Section 21.147, On-premise Sign, is repealed to comply with the changes to the statute by SB 2006. The distinction between on-premise and off-premise signs is not used under SB 2006 amendments to Transportation Code, Chapter 391. The statute now requires the regulation of commercial signs only. Under the definition of "commercial sign," signs that would have been previously classified as "on-premise" are excluded from regulation.

Section 21.148, Exception to License Requirement for Nonprofit Signs, is repealed as unnecessary under SB 2006. Nonprofit signs do not meet the definition of commercial signs and therefore, are not regulated.

Section 21.149, Nonprofit Sign Permit, is repealed as unnecessary under SB 2006.

Amendments to §21.150, Continuance of Nonconforming Commercial Signs, remove references to nonprofit signs and clarify that a nonconforming sign must be maintained in accordance with the current permit to be eligible for renewal. This change makes it clear that the sign must continue to match the provisions of the permit to hold its nonconforming status and conforms the rules to the department's current procedures.

Section 21.151, Time Proposed Roadway Becomes Subject to Division, is repealed to simplify the time that an existing sign comes under these regulations. The definition of "highway" was amended to include a roadway project for which the commission has authorized the purchase of right of way. With the change to the definition, this section is not needed.

Amendments to §21.152, License Application, address changes necessary to implement the new online application process. The changes require the applicant provide the applicant's email address and remove the requirement that the application be signed and notarized. The department has developed an online system to streamline the application and renewal process and the changes were necessary to implement the new process. The rules continue to provide for a written application that is mailed to the department and language is added to address the requirements for the mailed application.

Amendments to §21.153, License Issuance, provide the licensee the ability to amend a license by filing an amended application. This change streamlines the process for the department to receive updated information from the licensee.

Amendments to §21.154, License Not Transferable, merely replace the term "division" with "subchapter" to reflect the elimination of divisions within Chapter 21.

Amendments to §21.155, License Renewals, clarify that a license must be renewed annually. The department is now requiring that the license renewal application be provided to the department by the 15th day of the month in which it expires. Language is also added to clarify the fee for late renewals. The current rules include the $100 fee for renewals that are received within 45 days of the expiration but the language is only included in §21.156 regarding the fees. The department is adding the language to this section to make it clear that the department does accept late renewals if received within 45 days of the expiration. In addition changes are made to accommodate the online renewal process by eliminating the need for signatures.

Amendments to §21.156, License Fee, add credit cards to the types of payments accepted to accommodate the new online system. The changes also remove the 20-day requirement for the provision of a renewal notification. The section still requires the second renewal notification but no longer requires it within 20 days. With the new system and the use of email the department believes this requirement is not necessary.

Amendments to §21.158, License Revocation, update an amended section heading and require a request for an administrative hearing to be sent to the address listed on the enforcement notice. This change will eliminate the misdirection of these requests and allow for a timely filing of the administrative action.

Amendments to §21.159, Permit Application, make changes necessary to address the online application process. The online application requires removal of original signatures and notarization for the online application. These requirements are still applicable to a paper application. The department is also now accepting credit card payment through the online system and that change is also reflected in this section. The additional requirements for an electronic sign have been moved unchanged from §21.253, Issuance of Permits, and §21.258, Emergency Information.

Amendments to §21.160, Applicant's Identification of a New Commercial Sign's Proposed Site, address issues relating to identification of the sign. The department has noticed that on occasions there have been discrepancies between permit

application location and the stake or identifying mark placed at the sign location. The changes clarify that the stake must be on the parcel of land indicated on the application. If the wrong parcel has been identified, the department may not have the required land owner information.

Amendments to §21.161, Site Owner's Consent; Withdrawal, make the changes necessary to address the online application process. The amendments also replace the term "division" with "subchapter" to address the changes necessary to reflect the elimination of divisions within Chapter 21 and adds "commercial" immediately before "sign" to implement SB 2006.

Amendments to §21.162, Permit Application for Certain Preexisting Commercial Signs, provide additional guidance on the process for addressing preexisting signs. The section currently requires a sign owner to apply for a permit upon notification that the highway is about to come under the program, but the section does not state the consequences for failure get the permit. The amendments provide that failure to obtain the permit will result in the department issuing an order of removal. In addition, the amendments provide that the department may issue a non-conforming permit if the sign does not meet the current regulations. This is the process the department currently follows and the language was added to give the sign owner's notice of the process.

Amendments to §21.163, Permit Application Review, address the issues related to a paper application. The department reviews permit application in the order received, however the department wants to make it clear that the application must be complete to hold its priority place. The timing of a permit application submission might affect the sign's location eligibility. The department does not want a licensee using the application process to hold sign locations. In addition, new language provides that the department will notify the applicant if the application is not accepted as complete. The department will not return a copy of the application. This requirement is not necessary with the new online process.

Amendments to §21.164, Decision on Application, remove language that required the department to notify the land owner if the sign application was denied. The department is not involved in the relationship between the applicant and land owner and has found this requirement to be unnecessary. Changes also address the discontinuation of the permit plate and to be consistent with the changes to §21.163, Permit Application Review.

Section 21.165, Sign Permit Plate, is repealed, as the permit plate is an outdated method of identifying and connecting the permit to the particular sign. With the new online system and electronic inventory, the department does not need to view the permit plate to access the permit for the sign. The department is now able to access that information by electronic location information.

Amendments to §21.166, Commercial Sign Location Requirements, provide new direction on when the department will determine a location unavailable due to a pending construction project. If the department has received environmental clearance for a construction project, the department will not approve a location that will be within that project's boundaries. The department believes that a project with environmental clearance is advanced enough to prohibit the erection of a new sign that will have to be removed to accommodate the project. This will eliminate the expense of erecting a sign that will need to be removed once the construction project begins. In addition, provisions from §21.155, Location, have been added to this section to address the required changes to combine the two divisions. The language is unchanged except for non-substantive editing changes made to accommodate the new section.

Amendments to §21.167, Erection and Maintenance from Private Property, to Permit, add the word "commercial" immediately before "sign" to implement SB 2006 and change "licensee" to "license holder" for consistency with other rules in this chapter.

Amendments to §21.168, Conversion of Certain Authorization to Permit, removes the reference to the permit plate to address the repeal of §21.165, Sign Permit Plate.

Amendments to §21.169, Notice of Commercial Sign Becoming Subject to Regulations, require the sign owner to obtain a permit for the sign within 60 days of the notification of a sign becoming subject to Transportation Code, Chapter 391. The amendments provide that if the sign owner fails to obtain the permit or if the sign owner cannot be located, the department will initiate a removal action. Without this language it was difficult to determine when the department will proceed to the removal stage.

Amendments to §21.170, Appeal Process for Permit Denials, address electronic means of filing the appeal. The section currently requires an appeal request to be mailed to the executive director. The amendments provide that the request will go through to the Right of Way Division and allow the request to be emailed. The amendments delete the requirement of submitting a copy of the application as it is unnecessary for the review process. Subsection (d) is deleted as the department is able to process the appeal within 60 days of receipt, so the language requiring notification of a delay is not necessary.

Amendments to §21.171, Permit Expiration, merely replace the term "division" with "subchapter" to reflect the elimination of divisions within Chapter 21.

Amendments to §21.172, Permit Renewals, provide a clear requirement that the permit must be renewed prior to the expiration date, that by filing the renewal the permit holder is asserting that the sign meets all requirements, and that the issuance of the renewal does not indicate that the department has determined that the sign continues to meet all requirements. The department has experienced enforcement complications by issuing renewals without annually verifying the signs compliance with all requirements. The department does not have the necessary staff to review each sign prior to the annual renewal and wants to expressly provide that the issuance of the renewal is not evidence of the department's approval changes made to the sign since the last inspection. Language is also added to accommodate the new electronic application process. In addition language is added to make it clear that the department will not renew the permit if the permit holder has not demonstrated an identifiable access route from private property. This change is needed to address the continual use of highway right of way for the maintenance of the signs.

Amendments to §21.173, Transfer of Permit, address the new online application process. Subsections (e) and (f) regarding nonprofit signs have been deleted as these types of signs no longer fall within the regulation of the program.

Amendments to §21.174, Amended Permit, address the new online application process. Language has been added to provide that if the changes approved by the amended permit are not completed within one year after the date that the amended permit is issued, the permit holder must reapply. This change brings the

amended permit in line with the current requirement that the sign to be erected within one year of initial issuance of a permit for the permit to be eligible for renewal. In addition, changes clarify that the structure, as built, must be as approved by the department and changes to size, height, or configuration cannot be made without an amended permit. An amended permit cannot be used to change the location of the sign. A change of location requires a new permit application because the change could affect other applications under review and may require the department to get new land owner information. Language is added to describe the additional requirements for obtaining an amended permit for conversion to an electronic sign. This change makes it clear that the approval of the city in which the sign is located is required for this type of amended permit.

Amendments to §21.175, Permit Fees, make the necessary changes to address the deletion of Division 2 regarding electronic signs, the removal of non-profit signs from the program and the new online application and renewal process. With the repeal of Division 2 regarding electronic signs the language regarding the fees for electronic sign permit is not necessary and has been removed. The fees for both static and electronic permits are the same. The late fee is clarified by adding language that states it is owed if the fee is not received prior to the expiration date. There has been some confusion as to when the late fee was required which should be clarified by the new language.

Amendments to §21.176, Cancellation of Permit, clarify when a permit will be cancelled. Language is added to clarify that the permit will be cancelled if the sign is accessed, erected, repaired or maintained from the right of way. The current language created an additional obstacle for enforcement by stating that the sign could not be accessed from private property. The department does not need to prove that there were no available private property accesses only that right of way was used. In addition, a new cancellation provision is added for failure to pay an administrative penalty charged. If a sign owner refuses to pay the administrative penalty for a sign violation, the next action by the department will be to cancel the permit. The department must be able to enforce the administrative penalties to improve compliance with the rules.

Due to confusion, language regarding notification of the violation and opportunity to cure the violation has been moved from §21.176 to new §21.205, Curable Commercial Sign Permit Violations. The department's enforcement actions have been challenged because the language currently says the department may cancel the permit. With the change to the new section the department is making it clear that failure to cure the violation as requested will result in cancellation. The landowner notification is deleted from §21.176, as the department has found this to be unnecessary.

Amendments to §21.177, Commercial or Industrial Area, merely replace the term "division" with "subchapter" to address the changes necessary to reflect the elimination of divisions within Chapter 21.

Amendments to §21.178, Zoned Commercial or Industrial Areas, merely replace the term "outdoor advertising" with "commercial signs" to address the changes necessary to implement SB 2006.

Amendments to §21.179, Unzoned Commercial or Industrial Areas, merely replace the term "division" with "subchapter" to address the changes necessary to reflect the elimination of divisions within Chapter 21.

Amendments to §21.180, Commercial or Industrial Activity, revise "division" and "outdoor advertising" and uses the defined term "public space" in the place of recreational facility.

Amendments to §21.181, Abandonment of Sign, streamline the process for determining if a sign has been abandoned. The current rules provide that to be abandoned a sign must be without content for one year, overgrown by vegetation, or need repairs. The amendments remove the one year requirement for advertising or copy because it is essentially a restatement of the legible content requirement and is an impediment to enforcement. The department does not inventory every sign every year. A sign could be in the state of abandonment for some time before identified by the department and having to show that the sign was in the same state for one year from the time of the initial review creates unnecessary delay. The department has found that having pictures of the sign on four separate dates without copy has not been beneficial in establishing abandonment of the sign and this language has been removed. Subsection (e), regarding the availability of the location, is deleted as unnecessary. If the sign permit is cancelled, the availability of the location for a new sign permit would be determined under the general location provisions. Subsection (h) is moved to new §21.205, Curable Commercial Sign Permit Violations. Section 21.205 provides the same 60 day notice and cure provisions that currently are in subsection (h).

Amendments to §21.182, Commercial Sign Face Size and Position, provide that an electronic sign may have two electronic sign faces but only if the faces are facing different directions. This requirement is moved from §21.155, Location, to accommodate the combining of the two divisions of this subchapter.

Amendments to §21.184, Location of Commercial Signs Near Public Spaces, replace "public park" with the newly defined term "public space."

Amendments to §21.185, Location of Commercial signs Near Certain Facilities, add the word "commercial" to the title of the section to make it consistent with the new terminology of these rules.

Amendments to §21.186, Location of Signs Near Right of Way, change the title of the section to make it consistent with the new terminology of these rules and to clarify the section applies only to state-held right of way.

Amendments to §21.187, Spacing of Commercial Signs, delete subsection (h), providing exceptions for on-premise, directional, and official signs, as unnecessary because the amended rules apply only to commercial signs.

Amendments to §21.188, Wind Load Pressure, delete the requirement that the certification be signed to accommodate the new online application process.

Amendments to §21.189, Commercial Sign Height Restrictions, implement the provisions of SB 312 regarding the height of commercial signs in existence on March 1, 2017. SB 312 added new Transportation Code §391.038, Sign Height, which states that a sign existing on March 1, 2017, may not be higher than 85 feet, excluding cut outs. Language was also added to allow signs that a sign owner could rebuild a sign that was in existence on March 1, 2017,without obtaining an amended permit provided that the sign was rebuilt at the same location and at a height that does not exceed the height the sign was on March 1, 2017. This change will not affect any signs erected after March 1, 2017. All new commercial signs will have to comply with the existing

42-1/2 maximum height. In addition, these provisions allow a sign that is 85 feet or less on March 1, 2017,be rebuilt to the exact provisions of the current sign permit with exception of the height without obtaining an amended permit. Because SB 312 relates only to height an applicable sign that is nonconforming on a basis other than height remains nonconforming. If a conforming sign owner wants to change the number of faces, lighting or other physical aspects of the sign an amended permit would be required.

Amendments to §21.190, Lighting and Movement on Commercial Signs, add provisions that were in Chapter 21, Division 2 regarding electronic signs. The amendments add no new lighting restrictions. The changes were necessary to address merger of the two divisions of Chapter 21.

Amendments to §21.191, Repair and Maintenance of commercial Signs, clarify that routine maintenance includes changing all parts of the sign structure, and not just the sign face, if the same type of materials are used. A reference to Transportation Code, §391.038, regarding the sign height requirements, is included to implement SB 2006. The statute provides that a sign existing on March 1, 2017, can remain at the height on that date up to 85 feet, regardless of the maximum height set by rule. The statute also provides an exception to obtaining an amended permit and therefore, a reference to that exception is needed in this rule.

Amendments to §21.192, Permit for Relocation of a Commercial Sign, require that a sign must be timely removed from the construction site to be eligible for the relocation provisions. Signs that remain in the construction area or that must be removed by the department are an added expense to the department. The relocation provisions are a benefit to the sign owner; however, the department believes the sign owner must meet its obligations to be eligible for this benefit. The language regarding waiving the permit fee is also removed. The relocation application requires the same amount of review as a new permit and therefore, to maintain the revenue neutral aspect of the program, the fee needs to be charged for this permit.

Amendments to §21.193, Location of Relocated Commercial Sign, replace "public park" with "public space." References to on-premise signs have been removed to comply with S.B. 2006. The amendments delete the requirement that a sign must be relocated to the same parcel of land and the requirement's exception has been removed. The department finds this restriction to be an unnecessary step in the relocation approval process. Under the amended rule a sign owner is able to find a new location that meets the requirements without having to demonstrate that the current parcel in not feasible for use.

Section 21.194, Construction and Appearance of Relocated Sign, is repealed as unnecessary. The necessary provisions of this section are addressed under the permit requirements. The department has not found a benefit in requiring the same materials be used in the new sign. An eligible sign permit can be amended to allow for different sign faces, lighting, and other features and by prohibiting these changes from this permit process is unnecessary.

Amendments to §21.195, Relocation of Commercial Sign with Certified Cities, replace "municipality" with "certified cities" in the section heading to clarify that the section applies to municipalities that are approved as certified cities under §21.200. Subsection (b) is deleted as the relocation benefits are an aspect of the purchase of the right of way and not handled the Highway Beautification Program.

Section 21.196, Relocation Benefits, is repealed as relocation benefits are an aspect of the purchase of the right of way and not the sign permit process.

Amendments to §21.197, Discontinuance of Nonconforming Commercial Sign Due to Destruction, provide for the provisions of SB 312 by adding a reference to Transportation Code, §391.038.

Amendments to §21.198, Order of Removal, provide that the department will notify the land owner of the removal requirement if the sign owner cannot be determined. This is needed for the instances in which the sign owner is no longer operating and cannot be identified. The land owner will then be responsible for the sign on the land owner's property.

Amendments to §21.199, Destruction of Vegetation and Access from Right of Way Prohibited, merely replace "division" with "subchapter."

Amendments to §21.200, Local Control of Commercial Signs, add a reference to a certified city for clarification and to use the term commonly used by the department when referring to cities that have been granted local control.

Amendments to §21.201, Fees Nonrefundable, and §21.202, Property Right Not Created, merely replace "division" with "subchapter."

Amendments to §21.203, Complaint Procedures, replace "outdoor advertising" with "highway beautification" and "sign" to address the changes required under SB 2006.

Amendments to §21.204, Administrative Penalties for Commercial Signs, remove the penalties for no permit plate because permit plates are no longer required and revise the wording of the violation for improper placement of a sign to conform to the requirements of §21.160. Subsection (d) is deleted and replaced with subsection (g) for clarity and to conform to other provisions in rules related to cancellation of a permit.

New §21.205, Curable Commercial Sign Permit Violations, is added to address confusion caused by §21.176, Cancellation of Permit. The department has identified problems with the regulated community's understanding when a notice provides a right to cure a violation. This new section provides the department with a separate action prior to the cancellation notification. If the sign owner fails to cure the violation, department will move to the cancellation provisions of §21.176, Cancellation of Permits. The department believes that providing all of the violations that can be corrected in one section will be clearer to the affected industry.

New §21.206, Requirements for An Electronic Sign, gathers provisions from various sections of Division 2 of Chapter 21, Subchapter I. The department has found that having the two divisions has led to confusion in the regulated community. Division 2 provided additional provisions for electronic signs, while each rule in Division 1 applied to an electronic sign unless the rule was in direct conflict with a provision of Division 2. Whether a provision was in direct conflict was subject to varying interpretations. With the merging of the two divisions, the department has clarified the electronic sign process. This new section does not add new requirements but rather revises current §21.257, Requirements, §21.258, Emergency Information, and §21.259, Contact Information.

Division 2, Electronic Signs; §§21.251 - 21.260, is repealed and the content of the sections in the division are merged into the

appropriate commercial sign provisions of the amended rules for clarity and ease of understanding by the regulated community.

FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined that for each of the first five years in which the repeals, amendments, and new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals, amendments, and new sections.

Mr. Gus Cannon, Right of Way Division Director, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals, amendments, or new sections.

PUBLIC BENEFIT AND COST

Mr. Cannon has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the revisions will be the continuation of the Highway Beautification Program in compliance with federal requirements and consistent enforcement to the regulated community. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:00 a.m. on September 26, 2017, in the Ric Williamson Hearing Room, First Floor, Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact the General Counsel Division, 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-8630 at least five working days before the date of the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §§21.146 - 21.149, 21.151, 21.165, 21.194, 21.196, and §§21.251 - 21.260; amendments to §§21.141 - 21.145, 21.150, 21.152 - 21.156, 21.158 - 21.164, 21.166 - 21.182, 21.184 - 21.193, 21.195, and §§21.197 - 21.204; and new §21.205 and §21.206, 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 "Commercial sign rules." The deadline for receipt of comments is 5:00 p.m. on October 16, 2017. 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 revisions, or is an employee of the department.

DIVISION 1. SIGNS

43 TAC §§21.141 - 21.145, 21.150, 21.152 - 21.156, 21.158 - 21.164, 21.166 - 21.182, 21.184 - 21.193, 21.195, 21.197 - 21.206

STATUTORY AUTHORITY

The amendments and new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §391.032, which provides authority to establish rules to regulate the orderly and effective display of commercial signs on primary roads, Transportation Code, §391.0355, which provides authority for the commission to set fees for administrative penalties in association with violation of commercial sign regulations; Transportation Code, §391.065, which provides authority to establish rules to standardize forms and regulate the issuance of commercial sign licenses; and Transportation Code §391.068, which provides authority for the commission to prescribe permit requirements and set fees for commercial sign permits.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 391.

§21.141. Purpose.

This subchapter [~~division~~] is established to regulate the orderly and effective display of commercial signs [~~outdoor~~ ~~advertising~~] along a regulated highway within the State of Texas.

§21.142. Definitions.

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

(1) Commercial sign--A sign that is:

(A) at any time intended to be leased, or for which payment of any type is intended to be or is received, for the display of any good, service, brand, slogan, message, product, or company, except that the term does not include a sign that is leased to a business entity and located on the same property on which the business is located or is smaller than 50 square feet; or

(B) located on property owned or leased for the primary purpose of displaying a sign.

(2) [~~(1)~~] Commission--The Texas Transportation Commission.

(3) Conforming sign--A sign legally erected and maintained in accordance with state and federal law, including rules and regulations.

(4) [~~(2)~~] Department--The Texas Department of Transportation.

(5) Electronic sign--A commercial sign that changes its message or copy by programmable electronic or mechanical processes.

(6) [~~(3)~~] Erect--To construct, build, raise, assemble, place, affix, attach, embed, create, paint, draw, or in any other way bring into being or establish.

(7) [~~(4)~~] Freeway--A divided, controlled access highway for through traffic. The term includes a toll road.

(8) [~~(5)~~] Highway--The width between the boundary lines of either a publicly maintained way any part of which is open to the public for vehicular travel or roadway project for which the commission has authorized the purchase of right-of-way.

(9) [~~(6)~~] Interchange--A junction of two or more roadways, including frontage roads with on and off ramps, in conjunction with one or more grade separations that provides for the uninterrupted movement of traffic between two or more roadways or highways on different levels without the crossing of traffic streams.

(10) [~~(7)~~] Intersection--The common area at the junction of two highways that are on the primary system. The common area includes the area within the lateral boundary lines of the roadways.

(11) [~~(8)~~] Interstate highway system--Highways designated officially by the commission and approved pursuant to 23 United States Code §103 as part of the national system of interstate and defense highways.

(12) Lawfully erected--Erected before January 1, 1968 or if erected after January 1, 1968, erected in compliance with law, including rules, in effect at the time of erection.

(13) [~~(9)~~] License--A commercial sign [~~An outdoor advertising~~] license issued by the department.

(14) [~~(10)~~] Main-traveled way--The traveled way of a highway that carries through traffic. In the case of a divided highway, the traveled way of each of the separate roadways for traffic in opposite directions is a main-traveled way. It does not include such facilities as frontage roads, turning roadways, or parking areas.

(15) [~~(11)~~] Military Service Member--A person who is currently serving in the Armed Forces of the United States, in a reserve component of the United States, including the National Guard, or in the state military service of any service.

(16) [~~(12)~~] Military spouse--A person who is married to a military service member who is currently on active duty.

(17) [~~(13)~~] Military veteran--A person who has served in the Army, Navy, Air Force, Marine Corps, or Coast Guard of the United States, or in an auxiliary service of one of those branches of the armed forces.

(18) [~~(14)~~] National Highway System--Highways designated officially by the commission and approved pursuant to 23 United States Code §103 as part of the national highway system.

(19) [~~(15)~~] Nonconforming sign--A sign that was lawfully erected but that no longer complies with a law or rule because of changed conditions or because the law or rule was amended after the sign was erected or that fails to comply with a law enacted or rule adopted after the sign was erected. Examples of changed conditions are discontinuance of a commercial or industrial activity, decrease in the limits of an incorporated area, reclassification of a roadway, decertification of certified city, and amendment of a comprehensive local zoning ordinance from commercial to residential.

~~[(16) Nonprofit sign--A sign that is erected and maintained by a nonprofit organization under a permit issued under §21.149 of this division (relating to Nonprofit Sign Permit).]~~

(20) [~~(17)~~] Permit--Written authorization granted for the erection of a commercial sign, subject to this subchapter and Transportation Code, Chapter 391.

(21) [~~(18)~~] Person--An individual, association, partnership, limited partnership, trust, corporation, or other legal entity.

(22) [~~(19)~~] Primary system--Highways designated by the commission as the federal-aid primary system and any highway on the National Highway System. The term includes all roads designated as part of the National Highway System as of 1991.

(23) [~~(20)~~] Processing Area--An area where actions or operations are accomplished that contribute directly to a particular commercial or industrial purpose and are performed during established activity hours.

(24) [~~(21)~~] Public space--Publicly-owned land that is designated as a park, forest, playground, scenic area, recreation area, wildlife or waterfowl refuge, historic site, or similar public space. [~~park--A public park, forest, playground, nature preserve, or scenic area designated and maintained by a political subdivision or governmental agency.~~]

(25) [~~(22)~~] Regulated highway--A highway on the interstate highway system or primary system.

(26) [~~(23)~~] Rest area--An area of public land designated by the department as a rest area, comfort station, picnic area, or roadside park.

(27) [~~(24)~~] Roadway--That portion of a road used for vehicular travel, exclusive of the sidewalk, berm, or shoulder.

(28) [~~(25)~~] Sign--A structure, display, light, device, figure, painting, drawing, message, plaque, placard, poster, billboard, logo, or symbol that is designed, intended, or used to advertise or inform. [~~An object that is designed, intended, or used to advertise or inform, including a sign, display, light, device, figure, painting, drawing, message, plaque, placard, poster, billboard, logo, or symbol.~~]

(29) [~~(26)~~] Sign face--The part of the sign that contains [~~advertising or~~] information and is distinguished from other parts of the sign, including another sign face, by borders or decorative trim. The term does not include a lighting fixture, apron, or catwalk unless it displays a part of the [~~advertising or~~] information contents of the sign.

(30) [~~(27)~~] Sign structure--All of the interrelated parts and materials that are used, designed to be used, or intended to be used to support or display [~~advertising or~~] information contents. The term includes, at a minimum, beams, poles, braces, apron, frame, catwalk, stringers, and a sign face.

(31) Stacked sign--A sign with two faces placed one above another on a single structure.

(32) [~~(28)~~] Visible--Capable of being seen, whether or not legible, or identified without visual aid by a person operating a motor vehicle on the highways of this state. [~~of normal visual acuity.~~]

(33) Zoned commercial or industrial area--An area that is established by a zoning authority under state law as being most appropriate for commerce, industry, or trade, regardless of how the area is labeled. Such an area is commonly labeled as commercial, industrial, business, manufacturing, retail, trade, warehouse, or a similar classification.

§21.143. Permit Required.

Except as provided by this chapter, unless a person holds a permit issued under §21.164 of this subchapter [~~division~~] (relating to Decision on Application) or §21.200 of this subchapter [~~division~~] (relating to Local Control of Commercial Signs), the person may not erect or maintain a commercial [~~an outdoor~~] sign that is:

(1) within 660 feet of the nearest edge of the right of way of a regulated highway if any part of the sign's [~~advertising or~~] information content is visible from any place on the main-traveled way of the highway; or

(2) outside of the jurisdiction of an incorporated city and more than 660 feet from the nearest edge of the right of way of a regulated highway if any part of the commercial sign [~~sign's advertising or information content~~] is visible from the main-traveled way of the highway and the sign was erected for the purpose of having its [~~advertising or~~] information content seen from the main-traveled way of the highway.

§21.144. License Required.

(a) Except as provided by this subchapter [~~division~~], a person may not obtain a permit for a commercial sign under this subchapter [~~division~~] unless the person holds a currently valid license issued under §21.153 of this subchapter [~~division~~] (relating to License Issuance) or under §21.450 of this chapter (relating to License Issuance) applicable to the county in which the sign is to be erected or maintained.

(b) A license is valid for one year from the date of issuance or most recent renewal.

(c) Each license holder shall notify the department not later than the 30th day after the date of a change in the mailing address, telephone number, or email address of the license holder.

§21.145. Prohibited Signs.

(a) A sign may not be erected or maintained on the real property of another without the property owner's permission. [~~a tree or painted or drawn on a rock or other natural feature.~~]

(b) A sign may not be erected or maintained within the right of way of a public roadway, as prohibited by Transportation Code, §393.002, or an area that would be within the right of way if the right of way boundary lines were projected across an area of railroad right of way, utility right of way, or road right of way that is not owned by the state or a political subdivision.

(c) A sign may not be erected or maintained on a highway or part of a highway designated under Transportation Code, §391.252.

§21.150. Continuance of Nonconforming Commercial Signs.

(a) Notwithstanding other provisions of this subchapter [~~division~~], the department will renew a permit for a nonconforming sign only if the sign structure was lawfully erected and has been maintained in accordance with the permit being renewed.[~~:~~]

[~~(1) was lawful on the later of the date it was erected or became subject to the control of the department; and~~]

[~~(2) remains substantially the same as it was on the later of the date it was erected, became subject to the department's control, or became a nonconforming sign.~~]

(b) A sign that was legally erected before March 3, 1986 in a railroad, utility, or road right of way that is not owned by the state or a political subdivision may be maintained as a nonconforming sign if all other requirements of this subchapter [~~division~~] are met.

(c) A nonconforming sign may not be:

(1) removed and re-erected for any reason, other than a request by a condemning authority; or

(2) substantially changed, as described by §21.191 of this subchapter [~~division~~] (relating to Repair and Maintenance of Commercial Signs).

[~~(d) A nonprofit organization that holds a permit for a nonconforming sign that otherwise qualifies for a permit under §21.149 of this division (relating to Nonprofit Sign Permit) may convert the permit to one issued under that section.~~]

§21.152. License Application.

(a) To apply for a license under this subchapter [~~division~~], a person must file an application in a form prescribed by the department. The application must include at a minimum:

(1) the complete legal name, mailing address, email address, and telephone number of the applicant; and

(2) designation of each county in which the applicant's signs are to be erected or maintained.

(b) The application must be [~~signed, notarized, and~~] filed with the department and be accompanied by:

(1) a fully executed commercial sign [~~outdoor advertiser's~~] surety bond:

(A) in the amount of $2,500 for each county designated under subsection (a)(2) of this section up to a maximum of $10,000;

(B) payable to the commission to reimburse the department for removal costs of a sign that the license holder unlawfully erects or maintains; and

(C) in a form prescribed by the department, executed by a surety company authorized to transact business in this state;

(2) a duly certified power of attorney from the surety company authorizing the surety company's representative to execute the bond on the effective date of the bond;

(3) the license fee prescribed by §21.156 of this subchapter [~~division~~] (relating to License Fees); and

(4) if applicable, an indication that the applicant is a military service member, military spouse, or military veteran to ensure priority handling of application.

(c) If a paper application is filed, the form must be complete and the [~~The~~] documentation and the fee required under this section must be sent to: Texas Department of Transportation, Highway Beautification Section [~~Outdoor Advertising~~], P.O. Box 13043, Austin, Texas 78711-3043.

§21.153. License Issuance.

(a) The department will issue a license if the requirements of §21.152 of this subchapter [~~division~~] (relating to License Application) are satisfied.

(b) The department will not issue a license to an entity that is not authorized to conduct business in this state.

(c) To amend a license, the license holder must file an amended application in a form prescribed by the department and accompanied by a valid rider to the surety bond.

§21.154. License Not Transferable.

A license issued under this subchapter [~~division~~] is not transferable.

§21.155. License Renewals.

(a) To continue a license in effect, the license must be renewed annually in accordance with Subsection (b) of this section.

(b) To renew a license, the license holder must submit an [~~file a written~~] application in a form prescribed by the department accom-

panied by each applicable license fee prescribed by §21.156 of this subchapter [division] (relating to License Fees). The application must be received by the department before the 16th day of the month in which the license expires. The renewal [before the 46th day after the date of the license's expiration and] must include at a minimum proof of current surety bond coverage.[:]

[(1) the complete legal name, mailing address, and telephone number of the license holder;]

[(2) number of the license being renewed;]

[(3) proof of current surety bond coverage; and]

[(4) the signature of the license holder or person signing on behalf of the business entity.]

(c) An expired license may be reinstated if a renewal application, accompanied by proof of current surety bond and a $100 late processing fee, is received by the department not later than the 45th day after the expiration date of the license. A license reinstated under this subsection will have the same renewal date as if the renewal had been filed timely.

(d) [(c)] A license is not eligible for renewal if the license holder is not authorized to conduct business in this state.

(e) [(d)] If a paper renewal application is filed, it must be complete and the [The] documentation and the fee required under this section must be sent to: Texas Department of Transportation, Highway Beautification Section [Outdoor Advertising], P.O. Box 13043, Austin, Texas 78711-3043.

§21.156. License Fees.

(a) The amount of the fee for the issuance of a license issued under this subchapter is $125.

(b) The amount of the annual renewal fee is $75.

(c) In addition to the $75 annual renewal fee, an additional late fee of $100 is required for a renewal license application that is received before the 45th day after the expiration date of the license.

(d) A license fee is payable by credit card, check, cashier's check, or money order made payable to the Texas Highway Beautification Fund, and must be submitted with the application. If payment [the check or money order] is dishonored upon presentment, the license is voidable.

(e) The department will provide a renewal notification by mail or electronically to the license holder at least 45 days before the date of the license expiration and if the license is not renewed before it expires, the department [within 20 days after the date of expiration] will provide notification to the license holder of the opportunity to file a late renewal application.

§21.158. License Revocation.

(a) The department will revoke a license and will not issue or renew permits or transfer existing permits under the license if:

(1) the surety bond is not provided within the time specified by the department under §21.152 of this subchapter [division] (relating to License Application) or §21.155 of this subchapter [division] (relating to License Renewals);

(2) surety bond coverage is terminated under §21.157 of this subchapter [division] (relating to Temporary Suspension of License);

(3) the total number of final enforcement actions initiated by the department against the license holder under §21.176 of this subchapter (relating to Cancelation of Permit), §21.198 of this subchapter (relating to Order of Removal); §21.204 of this subchapter (relating to Administrative Penalties for Commercial Signs), §21.425 of chapter (relating to Cancelation of Permit), §21.426 of chapter (relating to Administrative Penalties), or §21.440 of chapter (relating to Order of Removal); or Transportation Code, Chapters 391 or 394, that result in the cancellation of the license holder's sign permit, payment of an amended penalty by the license holder, or the removal of the license holder's sign equal or exceed:

(A) 10 percent of the number of valid permits held by the license holder if the license holder holds more than 1,000 sign permits;

(B) 20 percent of the number of valid permits held by the license holder if the license holder holds at least 500 but fewer than 1,000 sign permits;

(C) 25 percent of the number of valid permits held by the license holder if the license holder holds at least 100 but fewer than 500 sign permits; or

(D) 30 percent of the number of valid permits held by the license holder if the license holder holds fewer than 100 sign permits; or

(4) the license holder has not complied with previous final administrative enforcement actions regarding the license or any permit held under the license.

(b) The department will send notice by certified mail of an action under this section to the address of record provided by the license holder.

(c) The notice will clearly state:

(1) the reasons for the action;

(2) the effective date of the action;

(3) the right of the license holder to request an administrative hearing; and

(4) the procedure for requesting a hearing including the period in which the request must be made.

(d) A request for an administrative hearing under this section must be made in writing to the department at the address listed on the notice letter within 45 days after the date that the notice is mailed.

(e) If timely requested, an administrative hearing will be conducted in accordance with Chapter 1, Subchapter E of this title (relating to Procedures in Contested Case).

(f) For the purposes of this section, an enforcement action is final if the time for any further review of the action or proceeding related to the action has expired.

§21.159. Permit Application.

(a) To obtain a permit for a commercial sign, a license holder [person] must file an application in a form prescribed by the department. The application must include, at a minimum:

(1) the complete name and address of the license holder [applicant];

(2) the complete name and address of the authorized agent of the license holder if an agent is used [the original signature of the applicant];

(3) the proposed location and description of the sign;

(4) the complete legal name and telephone number [address] of the owner of the designated site;

(5) the appraisal district property tax identification number of the designated site;

[(6) the original signature of the site owner or the site owner's authorized representative, with appropriate documentation from the site owner authorizing the person to act as the site owner's representative on the application demonstrating:]

[(A) consent to the erection and maintenance of the sign; and]

[(B) right of entry onto the property of the sign location by the department or its agents.]

(6) [(7)] city's current zoning of the sign's location; and

(7) [(8)] additional information the department considers necessary to determine eligibility.

[(b) If the sign is a nonprofit sign, the application must include verification of the applicant's nonprofit status.]

(b) [(c)] If the sign is to be located within [the jurisdiction of a municipality, including] the extraterritorial jurisdiction of a [the] municipality with a population greater than 1.9 million[,] that is exercising its statutory authority to regulate commercial signs, as authorized under §21.200 of this subchapter (relating to Local Control of Commercial Signs) [outdoor advertising], a certified copy of the permit issued by the municipality within the preceding twelve months must be submitted with the application. [unless documentation is provided to show that the municipality requires:]

[(1) the issuance of a department permit before the municipality's; or]

[(2) the erection of the sign within a period of less than twelve months after the date of the issuance of the municipal permit.]

(c) [(d)] The application must be[:]

[(1) notarized;]

[(2) sent to: Texas Department of Transportation, Outdoor Advertising, P.O. Box 13043, Austin, Texas 78711-3043; and]

[(3)] accompanied by the fee prescribed by §21.175 of this subchapter [division] (relating to Permit Fees).

(d) If a paper application is filed:

(1) the applicant must certify that the application is complete and correct;

(2) the application must have original signatures; and

(3) the application, required documentation, and the fee required under this section must be sent to: Texas Department of Transportation, Highway Beautification Section, P.O. Box 13043, Austin, Texas 78711-3043.

(e) A permit application fee is payable by credit card or check made payable to the Texas Highway Beautification Fund.

(f) [(e)] To facilitate a site's location during the initial inspection process, the application must identify the sign site marking in accordance with §21.160 of this subchapter (relating to Applicant's Identification of a New Commercial Sign's Proposed Site) by:

(1) GPS coordinates in latitude and longitude, accurate within 50 feet; or

(2) a sketch or aerial map depicting distances to nearby landmarks.

(g) In addition to the other requirements of this section, an application for an electronic sign must include:

(1) a certified copy of the permit issued by the municipality that gives permission for the electronic sign at the site specified in the permit application or if the municipality does not issue permits, a certified copy of written permission from the municipality for the electronic sign at the site specified in the permit application; and

(2) contact information for a person who is available to be contacted at any time and who is able to turn off the electronic sign promptly if a malfunction occurs or is able to accommodate an emergency notification request from a local authority under §21.258 of this subchapter (relating to Emergency Information).

§21.160. Applicant's Identification of a New Commercial Sign's Proposed Site.

(a) An applicant for a new permit [for a new sign] must identify the proposed site of the sign on the parcel number indicated in the application by setting a stake or marking the concrete at the proposed location of the edge of the sign structure, including the sign face, that is nearest to the right of way.

(b) At least two feet of the stake must be visible above the ground. The stake or the mark must be distinguished from any other stake or mark at the location.

(c) A stake or mark on the concrete may not be moved or removed until the application is denied or if approved, until the sign has been erected.

§21.161. Site Owner's Consent; Withdrawal.

[(a)] A site owner's consent to the erection and maintenance of a commercial [the] sign and access to the site by the department or its agent is provided with the filing of a permit application under §21.159 of this subchapter [division] (relating to Permit Application). The consent operates for the life of the lease. [or until the owner delivers to the department and to the sign owner a written statement that permission for the maintenance or inspection by the department or its agents of the sign has been withdrawn and documentation showing that the lease allowing the sign has been terminated in accordance with the terms of the lease agreement or through a court order.]

[(b) If the sign owner provides documentation that the sign owner is disputing the lease termination, the department will not cancel the permit until a settlement signed by both parties or a court order settling the dispute is delivered to the department.]

§21.162. Permit Application for Certain Preexisting Commercial Signs.

(a) If a sign was in place before the time that the land on which the sign is located first became subject to Transportation Code, Chapter 391, the owner of the sign must apply for a permit for the sign within 60 days after the date on which the department sends notice by certified mail to the owner that a permit for the sign is required. Failure to obtain a permit as required by the department will result in an order of removal under §21.198 of this subchapter (relating to Order of Removal).

(b) The department may issue a permit with a non-conforming status if the sign was lawfully erected before the roadway became subject to regulation and the conditions of the sign or location do not meet current requirements.

§21.163. Permit Application Review.

(a) The department will consider permit applications in the order of the receipt of completed [the] applications.

(b) If a paper [an] application is rejected because it is not complete, lacks documentation, or has incorrect information, the application loses its priority position. The department will notify [and a copy

~~of the application will be sent to~~] the applicant of [~~outlining~~] the reasons the application was rejected.

(c) The department will hold an application that is for the same site as or a conflicting site with that of an application that the department previously received until the department makes a final decision on the previously received application. The department will notify the applicant that the applicant's application is being held because an application for the same or a conflicting site was previously received. For the purposes of this subsection, the date of a final decision on an application is:

(1) the date of the final decision on an appeal under §21.170 of this subchapter [~~division~~] (relating to Appeal Process for Permit Denials); or

(2) if an appeal is not filed within the period provided by §21.170 of this subchapter [~~division~~], on the 46th day after the date the denial notice was received under §21.164 of this subchapter [~~division~~] (relating to Decision on Application).

(d) The department will review the permit application for completeness, correctness, and compliance with all requirements of this subchapter [~~division~~]. Measurements will be taken at the site to determine if the sign placement meets the spacing and location requirements.

§21.164. Decision on Application.

(a) The department will make a decision on an application within 60 days after the date of receipt of the application. If the decision cannot be made within the 60 day period, the department will notify the applicant of the delay and provide the reason for the delay and provide an estimate for when the decision will be made.

(b) If the permit application is approved, the department will issue a permit for the sign [~~by sending a copy of the approved application and a sign permit plate to the applicant~~].

(c) If the permit application is not approved, the department will send to the applicant [~~a copy of the denied application and~~] a notice that states the reason for the denial.

~~[(d) If the permit application is denied, the department will notify the landowner identified on the permit application of the denial by written notice. The notice is for informational purposes only, and does not convey any rights to the landowner. The landowner may not appeal the denial unless the landowner is also the applicant.]~~

§21.166. Commercial Sign Location Requirements.

(a) The department will not issue a permit under this subchapter [~~division~~] unless the sign for which application is made is located along a roadway to which Transportation Code, Chapter 391, applies and is in:

(1) an unzoned commercial, governmental, or industrial area; or

(2) a zoned commercial or industrial area.

(b) Subsection (a) of this section does not apply to a commercial sign that was lawfully in existence when it became subject to Transportation Code, Chapter 391.

(c) The department will not issue a permit or approve an application for an amended permit if the location of the sign is within the corridor of a section of highway that has received environmental clearance and alignment approval by the Federal Highway Administration, but for which the construction contract has not been awarded.

(d) An electronic sign may be located, relocated, or upgraded only along a regulated highway and within:

(1) the corporate limits of a municipality that allows electronic signs under its sign or zoning ordinance; or

(2) the extraterritorial jurisdiction of a municipality described by paragraph (1) of this subsection that under state law has extended its municipal regulation to include and allow electronic signs in that area.

(e) An electronic sign may not be located within 1,500 feet of another electronic sign on the same highway if facing the same direction of travel, or if the sign will be located in a political subdivision that is authorized to exercise control under §21.200 of this subchapter (relating to Local Control of Commercial Signs) the sign spacing must comply with the Texas Federal and State Agreement on Highway Beautification.

§21.167. Erection and Maintenance from Private Property.

(a) The department will not issue a permit for a commercial sign unless it can be erected and maintained from private property.

(b) If the department finds sufficient evidence that the license holder [~~licensee~~] destroyed vegetation on the right of way for a proposed sign site, the permit application will be denied.

§21.168. Conversion of Certain Authorization to Permit.

(a) The department will convert a commercial sign registration issued under §21.409 of this chapter (relating to Permit Application) or a permit issued under §21.407 of this chapter (relating to Existing Off-Premise Signs) to a commercial sign permit under this subchapter [~~division~~] if a highway previously regulated under Transportation Code, Chapter 394 becomes subject to Transportation Code, Chapter 391.

(b) A holder of a permit or registration converted under this section is not required to pay an original permit fee under §21.175 of this subchapter [~~division~~] (relating to Permit Fees). The permit must be renewed under §21.172 of this subchapter [~~division~~] (relating to Permit Renewals), on the date the renewal of the permit or registration issued under §21.407 or §21.409 of this chapter, as appropriate, would have been due.

(c) If a commercial sign owner has prepaid registration fees under §21.407 of this chapter, the outstanding balance will be credited to the sign owner's annual renewal fee.

~~[(d) The department will issue a sign permit plate to a holder of a permit or a registration converted under this section at no charge. If a replacement plate is needed after the initial issuance, a fee will be charged in accordance with §21.175 of this division.]~~

§21.169. Notice of Commercial Sign Becoming Subject to Regulation.

(a) The department will send notice by certified mail to the owner of a commercial sign that becomes subject to Transportation Code, Chapter 391 [~~because of the construction of a new highway, the change in designation of an existing highway, or decertification of a certified city~~]. If the owner of the sign cannot be identified from the information on file with the department, the department will give notice to the landowner of record [~~by prominently posting the notice on the sign for a period of 45 consecutive days~~].

(b) If the owner of a commercial sign described by subsection (a) of this section does not hold a license issued under §21.153 of this subchapter [~~division~~] (relating to License Issuance) or §21.450 of this chapter (relating to License Issuance), the owner must obtain the license within 60 days after the day that[~~:~~]

[~~(1)~~] the department sends notice under subsection (a) of this section.[~~; or~~]

[(2) the 45-day posting period under subsection (a) of this section ends.]

(c) The sign owner must obtain a permit in accordance with §21.162 of this subchapter (relating to Permit Application for Certain Preexisting Commercial Signs) within 60 days after the later of the date of receipt of the notice under subsection (a) of this section or the date of the issuance of the license in accordance with subsection (b) of this section.

(d) If the sign owner fails to obtain a permit from the department within the period described by subsection (c) of this section, or the sign owner cannot be determined or located, the landowner will be required to remove the sign structure in accordance with §21.198 of this subchapter (relating to Order of Removal).

§21.170. Appeal Process for Permit Denials.

(a) If a commercial sign permit is denied, the applicant may file a request for an appeal with the executive director through the Right of Way Division [for an appeal].

(b) The request for appeal must be written and sent:

(1) electronically at ROW_outdooradvertising@txdot.gov; or [be in writing;]

(2) by mail to: P.O. Box 5075, Austin, Texas 78704-5075, attention "Highway Beautification Section."

(c) The request must:

(1) [(2)] contain[:]

[(A) a copy of the denied permit application;]

[(B)] a statement of why the denial is believed to be in error; [and]

(2) [(C)] provide evidence that supports the issuance of the permit [application], such as documents, drawings, surveys, or photographs; and

(3) be received within 45 days after the date the denial notice was received.

(d) [(c)] The executive director or the executive director's designee who is not below the level of assistant executive director, will make a final determination on the appeal within 60 days after the date that the executive director receives the request for appeal. If the final determination is that the permit is denied, the executive director or the executive director's designee will send the final determination to the applicant stating the reason for denial. If the determination is that the application be approved, the department will issue the permit in accordance with §21.164 of this subchapter [division] (relating to Decision on Application).

[(d) If the executive director or designee is unable to make a final determination on the appeal within the 60-day period under subsection (c) of this section, the department will notify the applicant by mail of the delay and provide an estimated time in which a final determination will be made.]

§21.171. Permit Expiration.

(a) A permit is valid for one year.

(b) A permit automatically expires on the date that the license under which the permit was issued expires or is revoked by the department under §21.158 of this subchapter [division] (relating to License Revocation).

§21.172. Permit Renewals.

(a) To be continued in effect, a sign permit must be renewed annually on or before its expiration date.

(b) A permit is eligible for renewal if the sign for which it was issued continues to meet all applicable requirements of this subchapter [division] and Transportation Code, Chapter 391.

(c) To renew the permit, the permit holder must file with the department a renewal [written] application in a form prescribed by the department accompanied by the applicable fees prescribed by §21.175 of this subchapter [division] (relating to Permit Fees). The application with all applicable fees must be received by the department before the 46th day after the date of the permit's expiration.

(d) A permit may not be renewed if the sign for which it was issued is not erected to the extent that it includes a sign face or the permit holder has not demonstrated an identifiable legal access route from private property before the first anniversary of the date that the permit was issued.

(e) The department will provide a renewal notification to the license holder of record at least 30 days before the date of the permit expiration. If the permit is not renewed on or before its expiration date, [it expires, not later than 30 days after the date of expiration] the department will provide notification to the license holder of the opportunity to file a late renewal with all applicable fees.

(f) The department will inspect the sign site and the sign structure on or after the first anniversary of the date of the permit's issuance for compliance with applicable law, including regulations.

(g) If on the date of the inspection under subsection (f) of this section, the sign structure is not built to the full extent approved by the permit with respect to dimensions, lighting, height, or number of faces, the department will adjust the permit to reflect the dimensions, lighting, height, and number of faces of the sign structure as they exist on that date. The permit will be eligible for renewal only for the dimensions, lighting, height, and number of faces as adjusted by the department.

(h) The documentation and fees [fee] required under this section must be sent to: Texas Department of Transportation, Highway Beautification Section [Outdoor Advertising], P.O. Box 13043, Austin, Texas 78711-3043 or submitted to the department electronically through a process established by the department.

(i) By filing a renewal application, the sign owner is asserting to the department that the sign meets all applicable requirements of this subchapter. Renewal of a permit does not indicate that the department has determined that the sign is in compliance with applicable regulations.

§21.173. Transfer of Permit.

(a) A sign permit may be transferred only with the written approval of the department.

(b) At the time of the transfer, both the transferor and the transferee must hold a valid license issued under §21.153 of this subchapter [division] (relating to License Issuance) or §21.450 of this chapter (relating to License Issuance), except as provided in subsections (e) - (g) of this section.

(c) The permit holder must send to the department a [written] request to transfer a sign permit in a form prescribed by the department accompanied by the applicable fees prescribed by §21.175 of this subchapter [division] (relating to Permit Fees). The request may be submitted online or in writing.

(d) If the request is submitted in writing and is approved, the department will send to the transferor and to the transferee a copy of the approved permit transfer form.

(e) If the request is submitted electronically, the department will send the request to the transferor for affirmation, If affirmed by

transferor, the department will notify the transferee to submit applicable fees required under subsection (c) of this section. After the fee is received, the department will confirm the completed permit transfer to the transferor and transferee electronically. [~~A permit issued to a nonprofit organization under §21.149 of this division (relating to Nonprofit Sign Permit) may be transferred to another nonprofit organization that does not hold a license issued under §21.153 of this division or §21.450 of this chapter if the sign will be maintained as a nonprofit sign.~~]

[~~(f) A permit issued to a nonprofit organization under §21.149 of this division may be converted to a regular permit and transferred to a person that is not a nonprofit organization if the transferee holds a license for the county in which the sign is located at the time of the transfer and the sign meets all requirements of this division.~~]

(f) [~~(g)~~] The department may approve the transfer of one or more commercial sign permits from a transferor to a person who holds a license, with or without the signature of the transferor, if the person provides to the department:

(1) legal documents showing the sign has been sold;

(2) documents that indicate that the transferor is dead or cannot be located; or

(3) a court order demonstrating the new ownership of the sign permit.

(g) [~~(h)~~] The department will not approve the transfer if cancellation of the permit is pending or has been abated awaiting the outcome of an administrative hearing.

(h) [~~(i)~~] The department will approve a transfer only if the permit is valid.

(i) [~~(j)~~] The documentation and fees [~~fee~~] required under this section must be sent to: Texas Department of Transportation, Highway Beautification Section [~~Outdoor Advertising~~], P.O. Box 13043, Austin, Texas 78711-3043 or submitted to the department electronically through the process established by the department.

§21.174. Amended Permit.

(a) To perform customary maintenance or to make substantial changes to a commercial sign [~~the sign or sign structure~~] under §21.191 of this subchapter [~~division~~] (relating to Repair and Maintenance of Commercial Signs) a permit holder must obtain an amended permit before initiating any action to the sign structure. To change the sign face of an existing permitted sign to an electronic sign under [~~Division 2 of~~] this subchapter, [~~(relating to Electronic Signs)~~] a permit holder must obtain an amended permit.

(b) To obtain an amended permit, the permit holder must submit an amended permit application on a form prescribed by the department. The amended permit application must provide the information required under §21.159 of this subchapter [~~division~~] (relating to Permit Application) applicable to an amended permit and indicates the change from the information in the original application for the sign permit. [~~The amended application is not required to contain the signatures of the land owner or city representative.~~]

(c) The new sign face size, configuration, height, or lighting, [~~or location~~] must meet all applicable requirements of this subchapter. [~~division and if the amended permit is to erect an electronic sign, the requirements of Division 2 of this subchapter.~~]

(d) The holder of a permit for a nonconforming sign may apply for an amended permit to perform eligible customary maintenance under §21.191(b) of this subchapter [~~division~~]. An amended permit will not be issued for a substantial change as described by §21.191(c) of this subchapter [~~division~~] to a nonconforming sign.

(e) Making a change to a sign, except as provided by subsection (h) of this section, without first obtaining an amended permit is a violation of this subchapter [~~division~~] and will result in an administrative enforcement action.

(f) The department will make a decision on an amended permit application within 60 days of the date of the receipt of the amended permit application. If the decision cannot be made within the 60 day period the department will notify the applicant of the delay, provide the reason for the delay and provide an estimate of when the decision will be made.

(g) If an amended permit application is denied, the applicant may file a request with the executive director for an appeal using the same procedures found in §21.170 of this subchapter [~~division~~] (relating to Appeal Process for Permit Denials).

(h) If maintenance or changes authorized under this section are being made on a conforming sign because of a natural disaster, on request the department may waive the requirement that the required amended permit be issued before the work begins. If the department grants a waiver under this subsection, the permit holder shall submit the amended permit application within 60 days after the date that the work is completed. If the maintenance or changes violate this section or the permit holder fails to submit the amended permit application as required by this subsection, the sign is subject to enforcement and removal actions.

(i) An amended permit is valid for one year after the date of the department's approval of the amended permit application. If any of the changes approved in the amended permit application are not completed within one year after the date of the department's approval, the license holder must reapply to make those changes and must pay the prescribed fee. The provisions of this subchapter relating to a permit, including §21.172(g) of this subchapter [~~division~~] (relating to Permit Renewals), apply to the amended permit. The date of the department's approval of the amended permit application is considered to be the amended permit's date of issuance.

(j) The documentation and fee required under this section must be sent to: Texas Department of Transportation, Highway Beautification Section [~~Outdoor Advertising~~], P.O. Box 13043, Austin, Texas 78711-3043 or submitted to the department electronically through the process established by the department.

(k) If a sign is built with a smaller face than the size shown on the permit application, with fewer faces or number of lights shown on the permit application, or if the number of faces or lights is reduced or any face is reduced in size after the sign [~~it~~] is built, an amended permit will be required to make any changes to the configuration, height, or increase the size of the face or increase the number of lights.

(l) An amended application will not be approved to change the location of a permitted sign structure.

(m) A conforming commercial sign may be modified to be an electronic sign only if an amended permit for the electronic sign is obtained from both the municipality in whose jurisdiction the sign is located and the department.

§21.175. Permit Fees.

(a) The amounts of the fees related to permits under this subchapter are:

(1) $100 for an original or amended permit for a sign;

[~~(2) $100 for an original or amended permit issued under Division 2 of this subchapter for an electronic sign~~];

(2) [~~(3)~~] $100 for an original permit for a sign that was lawfully in existence when the sign became subject to Transportation Code, Chapter 391;

(3) [~~(4)~~] $75 for the renewal of a permit; and

[~~(5) $75 for the renewal of a permit issued under Division 2 of this subchapter for an electronic sign;~~]

(4) [~~(6)~~] $25 for the transfer of a permit.[~~; and~~]

[~~(7) $25 for a replacement sign permit plate.~~]

~~(b) The original and renewal permit fee for a nonprofit sign permit is $10.~~]

(b) [~~(c)~~] In addition to the $75 annual renewal fee, an additional late fee of $100 is required for a renewal of a permit if the renewal application is received by the department after the permit expiration date but before the 46th day after the permit expiration date.

[~~(d) No fee is charged for the transfer of a permit issued to a nonprofit organization to another nonprofit under §21.173 of this division (relating to Transfer of Permit). The fee provided under subsection (a)(6) of this section applies to the conversion and transfer of a permit issued to a nonprofit organization to a person other than a nonprofit organization under §21.173 of this division.~~]

(c) [~~(e)~~] A fee prescribed by this section is payable by credit card, check, cashier's check, or money order. If payment [~~a check or money order~~] is dishonored upon presentment, the permit, renewal, amended permit, or transfer is void.

§21.176. Cancellation of Permit.

(a) The department will cancel a permit for a commercial sign if the sign:

(1) is removed, unless the sign is removed and re-erected at the request of a condemning authority;

(2) is not maintained in accordance with this subchapter [~~division~~] or Transportation Code, Chapter 391;

(3) is damaged beyond repair, as determined under §21.197 of this subchapter [~~division~~] (relating to Discontinuance of Nonconforming Commercial Sign Due to Destruction);

(4) is abandoned, as determined under §21.181 of this subchapter [~~division~~] (relating to Abandonment of Sign);

(5) has substantial changes made to a non-conforming sign in violation of this subchapter [~~division~~] or Transportation Code, Chapter 391;

(6) is built by an applicant who uses false information on a material issue of the permit application;

(7) is erected, repaired, or maintained in violation of §21.199 of this subchapter [~~division~~] (relating to Destruction of Vegetation and Access from Right of Way Prohibited);

(8) has been made more visible by the permit holder clearing vegetation from the highway right of way in violation of §21.199 of this subchapter [~~division~~];

(9) is located in an unzoned commercial or industrial area and the department has evidence that an activity supporting the unzoned commercial or industrial area was created primarily or exclusively to qualify the area as an unzoned commercial or industrial area[~~, and that no activity has been conducted at the site within one year~~]; or

(10) is accessed, erected, repaired, or maintained from the right of way [~~site cannot be accessed from private property~~].

(b) The department will cancel a permit for a commercial sign if the sign owner:

(1) fails to cure a violation in accordance with §21.205 of this subchapter, (relating to Curable Commercial Sign Permit Violations); or

(2) fails to pay an administrative penalty under §21.204 of this subchapter, (relating to Administrative Penalties for Commercial Signs).

[~~(b) The department may cancel a permit for a sign if the sign:~~]

[~~(1) is erected after the effective date of this section and is more than twenty feet from the location described in the permit application, or is built within twenty feet of the location described in the permit application but at a location that does not meet all spacing requirements of this chapter or other assertions contained in the permit application;~~]

[~~(2) has customary repairs made to a non-conforming sign, or substantial changes made to a conforming sign without obtaining a required amended permit under §21.174 of this division (relating to Amended Permit);~~]

[~~(3) is erected, repaired, or maintained from the right of way; or~~]

[~~(4) does not have the permit plate properly attached under §21.165 of this division (relating to Sign Permit Plate).~~]

[~~(c) Before initiating an enforcement action under this section, the department will notify the sign owner in writing of the violation of subsection (b) of this section and will give the sign owner 60 days to correct the violation, provide proof of the correction, and if required, obtain an amended permit from the department.~~]

(c) [~~(d)~~] Upon determination that a permit should be canceled, the department will mail a notice of cancellation to the address of the record permit [~~license~~] holder. The notice must state:

(1) the reason for the cancellation;

(2) the effective date of the cancellation;

(3) the right of the permit holder to request an administrative hearing on the cancellation; and

(4) the procedure for requesting a hearing and the period for filing the request.

(d) [~~(e)~~] A request for an administrative hearing under this section must be in writing and delivered to the department within 45 days after the date that the notice of cancellation is received.

(e) [~~(f)~~] If timely requested, an administrative hearing will be conducted in accordance with Chapter 1, Subchapter E of this title (relating to Procedures in Contested Case) and the cancellation is abated until the cancellation is affirmed by order of the commission.

(f) [~~(g)~~] A permit holder may voluntarily cancel a permit by submitting a request in writing after the sign has been removed. Subsections (c) - (e) [~~(d) - (f)~~] of this section do not apply to a permit voluntarily canceled under this subsection.

[~~(h) The department will notify the landowner identified on the permit application of a cancellation enforcement action. The notice is for informational purposes only, and does not convey any rights to the landowner. The landowner may not appeal the cancellation unless the landowner is also the holder of the permit.~~]

§21.177. Commercial or Industrial Area.

For the purposes of this subchapter [~~division~~], a commercial or industrial area is:

(1) a zoned commercial or industrial area described by §21.178 of this subchapter [~~division~~] (relating to Zoned Commercial or Industrial Area); or

(2) an unzoned commercial or industrial area described by §21.179 of this subchapter [~~division~~] (relating to Unzoned Commercial or Industrial Area).

§21.178. Zoned Commercial or Industrial Area.

A zoned commercial or industrial area is an area that is designated, through a comprehensive zoning action, for general commercial or industrial use by a political subdivision with legal authority to zone. An area is not a zoned commercial or industrial area if it is:

(1) an area in which limited commercial or industrial activities incident to other primary land uses is allowed;

(2) an area that is designated for and created primarily to allow commercial sign [~~outdoor advertising~~] structures along a regulated highway;

(3) an unrestricted area; or

(4) a small parcel or narrow strip of land that cannot be put to ordinary commercial or industrial use and that is designated for a use classification that is different from and less restrictive than its surrounding area.

§21.179. Unzoned Commercial or Industrial Area.

(a) An unzoned commercial or industrial area is an area that:

(1) is within 800 feet, measured from the nearest point along the edge of the highway right of way perpendicular to the centerline of the main-traveled way, of and on the same side of the highway as the principal part of at least two adjacent recognized governmental, commercial, or industrial activities that meet the requirements of subsection (c) of this section;

(2) is not predominantly used for residential purposes; and

(3) has not been zoned under authority of law.

(b) A part of the regularly used buildings, parking lots, or storage or processing areas of each of the governmental, commercial, or industrial activities must be within 200 feet of the highway right of way and a portion of the permanent building in which the activity is conducted must be visible from the main-traveled way.

(c) For governmental, commercial, or industrial activities to be considered adjacent for the purposes of subsection (a)(1) of this section, the regularly used buildings, parking lots, storage or processing areas of the activities may not be separated by:

(1) a public road, or a street; or

(2) more than 50 feet of:

(A) vacant lot;

(B) undeveloped area; or

(C) a non-governmental, non-commercial, or non-industrial area.

(d) Two activities that occupy the same building qualify as adjacent activities for the purposes of subsection (a)(1) of this section, if:

(1) each activity:

(A) has at least 400 square feet of floor space dedicated to that activity; and

(B) is an activity that is customarily allowed only in a zoned commercial or industrial area;

(2) the two activities are separated by a dividing wall constructed from floor to ceiling;

(3) the two activities have access to the restroom facilities during all hours the activity is staffed or opened; and

(4) the two activities operate independently of one another.

(e) For the purposes of subsection (d) of this section, two separate product lines offered by one business are not considered to be two activities.

(f) To determine whether an area is not predominantly used for residential purposes under subsection (a)(2) of this section, not more than 50 percent of the area, considered as a whole, may be used for residential purposes. A road or street is considered to be used for residential purposes only if residential property is located on both of its sides. The area to be considered is the total of actual or projected frontage of the commercial or industrial activities plus 800 feet on each side of that frontage, measured along the highway right of way to a depth of 660 feet. The depth of an unzoned commercial or industrial area is measured from the nearest edge of the highway right of way perpendicular to the centerline of the main-traveled way of the highway.

(g) The length of an unzoned commercial or industrial area is measured from the outer edge of the regularly used building, parking lot, storage, or processing area of the commercial or industrial activity and along or parallel to the edge of the pavement of the highway. If the business activity does not front the highway, a projected frontage is measured from the outer edge of the regularly used building, parking lot, storage, or processing area to a point perpendicular to the centerline of the main-traveled way.

(h) A sign is not required to meet the requirements of subsection (d)(1)(A), (2), or (3) of this section or §21.180 of this subchapter [~~division~~] (relating to Commercial or Industrial Activity) to maintain conforming status if the permit for the sign was issued before the effective date of this section.

§21.180. Commercial or Industrial Activity.

(a) For the purposes of this subchapter [~~division~~], a governmental, commercial or industrial activity is an activity that:

(1) is customarily allowed only in a zoned commercial or industrial area; and

(2) is conducted in a permanent building or structure permanently affixed to the real property that:

(A) has an indoor restroom, running water, functioning electrical connections, and permanent flooring, other than dirt, gravel, or sand;

(B) is visible from the traffic lanes of the main-traveled way;

(C) is not primarily used as a residence; and

(D) has at least 400 square feet of its interior floor space devoted to the activity.

(b) For the purposes of this subchapter, a building or structure is considered permanently affixed if:

(1) it has an attached septic field or is part of a sewer system, or is considered to be real property by the county appraisal district; or

(2) all of the following requirements are met:

(A) it has no wheels attached;

(B) it does not have a towing device, such as hitch or tongue; and

(C) it has anchoring straps or cables affixed to the ground using pier footing.

(c) The following are not commercial or industrial activities:

(1) agricultural, forestry, ranching, grazing, farming, and related activities, including the operation of a temporary wayside fresh produce stand;

(2) an activity that is conducted only seasonally;

(3) an activity that has not been conducted at its present location for at least 180 days;

(4) an activity that is not conducted by at least one person at the activity site, and that is not operated for at least 30 hours per week and on at least four days per week;

(5) the operation or maintenance of:

(A) a commercial sign [~~an outdoor advertising structure~~];

(B) a public space [~~recreational facility, such as a campground, golf course, tennis court, wild animal park, or zoo,~~] other than the related activities conducted in a building or structure that meets the requirements of subsection (a)(2) of this section and the parking facilities for that building or structure;

(C) an apartment house or residential condominium;

(D) a public or private preschool, secondary school, college, or university, other than a trade school or corporate training campus;

(E) a quarry or borrow pit, other than the related activities conducted in a building or structure that meets the requirements of subsection (a)(2) of this section and the parking facilities for that building or structure;

(F) a cemetery; or

(G) a place that is primarily used for worship;

(6) an activity that is conducted on a railroad right of way; and

(7) an activity that is created primarily or exclusively to qualify an area as an unzoned commercial or industrial area.

(d) For the purposes of this section, a building is not primarily used as a residence if more than 50 percent of the building's square footage is used solely for the business activity.

(e) A sign is not required to meet the requirements of subsection (a)(2)(C) (as clarified by subsection (d) of this section), (a)(2)(D), (c)(3), or (c)(4) of this section to maintain conforming status if the permit for the sign was issued before the effective date of this section.

§21.181. Abandonment of Sign.

(a) The department may consider a sign abandoned and cancel the sign's permit if:

(1) all [~~the~~] sign faces are [~~face is~~] blank or without legible content; [~~advertising or copy for a period of 365 consecutive days or longer; or~~]

(2) the sign structure needs more than customary maintenance to be repaired; or

(3) the sign structure is overgrown by trees or other vegetation.

[~~(b) Small temporary signs, such as garage sale signs or campaign signs, that are attached to the structure do not constitute legible advertising or copy for the purpose of ending the period under subsection (a)(1) of this section.~~]

(b) [~~(c)~~] The department will not consider the payment of property taxes or the retention of a sign as a balance sheet asset in determining whether the sign permit should be canceled under this section.

[~~(d) The department may initiate the cancellation process if the department has evidence that supports the fact that the sign face has been blank or has been without legible advertisement or copy for 365 days, such as photographs showing that on at least four dates throughout the 365-day period the sign was in the same condition or was degrading. Evidence is not required for each of the 365 days.~~]

[~~(e) If the location of the abandoned sign is allowed under this division, the department may issue a permit for the sign site to anyone who submits an application that meets the requirements of this division. The department will not issue a permit for an abandoned sign that is located in a place that does not meet the requirements of this division.~~]

[~~(f) For the purposes of this section "copy" includes any advertisement that the sign is available for lease.~~]

[~~(g) A multi-face sign is not abandoned unless all sign faces may be considered abandoned under this section.~~]

[~~(h) Before initiating a cancellation process under this section the department will provide notice to the sign owner and land owner as identified on the permit application of the abandonment determination and allow the sign owner 60 days to correct the issue.~~]

§21.182. Commercial Sign Face Size and Positioning.

(a) A sign face may not exceed:

(1) 672 square feet in area;

(2) 25 feet in height; and

(3) 60 feet in length.

(b) For the purposes of this section, border and trim are included as part of the sign face, and the base, apron, supports, and other structural members, are excluded as part of the sign face.

(c) Notwithstanding the area limitation provided by subsection (a)(1) of this section, one or more temporary protrusions may be added to a sign, provided that the sign face, including the protrusions, meets the height and length limitations of subsection (a) of this section and:

(1) the area of a protrusion is located exclusively inside of the sign face border and trim; or

(2) the area of the protrusion is outside of the sign face border and trim, as indicated on the sign permit, and does not exceed 10 percent of the permitted area.

(d) Except as provided in subsection (g) of this section, a [~~A~~] sign may have two or more sign faces that are placed back-to-back, side-by-side, stacked, or in "V" type construction with not more than two faces presented in each direction. If such an arrangement is used, the sign structure or structures are considered to be one sign for all purposes. Two sign faces which together exceed 700 square feet in area may not face in the same direction.

(e) Two sign faces that face in the same direction may be presented as one face by covering both faces and the area between the faces

with an advertisement, as long as the size limitations of subsection (a) of this section are not exceeded.

(f) A sign may not have a moveable protrusion unless authorized under [~~Division 2 of~~] this subchapter [~~(relating to Electronic Signs)~~].

(g) Two electronic sign faces may be located on the same sign structure if each sign face is visible only from a different direction of travel.

§21.184. Location of Commercial Signs Near Public Spaces [~~Parks~~].

(a) The center of a sign may not be located within 250 feet of the nearest point of the boundary of a public space [~~park~~].

(b) This subsection applies only if a public space [~~park~~] boundary abuts the right of way of a regulated highway. A sign may not be located within 1,500 feet of the boundary of the public space [~~park~~], as measured along the right of way line from the nearest common point of the space's boundary and the right of way. This limitation applies:

(1) on both sides of a highway that is on a nonfreeway primary system; or

(2) on the side of a highway on which the public space [~~park~~] is located, if the highway is on an interstate or freeway primary system.

§21.185. Location of Commercial Signs Near Certain Facilities.

(a) A sign may not be erected along a freeway or interstate regulated highway that is outside an incorporated municipality in an area that is adjacent to or within 1,000 feet of:

(1) an interchange or intersection at grade; or

(2) a rest area, ramp, or the highway's acceleration and deceleration lanes.

(b) The distance from a ramp or acceleration or deceleration lane is measured from the point of the pavement widening at the beginning of the entrance or exit ramp and from the point that the pavement widening ends at the conclusion of the entrance or exit ramp.

(c) The distance from a rest area is measured along the right of way line from the outer edges of the rest area boundary abutting the right of way.

(d) An area is adjacent to a rest area or a highway's acceleration or deceleration lane if the area is between the point of the highway widening at the beginning of the entrance or exit ramp and the point that pavement widening ends at the conclusion of the entrance or exit ramp.

(e) All measurements are taken from a point perpendicular to the highway and along the highway right or way.

§21.186. Location of Commercial Signs Near State Right of Way.

A sign may not be erected so that the part of the sign face nearest a highway is within five feet of the highway's right of way line.

§21.187. Spacing of Commercial Signs.

(a) Permitted signs on the same side of a regulated freeway, including freeway frontage roads, may not be erected closer than 1,500 feet apart.

(b) For a highway on a non-freeway primary system and outside the incorporated boundaries of a municipality, permitted signs on the same side of the highway may not be erected closer than 750 feet apart.

(c) For a highway on a non-freeway primary system highway and within the incorporated boundaries of a municipality, permitted signs on the same side of the highway may not be erected closer than 300 feet apart.

(d) A permitted sign that is located within the incorporated boundaries of a certified city on a highway on a freeway primary system may not be closer than:

(1) 1,500 feet to another sign that is on the same side of the highway and outside the incorporated boundaries of a municipality; or

(2) 500 feet to another sign that is on the same side of the highway and inside the incorporated boundaries of a municipality.

(e) A permitted sign that is located within the incorporated boundaries of a municipality on a highway that is on a non-freeway primary system may not be closer than:

(1) 750 feet to another sign that is on the same side of the highway and outside the incorporated boundaries of a municipality; or

(2) 300 feet to another sign that is on the same side of the highway and inside the incorporated boundaries of a municipality.

(f) For the purposes of this section, the space between commercial signs is measured between points along the right of way of the highway perpendicular to the center of the signs.

(g) For the purposes of this section, a municipality's extraterritorial jurisdiction is not considered to be included within the boundaries of the municipality.

[~~(h) This section does not apply to directional signs, on-premise signs, or official signs that are exempted from the application of Transportation Code, §391.031.~~]

(h) [~~(i)~~] The spacing requirements of this section do not apply to commercial signs separated by buildings, natural surroundings, or other obstructions in a manner that causes only one of the signs to be visible within the specified spacing area.

(i) [~~(j)~~] A permitted sign may not be erected within five feet of the highway right of way line. The distance shall be measured from the end of the sign face nearest the right of way line.

(j) [~~(k)~~] A permitted sign that is being displaced by a highway construction project will not be considered in determining the spacing for a new sign application.

§21.188. Wind Load Pressure.

An application for new commercial sign permit or a permit renewal must include a certification [~~signed~~] by the applicant that the proposed or existing sign will withstand wind load pressures in pounds per square foot as set out in the following table.
Figure: 43 TAC §21.188 (No change.)

§21.189. Commercial Sign Height Restrictions.

(a) Except as provided by subsections [~~subsection~~] (f) and (g) of this section, a commercial sign may not be erected that exceeds an overall height of 42-1/2 feet.

(b) A roof sign that has a solid sign face surface may not at any point exceed 24 feet above the roof level.

(c) A roof sign that has an open sign face in which the uniform open area between individual letter or shapes is not less than 40 percent of the total gross area of the sign face may not at any point exceed 40 feet above the roof level.

(d) The lowest point of a projecting roof sign or a wall sign must be at least 14 feet above grade.

(e) For the purposes of this section, height is measured from the centerline of the main-traveled way closest to the sign face, at a

point perpendicular to the sign location. A frontage road of a controlled access highway or freeway is not considered the main-traveled way for purposes of this subsection. In the event that the main-traveled way that is perpendicular to the sign structure is below grade, sign height will be measured from the base of the sign structure.

(f) The height measurement does not include any renewable energy device such as solar panels or wind turbines that are attached to the sign structure above the sign face to improve the energy efficiency of the sign structure.

(g) A commercial sign structure erected prior to March 1, 2017,may not be higher than 85 feet, excluding a cutout that extends above the rectangular border of the sign face.

(h) A person may rebuild a sign structure erected prior to March 1, 2017,without obtaining a new or amended permit from the department, provided that the sign is rebuilt at the same location where the sign existed on March 1, 2017, at a height that does not exceed the height of the sign on that date and continues to complies with all other provisions of the sign permit except height.

§21.190. Lighting of and Movement on Commercial Signs.

(a) Other than a sign permitted as an electronic sign, a [~~A~~] sign may not contain or be illuminated by flashing, intermittent, or moving lights, including any type of screen using animated or scrolling displays[~~, except that this subsection does not apply to a sign that only provides public service information, such as time, date, temperature, weather, or similar information~~].

(b) A conforming [~~Except for a relocated sign, any new~~] sign may be illuminated but only by:

(1) upward lighting of no more than 4 luminaires per direction of the sign face or faces of the structure; or

(2) downward lighting of no more than 4 luminaires per direction of the sign face or faces of the structure.

(c) Lights that are a part of or illuminate a sign:

(1) must be shielded, directed, and positioned to prevent beams or rays of light from being directed at any portion of the traveled ways of a regulated highway;

(2) may not be of such intensity or brilliance as to cause vision impairment of a driver of any motor vehicle on a regulated highway or otherwise interfere with the driver's operation of a motor vehicle; and

(3) may not obscure or interfere with the effectiveness of an official traffic sign, device, or signal.

(d) A temporary protrusion may not be illuminated by flashing or moving lights or enhanced by reflective material that creates the illusion of flashing or moving lights.

(e) Reflective paint or reflective disks may be used on a sign face only if the paint or disks do not:

(1) create the illusion of flashing or moving lights; or

(2) cause an undue distraction to the traveling public.

(f) A neon light may be used on a sign face only if:

(1) the light does not flash;

(2) the light does not cause an undue distraction to the traveling public; and

(3) the permit for the sign specifies that the sign is an illuminated sign.

(g) This subchapter [~~division~~] does not prohibit a temporary protrusion area of the sign face that displays only numerical characters and that satisfies this subsection and the requirements of §21.182 of this subchapter [~~division~~] (relating to Commercial Sign Face Size and Positioning). An electronic sign may contain a temporary protrusion described by this subsection. The display on the temporary protrusion may be a digital or other electronic display, but if so:

(1) it must consist of a stationary image;

(2) it may not change more frequently than four times in any 24 hour period; and

(3) the process of any change of display must be completed within two minutes.

(h) If the department finds that an electronic sign causes glare or otherwise impairs the vision of the driver of a motor vehicle or otherwise interferes with the operation of a motor vehicle, the owner of the sign, within 12 hours of a request by the department, shall reduce the intensity of the sign to a level acceptable to the department.

§21.191. Repair and Maintenance of Commercial Signs.

(a) The following are considered to be routine maintenance activities that do not require an amended permit:

(1) the replacement of nuts and bolts;

(2) nailing, riveting, or welding;

(3) cleaning and painting;

(4) manipulation of the sign structure to level or plumb it;

(5) changing of the advertising message;

(6) the replacement of minor parts if the materials of the minor parts are the same type as those being replaced and the basic design or structure of the sign is not altered;

(7) changing all or part of the sign [~~face~~] structure but only if materials similar to those of the sign structure [~~face~~] being replaced are used; and

(8) upgrading existing lighting for an energy efficient lighting system.

(b) Except as allowed by Transportation Code, §391.038, the [~~The~~] following are considered to be customary maintenance activities that may be made but require an amended permit before the initiation of such an activity:

(1) replacement of poles, but only if not more than one-half of the total number of poles of the sign structure are replaced in any 12 month period and the same material is used for the replacement poles; and

(2) adding a catwalk to the sign structure.

(c) The following are examples of substantial changes that may be made but require an amended permit before the initiation of such an activity:

(1) adding lights to an un-illuminated sign or adding additional lights or adding more intense lighting to an illuminated sign whether or not the lights are attached to the sign structure;

(2) changing the number of poles in the sign structure;

(3) adding permanent bracing wires, guy wires, or other reinforcing devices;

(4) changing the material used in the construction of the sign structure, such as replacing wooden material with metal material;

(5) adding faces to a sign or changing the sign configuration;

(6) increasing the height of the sign;

(7) changing the configuration of the sign structure, such as changing a "V" sign to a stacked or back to back sign, or a single face sign to a back-to back sign; and

(8) moving the sign structure or sign face in any way unless the movement is made in accordance with §21.192 of this subchapter [~~division~~] (relating to Permit for Relocation of Sign).

(d) To add a catwalk to a sign structure the catwalk must meet Occupational Safety and Health Administration guidelines.

§21.192. Permit for Relocation of a Commercial Sign.

(a) A commercial sign that has been timely removed from a department construction project site may be relocated in accordance with this section, §21.193 of this subchapter [~~division~~] (relating to Location of Relocated Commercial Sign)[~~, §21.194 of this division (relating to Construction and Appearance of Relocated Sign),~~] and §21.195 of this subchapter [~~division~~] (relating to Relocation of Sign within a Certified City [~~Municipality~~]) if the sign is legally erected and maintained and will be within the highway right of way as a result of a highway construction project or, under exceptional circumstances as determined by the executive director or the executive director's deputy if the sign is legally erected and maintained and the relocation will further the intended purposes of the Highway Beautification Act of 1965 (23 U.S.C. §§131, 136, 319).

(b) To relocate a sign under this section, the permit holder must obtain a new permit under §21.164 of this subchapter [~~division~~] (relating to Decision on Application)[~~, but the permit fee is waived~~].

(c) To receive a new permit to relocate a sign under this section, the permit holder must submit a new permit application that identifies that the application is for the relocation of an existing sign due to a highway construction project. The new location must meet all local codes, ordinances, and applicable laws.

(d) The permit holder must receive the permit approving the relocation of the existing sign before applying for an amended permit under §21.174 of this subchapter [~~division~~] (relating to Amended Permit) to change the sign structure.

(e) Notwithstanding other provisions of this section, if only a part of a sign will be located within the highway right of way as a result of the construction project, the sign owner may apply to amend the existing permit for the sign to authorize:

(1) the adjustment of the sign face on a monopole sign that would overhang the proposed right of way and the required five foot setback from that location to the land on which the sign's pole is located, including adding a second pole if required to support the adjustment for a legal non-conforming monopole sign;

(2) the relocation of the poles and sign face of a multiple sign structure that is located in the proposed right of way from the proposed right of way and the required five-foot setback to the land on which the other poles of the sign structure are located; or

(3) a reduction in the size of a sign structure that is located partially in the proposed right of way and the required five-foot setback so that the sign structure and sign face are removed from the proposed right of way and the required five-foot setback.

(f) A permit application for the relocation of a sign must be submitted within 36 months after the earlier of the date the original sign was removed or the date the original sign was required to move. The sign owner is required to continue to renew the sign permit and pay the permit renewal fee for the sign to remain eligible for relocation. The relocation permit issued must be maintained in accordance with §21.172 of this subchapter [~~division~~] (relating to Permit Renewals).

(g) To replace an issued and active relocation permit, an operator first must cancel the permit, then must reapply, pay the fee prescribed by §21.175 of this subchapter [~~division~~] (relating to Permit Fees), and obtain approval for the new permit in accordance with subsection (a) of this section. The relocation process must be completed within the time requirements of subsection (f) of this section.

§21.193. Location of Relocated Commercial Sign.

[~~(a) To receive a new permit for relocation, an existing sign must be relocated on a part of the same parcel of land on which the sign was situated before relocation in a location that is allowed under this section.~~]

[~~(b) If the sign owner can demonstrate that the location under subsection (a) of this section is not physically or economically feasible for a sign structure, the sign owner, on approval by the department, may relocate the sign to any other location that is allowed under this subsection. The owner is not entitled to additional relocation benefits under §21.196 of this division (relating to Relocation Benefits) if the sign structure is relocated further than 50 miles from the location of the existing sign.~~]

(a) [~~(c)~~] The location of the relocated sign must be within a zoned commercial or industrial area as described by §21.178 of this subchapter [~~division~~] (relating to Zoned Commercial or Industrial Area) or an unzoned commercial or industrial area, as described by §21.179 of this subchapter [~~division~~] (relating to Unzoned Commercial or Industrial Area) except that an unzoned commercial or industrial area may include only one recognized commercial or industrial activity.

(b) [~~(d)~~] A sign may not be relocated to a place where it:

(1) can cause a driver to be unduly distracted in any way;

(2) will obscure or otherwise interfere with the effectiveness of an official traffic sign, signal, or device; or

(3) will obstruct or interfere with the driver's view of approaching, merging, or intersecting motor vehicle or rail traffic.

(c) [~~(e)~~] A sign may not be relocated to a place that is:

(1) within 500 feet of a public space [~~park~~] that is adjacent to a regulated highway, with the limitation provided under this paragraph applying:

(A) on either side of a regulated highway that is on a nonfreeway primary system; or

(B) on the side of the highway adjacent to the public space [~~park~~] if the regulated highway is on an interstate or freeway primary system;

(2) if outside of an incorporated municipality along a regulated highway, adjacent to or within 500 feet of:

(A) an interchange, intersection at grade, or rest area; or

(B) a ramp or the ramp's acceleration or deceleration lane;

(3) for a highway on the interstate or freeway primary system, closer than 500 feet to another permitted sign on the same side of the highway;

(4) for a highway on the nonfreeway primary system and outside of a municipality, closer than 300 feet to another permitted sign on the same side of the highway;

(5) for a highway on the nonfreeway primary system and within the incorporated boundaries of a municipality, closer than 100 feet to another permitted sign on the same side of the highway; or

(6) within five feet of any highway right of way line.

(d) [~~(f)~~] A sign, at the time of and after its relocation, must be within 800 feet of at least one recognized governmental, commercial, or industrial activity that is located on the same side of the highway.

~~[(g) The spacing limitations provided in subsection (e) of this section do not apply to on-premise signs or directional or official signs that are exempted from the application of Transportation Code, §391.031.]~~

(e) [~~(h)~~] A sign may not be relocated from a road regulated under this subchapter [~~division~~] to a rural road regulated by Subchapter K of this chapter (relating to Control of Signs along Rural Roads).

(f) [~~(i)~~] A relocated sign may not be erected or maintained in a location that violates Health and Safety Code, Chapter 752.

§21.195. Relocation of Commercial Sign within Certified Cities [~~Municipality~~].

[~~(a)~~] If an existing sign is located within the incorporated boundaries of a municipality that is approved by the department to control commercial signs [~~outdoor advertising~~] under §21.200 of this subchapter [~~division~~] (relating to Local Control of Commercial Signs) and the sign will be relocated within the incorporated boundaries of the same municipality, permission to relocate the sign must be obtained only from the municipality in accordance with the municipality's sign and zoning ordinances.

~~[(b) Permission from the municipality to relocate the sign is required to receive relocation benefits from the department under §21.196 of this division (relating to Relocation Benefits).]~~

§21.197. Discontinuance of Nonconforming Commercial Sign Due to Destruction.

(a) Except as allowed by Transportation Code, §391.038, if [~~If~~] a sign is partially destroyed by a natural force outside the control of the permit holder, including wind, tornado, lightening, flood, fire, or hurricane, the department will determine whether the sign can be repaired without an amended permit.

(b) The department may require the sign owner to submit an estimate of the proposed work, including an itemized list of the materials to be used and the manner in which the work will be done. The department will allow the sign to be repaired without an amended permit if the department determines that the damage is not substantial. If the damage is determined to be substantial the sign owner must obtain an amended permit under §21.174 of this subchapter [~~division~~] (relating to Amended Permit).

(c) The department will cancel the existing permit if it determines the damage to the sign is substantial under subsection (g) of this section and an amended permit is not obtained by the sign owner within one year after the date that the department first became aware of the damage.

(d) If a permit is canceled under this section or §21.176 of this subchapter [~~division~~] (relating to Cancellation of Permit), the remaining sign structure must be dismantled and removed without cost to the state.

(e) A sign that is totally or partially destroyed by vandalism or a motor vehicle accident may be rebuilt as described on the most recently approved permit application.

(f) If a decision to cancel a permit is appealed, the sign may not be repaired during the appeal process.

(g) Damage is considered to be substantial if the cost to repair the sign would exceed 60 percent of the cost to replace it with a sign of the same basic construction using new materials and at the same location.

(h) If a sign is partially destroyed by a natural force outside the control of the sign owner in an area that receives a state or federal disaster declaration and the sign owner has documentation to show that the sign damage is not considered substantial the sign may be repaired without a prior determination by the department under subsection (b) of this section if the sign is repaired within 180 days after the date of the event and if within 60 days after the date of completion of the repairs, the owner submits to the department:

(1) photos of the partially destroyed sign and the repaired sign; and

(2) a notarized affidavit executed by the sign owner containing:

(A) the permit number of the sign;

(B) a statement that the sign was damaged by the natural force;

(C) a statement that the cost to repair the sign was less than 60 percent of the cost of a new sign with the same basic construction; and

(D) a statement that the sign was repaired in the same configuration and with like materials according to the most recent approved permit.

(i) A sign repaired in violation of this subsection is subject to enforcement and removal.

§21.198. Order of Removal.

(a) If a commercial sign permit expires without renewal, or is canceled or if a [~~the~~] sign is erected or maintained in violation of this subchapter [~~division~~], the owner of the sign or, if the department cannot after reasonable effort determine the identity or location of the sign owner, the land owner, on a written demand by the department, shall remove the sign at no cost to the state.

(b) If the sign owner, or land owner, does not remove the sign within 45 days of the day that the demand is sent, the department will remove the sign and will charge the sign owner or land owner, as appropriate, for the cost of removal, including the cost of any court proceedings.

(c) The department will rescind a removal demand if the department determines the demand was issued incorrectly.

§21.199. Destruction of Vegetation and Access from Right of Way Prohibited.

(a) A person may not:

(1) trim or destroy a tree or other vegetation on the right of way for any purpose related to this subchapter [~~division~~]; or

(2) erect or maintain a sign from the right of way.

(b) The department will initiate enforcement action if the permit holder, or someone acting on behalf of the permit holder, violates this section.

(c) Subsection (a)(2) of this section does not apply to the maintenance of a sign if:

(1) the state right of way is the only available access for a sign on railroad right of way to which §21.150(b) of this subchapter [~~division~~] (relating to Continuance of Nonconforming Signs) applies; and

(2) the sign owner notifies the department and obtains approval of the department before accessing the sign for maintenance.

(d) It is not a violation to trim the portion of the tree or vegetation that encroaches onto private property at the private property line as long as the trimming occurs from the private property.

§21.200. Local Control of Commercial Signs.

(a) The department may authorize a political subdivision, as a certified city, to exercise control over commercial [~~outdoor~~] signs in its jurisdiction. If the political subdivision receives approval under this section, it will be listed as a certified city and a permit issued by that political subdivision is acceptable instead of a permit issued by the department within the approved area.

(b) To be considered for authorization under this section, the political subdivision must submit to the department:

(1) a copy of its sign regulations;

(2) a copy of its zoning regulations;

(3) information about the number of personnel who will be dedicated to the program and what type of records will be maintained, including whether the political subdivision maintains an inventory of signs that can be provided to the department in an electronic format that is acceptable to the department; and

(4) an enforcement plan that includes the removal of illegal signs.

(c) The department, after consulting with the Federal Highway Administration, shall determine whether a political subdivision has established and will enforce within its corporate limits standards and criteria for size, lighting, and spacing of commercial [~~outdoor~~] signs consistent with the purposes of the Highway Beautification Act of 1965, 23 United States Code §131, and with customary use. The size, lighting, and spacing requirements of the political subdivision may be more or less restrictive than the requirements of this subchapter [~~division~~] as long as the requirements comply with the federal requirements, such as the prohibition of signs over 1,200 square feet in size and spacing of less than 500 feet. The authorization does not include the area in a municipality's extraterritorial jurisdiction.

(d) The department may meet with a political subdivision to ensure that it is enforcing the standards and criteria in accordance with subsection (c) of this section.

(e) After approval under this section, the political subdivision shall:

(1) provide to the department:

(A) a copy of each amendment to its sign and zoning regulations when the amendment is proposed and adopted; and

(B) a copy of any change to its corporate limits and its extraterritorial jurisdiction, if covered by the approval;

(2) annually provide to the department:

(A) an electronic copy of the sign inventory; and

(B) report of the number of sign permits issued and the status of all pending enforcement actions; and

(3) participate in at least one video conference or teleconference sponsored by the department each year.

(f) The political subdivision may:

(1) set and retain the fees for issuing a sign permit; and

(2) establish the period for which a sign permit is effective.

(g) The department will conduct an on-site compliance monitoring review every two years.

(h) The department may withdraw the approval of a political subdivision given under this section if the department determines that the political subdivision does not have an effective sign control program. The department will consider whether:

(1) the standards and criteria of political subdivision's sign regulations continue to meet the requirements of subsection (c) of this section;

(2) the political subdivision maintains an accurate sign inventory and annually provides the inventory to the department in an electronic format; and

(3) the political subdivision enforces the sign regulations and annually reports enforcement actions as required.

(i) The department may reinstate a political subdivision's authority on the showing of a new plan that meets the requirements of subsection (c) of this section.

§21.201. Fees Nonrefundable.

A fee paid to the department under this subchapter [~~division~~] is nonrefundable.

§21.202. Property Right Not Created.

Issuance of a permit or license under this subchapter [~~division~~] does not create a contract or property right in the permit or license holder.

§21.203. Complaint Procedures.

(a) The department will accept and investigate all written complaints on a specific sign structure, sign company, or any other issue under the jurisdiction of the highway beautification [~~outdoor advertising~~] program.

(b) The complaints can be filed via the department's website or by mail.

(c) If the complaint involves a sign structure or a sign company the department will notify the owner of the sign structure or sign company of the complaint and the pending investigation within 15 days of receipt of the complaint. This notification will include a copy of the complaint and complaint investigation procedures.

(d) If the complaint included contact information, the department will provide the complainant with a copy of the complaint procedures within 15 days of the receipt of the complaint.

(e) If the complaint involves fewer than 10 sign structures the department will investigate the complaint and make a finding within 30 days of the receipt of the complaint. If the complaint involves 10 or more sign structures or is an investigation of a sign company or any other sign [~~outdoor advertising~~] matter the department will make a finding within 90 days of the receipt of the complaint.

(f) If the department is unable to meet the deadlines in subsection (e) of this section, the department will notify the complainant, the sign owner, or sign company of the delay and will provide a date for the completion of the investigation.

(g) The department will provide the complainant, sign owner, or sign company the findings of the investigation, which will include whether administrative enforcement actions are being initiated.

§21.204. Administrative Penalties for Commercial Signs.

(a) The department may impose administrative penalties against a person who intentionally violates Transportation Code, Chapter 391 or this subchapter.

(b) The amount of the administrative penalty may not exceed the maximum amount of a civil penalty that may be imposed under Transportation Code, §391.035 and will based on the following:

[~~(1) $150 for a violation of a permit plate requirement under §21.165 of this division (relating to Sign Permit Plate);~~]

(1) [~~(2)~~] $250 for a violation of:

(A) a registration requirement of §21.162 of this subchapter [~~division~~] (relating to Permit Application for Certain Preexisting Commercial Signs); or

(B) erecting the sign at a [~~the~~] location other than the location identified by stake or paint [~~specified on the application~~], except that if the [~~actual~~] sign location as built does not conform to all other requirements the department will seek cancellation of the permit;

(2) [~~(3)~~] $500 for:

(A) maintaining or repairing the sign from the state right of way; or

(B) performing customary maintenance on any sign or substantial changes [~~maintenance~~] on a conforming sign without first obtaining an amended permit as required by §21.191 of this subchapter (relating to Repair and Maintenance of Commercial Signs); or

(3) [~~(4)~~] $1,000 for erecting a sign from the right of way.

(c) In addition to the penalties assessed under subsection (b) of this section, the department may seek to recover the cost of repairing any damage to the right of way done by the sign owner or on the sign owner's behalf.

[~~(d) Before initiating an enforcement action under this section, the department will notify the sign owner in writing of a violation of subsection (b)(1) or (2)(B) of this section and will give the sign owner 60 days to correct the violation and provide proof of the correction to the department.~~]

(d) [~~(e)~~] Upon determination to seek administrative penalties the department will mail a notice of the administrative penalties to the last known address of the permit holder. The notice must clearly state:

(1) the reasons for the administrative penalties;

(2) the amount of the administrative penalty; and

(3) the right of the holder of the permit to request an administrative hearing.

(e) [~~(f)~~] A request for an administrative hearing under this section must be made in writing and delivered to the department within 45 days after the date of the receipt of the notice.

(f) [~~(g)~~] If timely requested, an administrative hearing shall be conducted in accordance with Chapter 1, Subchapter E of this title (relating to Procedures in Contested Case), and the imposition of administrative penalties will be abated unless and until that action is affirmed by order of the commission.

(g) An imposed penalty that is not paid within 60 days of the later of the date of receipt of notice from the department or if an administrative hearing is conducted, the date that the imposition is confirmed, will result in the cancelation of the sign's permit as described in §21.176 of this subchapter (relating to Cancellation of Permit).

§21.205. Curable Commercial Sign Permit Violations.

(a) A permit holder commits a curable violation if the permit holder:

(1) abandons a sign, as determined under §21.181 of this subchapter (relating to Abandonment of Sign);

(2) erects an otherwise conforming sign structure the part of which that is closest to a point perpendicular to the right of way is more than 20 feet but less than 50 feet from the location identified by GPS coordinates recorded by the department at permit issuance;

(3) erects a sign structure at a location that does not meet all spacing requirements of this subchapter or as described in the permit application;

(4) makes customary repairs or substantial changes to a conforming sign without obtaining a required amended permit under §21.174 of this subchapter (relating to Amended Permit);

(5) fails to establish legal access from private property in accordance with §21.167 of this subchapter (relating to Erection and Maintenance from Private Property); or

(6) violates any of the provisions of §21.190 of this subchapter (relating to Lighting of and Movement on Commercial Signs).

(b) The department will notify the permit holder in writing of a violation of this section and will give the permit holder 60 days, beginning on the date of receipt of notice of the violation, to correct the violation, provide proof of the correction, and if required, obtain an amended permit from the department.

(c) Examples of proof of correction of a violation include:

(1) acceptable photographs; and

(2) current survey documentation.

(d) If a permit holder who violates this section fails to correct the violation in accordance with this section, the department will cancel the permit in accordance with §21.176 of this subchapter (relating to Cancellation of Permit).

§21.206. Requirements For An Electronic Sign.

(a) On an electronic sign each message must be displayed for at least eight seconds. A change of message must be accomplished within two seconds and must occur simultaneously on the entire sign face.

(b) An electronic sign must:

(1) contain a default mechanism that freezes the sign in one position if a malfunction occurs; and

(2) automatically adjust the intensity of its display according to natural ambient light conditions.

(c) The owner of an electronic sign shall coordinate with local authorities to display, when appropriate, emergency information important to the traveling public, such as Amber Alerts or alerts concerning terrorist attacks or natural disasters. Emergency information messages must remain in the advertising rotation according to the protocols of the agency that issues the information.

(d) The department will share the contact information with the appropriate local authority that has jurisdiction over the location of the electronic sign.

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 August 31, 2017.

TRD-201703468
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 15, 2017
For further information, please call: (512) 463-8630

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43 TAC §§21.146 - 21.149, 21.151, 21.165, 21.194, 21.196

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §391.032, which provides authority to establish rules to regulate the orderly and effective display of commercial signs on primary roads, Transportation Code, §391.0355, which provides authority for the commission to set fees for administrative penalties in association with violation of commercial sign regulations; Transportation Code, §391.065, which provides authority to establish rules to standardize forms and regulate the issuance of commercial sign licenses; and Transportation Code §391.068, which provides authority for the commission to prescribe permit requirements and set fees for commercial sign permits.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 391.

§21.146. Exempt Signs.
§21.147. On-premise Sign.
§21.148. Exception to License Requirement for Nonprofit Signs.
§21.149. Nonprofit Sign Permit.
§21.151. Time Proposed Roadway Becomes Subject to Division.
§21.165. Sign Permit Plate.
§21.194. Construction and Appearance of Relocated Sign.
§21.196. Relocation Benefits.

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

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DIVISION 2. ELECTRONIC SIGNS

43 TAC §§21.251 - 21.260

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §391.032, which provides authority to establish rules to regulate the orderly and effective display of commercial signs on primary roads, Transportation Code, §391.0355, which provides authority for the commission to set fees for administrative penalties in association with violation of commercial sign regulations; Transportation Code, §391.065, which provides authority to establish rules to standardize forms and regulate the issuance of commercial sign licenses; and Transportation Code §391.068, which provides authority for the commission to prescribe permit requirements and set fees for commercial sign permits.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 391.

§21.251. Definition; Exception to Application of Division.
§21.252. Department Determination.
§21.253. Issuance of Permit.
§21.254. Prohibitions.
§21.255. Location.
§21.256. Modification to Electronic Sign.
§21.257. Requirements.
§21.258. Emergency Information.
§21.259. Contact Information.
§21.260. Application of Other Rules.

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

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CHAPTER 31. PUBLIC TRANSPORTATION

The Texas Department of Transportation (department) proposes amendments to §§31.3, 31.11, 31.30, 31.31, 31.36, 31.42 - 31.45, 31.47, 31.48, 31.50, and 31.57, and the repeal of §31.17 and §31.18, all concerning public transportation.

EXPLANATION OF PROPOSED AMENDMENTS AND REPEALS

The proposed revisions address the impact of changes in state statutes and appropriations, revise funding allocation formulas, address the impacts of revised federal program guidance, remove obsolete text, and update references to current authorizing statutes. Certain sections proposed for repeal administered obsolete federal programs.

SUBCHAPTER A, GENERAL

Amendments to §31.3, Definitions, reflect revisions to the Texas Administrative Code in Chapter 31 in accordance with state and federal statutes and federal guidance impacting the department's role in administering public transportation programs and remove references to repealed federal programs. The definition

of "Common Rule," paragraph (10) is deleted. The United States Department of Transportation Common Rules have been superseded. The citation to the appropriate federal regulations has been substituted for the term "Common Rule" throughout the amended rules. The amendments delete the definition "job access project" which was used as part of a repealed federal statute and add the definition of "large urban transit district," in accordance with HB 1140, 85th Legislature, Regular Session. The amendments add the definition of "small urban transit district," in accordance with HB 1140, 85th Legislature, Regular Session. In the definition of "welfare recipient," the amendments remove a reference to a repealed federal statute.

SUBCHAPTER B, STATE PROGRAMS

Amendments to §31.11, Formula Program, revise the text to account for statutory changes from HB 1140, 85th Legislature, Regular Session, which revise geographical funding categories, address increases in funding, clarify funding allocation description for urban transit districts in the Dallas-Ft. Worth-Arlington urbanized area, remove an expired section, and require a one-time award in FY 2018 to transition from the old formula to the new formula.

Amendments to §31.11(b)(1) indicate the amount of funds available, allocate a portion of those funds to the new funding category "large urban transit districts," show funds as dollar amounts rather than as percentages, and indicate that if appropriated amounts are less than shown, the funds will be reduced proportionately in each funding category.

Amendments to §31.11(b)(1)(A)(i) clarify the description of four urban transit districts in the Dallas-Ft. Worth-Arlington urbanized area. Instead of a description as "tier one," the text explicitly names these four transit districts. The amendments also include the allocated amounts authorized by statute for each of these transit districts.

Amendments to §31.11(b)(1)(A)(ii) describe funding allocation methodology for the small urbanized areas.

Amendments to §31.11(b)(1)(A)(iii) describe funding allocation methodology for the large urbanized areas. The amendments also include a cap on the population figure used in the formula of 299,999 to allocate funds among all eligible large urbanized areas.

Amendments to §31.11(b)(2) remove a reference to an expired provision and add a one-time provision for FY 2018 that requires an allocation to account for the award of additional funds due to the revised rules and available funds.

SUBCHAPTER C, FEDERAL PROGRAMS

Section 31.17, Section 5316 Grant Program, and §31.18, Section 5317 Grant Program, are repealed because the Section 5316 and Section 5317 grant programs were removed from federal statutes by the previous authorizing legislation, known as MAP-21. Projects under §31.17 and §31.18 have been completed and closed out. No impact of the repeal to existing and potential subrecipients is expected.

Amendments to §31.30, Section 5339 Grant Program, reflect revisions to the department's role in administering the Federal Transit Administration (FTA) Section 5339 program. The department will continue to act as the designated recipient in this program for small urban transit districts. However, the department will exercise its option to have small urban transit districts apply directly to the FTA for those funds, upon notification by the department. This is similar to how the FTA Section 5307 program is handled. The department will continue to determine allocations and administer the Section 5339 program for the rural transit districts.

Amendments to §31.30(c) change the description from "transit agencies" to "transit districts" to improve clarity.

Amendments to §31.30(d)(1) revise the formula to use total vehicle miles as reported by transit districts instead of a formula based upon the expected remaining useful life of each vehicle. The amendments also include a minimum amount of one percent of the total program allocation to be awarded to each transit district.

Amendments to §31.30(d)(2) specify that the department will notify the FTA of the formula allocations.

Amendments to §31.30(d)(3) specify that the department will notify the small urban transit districts of the formula allocations.

Amendments to §31.30(d)(4) authorize transit districts to apply for those funds directly with the FTA.

Amendments to §31.30(e)(1) revise the formula to use total vehicle miles as reported by transit districts instead of a formula based upon the expected remaining useful life of each vehicle. The amendments also include a minimum amount of one percent of the total program allocation to be awarded to each transit district.

Amendments to §31.30(f) refer to the latest federal guidance document and remove the reference to fleet condition.

Amendments to §31.30(g) add that recipient projects must also be linked to the asset management plan.

Amendments to §31.31, Section 5310 Grant Program, revise the text to reflect the revised Code of Federal Regulations for the Section 5310 grant program as a result of changes that occur in the Fixing America's Surface Transportation (FAST) Act.

Amendments to §31.31(d) show there is no distinction between primary and alternate recipients of Section 5310 funds for rural and urbanized areas with a population of less than 200,000. Recipients are urban and rural transit districts, private non-profit organizations, state and local government authorities that coordinate services for seniors and individuals with disabilities, or taxis providing shared-ride service. Recipients that are not transit districts shall coordinate service with transit districts to ensure service does not duplicate existing service.

Amendments to §31.31(e)(2)(A)(ii) clarify the description of vehicles by replacing the term paratransit with smaller accessible vehicles to avoid any confusion with vehicles that are used specifically for the ADA required paratransit service in places with fixed route bus service.

Amendments to §31.31(e)(2)(A)(viii) expand the eligible items to lifts, ramps, and other securement devices to include new technology and to reflect the language in the federal circular.

The amendment to §31.31(e)(2)(A)(x) clarifies the use of the word computer to cover the development of new technology beyond the term microcomputer.

Amendments to §31.31(i)(1) - (2) reflect a change in department procedure. Local stakeholders are consulted during the public outreach process before project selection. Local planning and project development occur as part of the coordinated human service transportation planning process, not as part of Section 5310

public outreach. To increase fairness and equity, the department recommends projects that consider program goals and objectives. The reference to the FTA Circular is updated to 9070.1G.

Amendments to §31.31(i) add paragraph (3) to clarify the requirement for at least 55 percent of the funds allocation to be used for capital expenses, expanding on the existing language that not more than 45 percent of the funds can be used for operating expenses.

Amendments to §31.36, Section 5311 Grant Program, revise the text to describe intent to minimize negative impacts from changes in transit district boundaries, revise the factor used to allocate a portion of the funding from revenue miles to total vehicles miles, revise definitions to more closely follow industry usage, and correct references to implementing regulations. Subsection (b)(5) is added to the list of department objectives to show that transportation district boundary changes are an important factor. This includes changes that occur when Texas counties move from one rural transit district to another or when the counties create a new transit district.

Amendments to §31.36(e)(2)(A)(ii) clarify the description of eligible items for capital expenses.

Amendments to §31.36(e)(2)(A)(ix) and (xiii) revise the language to use the same terminology as used in the federal guidance.

Amendments to §31.36(e)(2)(C)(iv), (e)(3) and (4), and (g) refer to the latest federal guidance document.

Amendments to §31.36(g)(3) add a one-time award to address changes in transit district boundaries as a discretionary allocation award category. Amendments to §31.36(g)(4) change the data element for calculating this award category from vehicle revenue miles to total vehicle miles.

SUBCHAPTER D, PROGRAM ADMINISTRATION

Amendments to §31.42, Standard Federal Requirements; §31.43, Contracting Requirements; §31.44, Procurement Requirements; §31.45 Accounting and Financial Recordkeeping Requirements; §31.46, Reimbursement Procedures; §31.47, Audit and Project Close-Out Standards; and §31.48 Project Oversight, revise the rules to correct references to federal regulations and update a compliance monitoring practice.

Amendments to §§31.42(a), 31.43(b), 31.44(b), 31.45(b), and 31.47(b) refer to the latest federal regulations. Amendments to §31.48(b)(4) refer to the latest federal regulations and remove a reference to a state program that does not apply. The amendment to §31.48(c)(3) changes a description to indicate a current compliance monitoring practice.

SUBCHAPTER E, PROPERTY MANAGEMENT STANDARDS

Amendments to §31.50, Recordkeeping and Inventory Requirements, and §31.57, Disposition, revise the text to correct references to federal regulations.

Amendments to §31.57(c) and (d)(2)(C) refer to the latest federal regulations.

FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined that for each of the first five years in which the amendments and repeals as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments or repeals.

Mr. Eric Gleason, Director, Public Transportation Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments or repeals.

PUBLIC BENEFIT AND COST

Mr. Gleason has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments and repeals will be an efficient and effective distribution methodology for additional funds appropriated for public transportation grants, as well as an improved transparency and accountability of administering public transportation programs. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:00 a.m. on October 11, 2017, in the Ric Williamson Hearing Room, First Floor, Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas 78701-2483 and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact the General Counsel Division, 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-8630 at least five working days before the date of the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§31.3, 31.11, 31.30, 31.31, 31.36, 31.42 - 31.45, 31.47, 31.48, 31.50, and 31.57, and the repeal of §31.17 and §31.18, 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 "Public Transportation Rules." The deadline for receipt of comments is 5:00 p.m. on October 16, 2017. 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 repeals, or is an employee of the department.

SUBCHAPTER A. GENERAL

43 TAC §31.3

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, §456.022, which provides the commission with authority to adopt rules establishing a formula allocating funds among individual eligible public transportation providers.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, and 461.

§31.3. Definitions.

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

(1) Administrative expenses--Include, but are not limited to, general administrative expenses such as salaries of the project director, secretary, and bookkeeper; insurance premiums or payments to a self-insurance reserve; office supplies; facilities and equipment rental; and standard overhead rates.

(2) Allocation--A preliminary distribution of grant funds representing the maximum amount to be made available to an entity during the fiscal year, subject to the entity's completion of and compliance with all application requirements, rules, and regulations applicable to the specific funding program.

(3) Americans with Disabilities Act (ADA)--The Americans with Disabilities Act of 1990 (42 U.S.C. §12101 et seq.), which provides a comprehensive national mandate for the elimination of discrimination against individuals with disabilities. The ADA provides specific requirements related to public transportation.

(4) Asset management plan--The transit asset management plan prepared in accordance with 49 U.S.C. §5326 and certified by the department. The plan includes at a minimum, capital asset inventories and condition assessments, decision support tools, and investment prioritization.

(5) Authority--A metropolitan transit or regional transportation authority created under Transportation Code, Chapter 451 or 452; a city transit department created under Transportation Code, Chapter 453, by a municipality having a population of not less than 200,000 at the time of its creation; or a coordinated county authority created under Transportation Code, Chapter 460.

(6) Average revenue vehicle capacity--The number of seats in all revenue vehicles divided by the number of revenue vehicles.

(7) Capital expenses--Include the acquisition, construction, and improvement of public transit facilities and equipment needed for a safe, efficient, and coordinated public transportation system.

(8) Clean Air Act--The federal Clean Air Act (42 U.S.C. §7401 et seq.), which seeks to protect and enhance the quality of the nation's air resources by promoting and financing reasonable federal, state, and local governmental actions for pollution prevention.

(9) Commission--The Texas Transportation Commission.

~~[(10) Common Rule --49 C.F.R. Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments or 49 C.F.R. Part 19, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations.]~~

(10) ~~[(11)]~~ Contractor--A recipient of public transportation funds through a contract or grant agreement with the department.

(11) ~~[(12)]~~ Department--The Texas Department of Transportation.

(12) ~~[(13)]~~ Designated recipient--The state, an authority, a municipality that is not included in an authority, a local governmental body, another political subdivision, or a nonprofit entity providing rural public transportation services, that receives federal or state public transportation money through the department or the Federal Transit Administration, or its successor.

(13) ~~[(14)]~~ Director--The director of public transportation for the department.

(14) ~~[(15)]~~ Disability--Disability as defined in the ADA (42 U.S.C. §12102), which includes a physical or mental impairment that substantially limits one or more major life activities of an individual.

(15) ~~[(16)]~~ District--One of the 25 districts of the department for a designated geographic area.

(16) ~~[(17)]~~ Employment-related transportation--Transportation to support services that assist individuals in job search or job preparation. Trips to daycare centers, one-stop workforce centers, jobs interviews, and vocational training are examples.

(17) ~~[(18)]~~ Equipment--Tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

(18) ~~[(19)]~~ Executive director--The executive director of the department.

(19) ~~[(20)]~~ Fare box revenues--Fares paid by riders, including those who are later reimbursed by a human service agency or other user-side subsidy arrangement. This definition includes subscription service fees, whether or not collected on-board a transit vehicle. Payments made directly to the transportation system by a human service agency are not considered to be fare box revenues.

(20) ~~[(21)]~~ Federal Transit Administration (FTA)--The Federal Transit Administration of the United States Department of Transportation.

(21) ~~[(22)]~~ Federally funded project--A public transportation project that is being funded in part under the provisions of the Federal Transit Act, as amended, 49 U.S.C. §5301 et seq., the Federal-Aid Highway Act of 1973, as amended, 23 U.S.C. §101 et seq., or any other federal program for funding public transportation.

(22) ~~[(23)]~~ Fiscal year--The state accounting period of 12 months that begins on September 1 of each calendar year and ends on August 31 of the following calendar year.

(23) ~~[(24)]~~ Good standing--A status indicating that the department's director of public transportation has not sent a letter to an entity signifying the entity is in noncompliance with any aspect of a program.

(24) ~~[(25)]~~ Incident--An intentional or unintentional act that occurs on or in association with transit-controlled property and that threatens or affects the safety or security of an individual or property.

(25) [~~(26)~~] Large urban transit district--A local governmental entity or a political subdivision of the state that provides and coordinates public transportation within an urbanized area with a population greater than or equal to 200,000 in accordance with Transportation Code, Chapter 458. This definition includes urban transportation providers under Transportation Code, Chapter 456, that received state money through the department on September 1, 1994. This definition excludes authorities. [~~Job access project--A public transportation project relating to the development and maintenance of transportation services designed to transport welfare recipients and eligible low-income individuals to and from jobs and activities related to their employment, or as otherwise defined by 49 U.S.C. §5302 or 49 U.S.C. §5316, the Job Access and Reverse Commute program as established under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).~~]

(26) [~~(27)~~] Like-kind exchange--The trade-in or sale of a transit vehicle before the end of its useful life to acquire a replacement vehicle of like kind.

(27) [~~(28)~~] Local funds--Directly generated funds, as defined in the latest edition of the Federal Transit Administration National Transit Database Reporting Manual. Examples include, but are not limited to, passenger fares, special transit fares, purchased transportation fares, park and ride revenue, other transportation revenue, charter service revenue, freight tariffs, station and vehicle concessions, advertising revenue, funds dedicated to transit at their source, taxes, cash contributions, contract revenue, general revenue, and in-kind contributions.

(28) [~~(29)~~] Local governmental entity--Any local unit of government including a city, town, village, municipality, county, city transit department, or authority.

(29) [~~(30)~~] Local public entity --Includes a city, county, or other political subdivision of the state, a public agency, or an instrumentality of one or more states, municipalities, or political subdivisions of states.

(30) [~~(31)~~] Local share requirement--The amount of funds required and eligible to match federally funded projects for the improvement of public transportation.

(31) [~~(32)~~] Low-income individual--An individual whose family income is at or below 150 percent of the poverty line, as that term is defined in the Community Services Block Grant Act (42 U.S.C. §9902(2)), including any revision required by that section, for a family of the size involved, or as otherwise defined by 49 U.S.C. §5302 or 49 U.S.C. §5316, the Job Access and Reverse Commute program as established under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users.

(32) [~~(33)~~] Metropolitan Planning Organization (MPO)--The organization designated or redesignated by the governor under 23 U.S.C. §134 as the responsible entity for transportation planning in urbanized areas over 50,000 in population.

(33) [~~(34)~~] Mobility management--Eligible capital expenses consisting of short-range planning and management activities and projects for improving coordination among public transportation and other transportation-service providers carried out by a recipient or subrecipient through an agreement entered into with a person, including a government entity, under 49 U.S.C. §5301 et seq. (other than §5309 and §5339). Mobility management excludes operating public transportation services and excludes equipment, tires, tubes, material, and reconstruction of equipment and material described as associated capital maintenance in the definition of "capital project" under 49 U.S.C. §5302.

(34) [~~(35)~~] Net operating expenses--Those expenses that remain after fare box revenues are subtracted from eligible operating expenses.

(35) [~~(36)~~] New public transportation services or alternatives--An activity that, with respect to the New Freedom program:

(A) is targeted toward people with disabilities;

(B) is beyond the ADA requirements;

(C) meets the intent of the program by removing barriers to transportation and assisting persons with disabilities with transportation, including transportation to and from jobs and employment services; and

(D) is not included in a Transportation Improvement Program or Statewide Transportation Improvement Program prior to August 10, 2005.

(36) [~~(37)~~] Nonprofit organization--A corporation or association determined by the Secretary of the Treasury of the United States to be an organization described by 26 U.S.C. §501(c), one that is exempt from taxation under 26 U.S.C. §504(a) or §101, or one that has been determined under state law to be nonprofit and for which the state has received documentation certifying the status of the organization.

(37) [~~(38)~~] Nonurbanized area--An area outside an urbanized area.

(38) [~~(39)~~] Obligated funds--Monies made available under a valid, unexpired contract or grant agreement between the department and a public transportation subrecipient.

(39) [~~(40)~~] Private--Pertaining to nonpublic entities. This definition does not include municipalities or other political subdivisions of the state; public agencies or instrumentalities of one or more states; Native American tribes (except private nonprofit corporations formed by Native American tribes); public corporations, boards, or commissions established under the law of any state; or entities subject to control by public authority, whether state or municipal.

(40) [~~(41)~~] Project--The public transportation activities to be carried out by a subrecipient, as described in its application for funding.

(41) [~~(42)~~] Public transportation--Shared-ride transportation of passengers and their hand-carried packages or baggage on a regular or continuing basis by means of surface or water conveyance by a governmental entity or by a private entity if the private entity receives financial assistance for that conveyance from any governmental entity. This definition includes fixed guideway transportation and underground transportation. This definition excludes services provided by aircraft, ambulances, emergency vehicles, intercity passenger rail transportation, charter bus service, school bus service, sightseeing service, courtesy shuttle service for patrons of one or more specific establishments, or intra-terminal and intra-facility shuttle services.

(42) [~~(43)~~] Public transportation safety plan--The agency safety plan prepared in accordance with 49 U.S.C. §5329 and certified by the department.

(43) [~~(44)~~] Real property--Land, including improvements, structures, and appurtenances, but excluding movable machinery and equipment.

(44) [~~(45)~~] Revenue service--Passenger transportation occurring when a vehicle is available to the general public and there is a reasonable expectation of carrying passengers that directly pay fares, are subsidized by public policy, or provide payment through some contractual agreement. This does not imply that a cash fare must be paid.

Vehicles operated in free fare services are considered in revenue service.

(45) [~~(46)~~] Revenue vehicle--The rolling stock used in providing transit service for passengers. This definition does not include a vehicle used in connection with keeping revenue vehicles in operation, such as a tow truck or a staff car.

(46) [~~(47)~~] Reverse commute project--A public transportation project designed to transport residents of urbanized areas and other than urbanized areas to suburban employment opportunities, or as otherwise defined by 49 U.S.C. §5302 or 49 U.S.C. §5316, the Job Access and Reverse Commute program as established under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users.

(47) [~~(48)~~] Ridership--Unlinked passenger trips.

(48) [~~(49)~~] Rural area--A nonurbanized area.

(49) [~~(50)~~] Rural transit district--A political subdivision of the state that provides and coordinates rural public transportation within its boundaries in accordance with the provisions of Transportation Code, Chapter 458.

(50) [~~(51)~~] Senior--An individual who is 65 years of age or older.

(51) Small urban transit district--A local governmental entity or a political subdivision of the state that provides and coordinates public transportation within an urbanized area with a population less than 200,000 in accordance with Transportation Code, Chapter 458. This definition includes urban transportation providers under Transportation Code, Chapter 456, that received state money through the department on September 1, 1994. This definition excludes authorities.

(52) Stakeholders--All individuals or groups that are potentially affected by transportation decisions. Examples include public health, work force, and human service agencies; representatives of transportation agency employees or other affected employees; private providers of transportation; non-governmental agencies; local businesses; advocates for persons in diverse and traditionally underserved communities, such as seniors, individuals with disabilities, and persons with low incomes; and other interested parties.

(53) Subrecipient--An entity that receives state or federal transportation funding from the department, rather than directly from FTA or other state or federal funding source.

(54) Uniform grant and contract management standards--The standards contained in the Texas Administrative Code, Title 1, Chapter 5, Subchapter A, concerning uniform grant and contract management standards for state agencies.

(55) U.S. DOT--United States Department of Transportation.

(56) Unlinked passenger trips--The number of passengers who board public transportation vehicles. A passenger is counted each time the passenger boards a vehicle even though the passenger might be on the same journey from origin to destination.

(57) Urban transit district--A local governmental entity or a political subdivision of the state that provides and coordinates public transportation within an urbanized area in accordance with Transportation Code, Chapter 458. This definition includes urban transportation providers under Transportation Code, Chapter 456, that received state money through the department on September 1, 1994. This definition excludes authorities.

(58) Urbanized area--A core area and the surrounding densely populated area with a population of 50,000 or more, with boundaries fixed by the United States Census Bureau.

(59) Vehicle miles--The miles a vehicle travels while in revenue service, plus deadhead miles. This definition excludes miles a vehicle travels for charter service, school bus service, operator training, or maintenance testing.

(60) Vehicle revenue hours or miles--The hours or miles a vehicle travels while in revenue service. This definition includes layover and recovery, but excludes travel to and from storage facilities, the training of operators prior to revenue service, road tests, deadhead travel, and school bus and charter service.

(61) Vehicle utilization--Average daily passenger trips per revenue vehicle, divided by average revenue vehicle capacity. This definition provides a measure of an individual system's ability to use existing seating capacity.

(62) Welfare recipient--An individual who has received assistance under a state or tribal program funded under the Social Security Act, Title IV, Part A, at any time during the previous three year period before the date on which the applicant applies for a grant under 49 U.S.C. §5307 or §5311, or as otherwise defined by 49 U.S.C. §5307 or §5311[~~, or under 49 U.S.C. §5316, the Job Access and Reverse Commute program as established under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users~~].

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

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SUBCHAPTER B. STATE PROGRAMS

43 TAC §31.11

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, §456.022, which provides the commission with authority to adopt rules establishing a formula allocating funds among individual eligible public transportation providers.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, and 461.

§31.11. Formula Program.

(a) Purpose. Transportation Code, Chapter 456 requires the commission to allocate, at the beginning of each fiscal biennium, certain amounts appropriated for public transportation. This section sets out the policies, procedures, and requirements for that allocation.

(b) Formula allocation. At the beginning of each state fiscal biennium, an amount equal to the amount appropriated from all sources to the commission by the legislature for that biennium for public trans-

portation, other than federal funds and amounts specifically appropriated for coordination, technical support, or other costs of administration, will be allocated to urban and rural transit districts.

(1) If the appropriated amount to which this subsection applies is at least $69,982,134 [~~$57,482,135 or less~~], the commission will allocate $7,000,000 to large urban transit districts, $20,118,748 [~~35 percent of the appropriated amount~~] to small urban transit districts, and $42,863,386 [~~65 percent of the appropriated amount~~] to rural transit districts. If the appropriated amount is less than $69,982,134, the amounts allocated by this paragraph will be reduced proportionately.

(A) Urban funds available under this section will be allocated to urban transit districts as provided by this subparagraph.

(i) If at least $69,982,134 is appropriated as described in paragraph (1) of this subsection, an urban transit district receiving funds under Transportation Code, Section 456.006(b), will be allocated for each year of the biennium an amount equal to the amount received by that district in Fiscal Year 1997. These districts include the cities of Arlington (amount $341,663), Grand Prairie (amount $170,584), Mesquite (amount $142,455), and North Richland Hills (amount $116,134). These allocations will be assigned from the small urban transit district funds. If less than $69,982,134 is appropriated, the amounts allocated by this clause will be reduced proportionately. If more than $69,982,134 is appropriated, an urban transit district to which this clause applies is not eligible for additional funds under paragraph (2) or (3) of this subsection. [~~Urban funds allocated under this paragraph will be divided into two tiers. Tier one will include urban transit districts that restrict transit eligibility for all public transportation services to seniors and individuals with disabilities. Funding available in tier one is calculated by multiplying the available urban funding by the population of seniors and individuals with disabilities in tier one providers, divided by the service eligible population of urbanized areas receiving funding under this subchapter. Tier two will include urban transit districts that provide any service to the general population. The funds for tier two will be the remaining balance of the available funds after the funds for tier one have been allocated.~~]

(ii) One-half of the funds allocated to small urban transit districts will be [~~within each tier provided under clause (i) of this subparagraph will be allocated to urban transit districts as a need based allocation~~] based on population by using the latest census data available from[~~, and as defined by,~~] the U.S. Census Bureau for each small urbanized area relative to the sum of all small urbanized areas. [~~Any urban transit district whose urbanized area population is 200,000 or greater will have the population adjusted to reflect a population level of 199,999, except that any urban transit district receiving funds in tier one, as described in clause (i) of this subparagraph, will have the population adjusted to reflect a population level of 199,999, or the urbanized area population of the place as defined by the U.S. Census Bureau, whichever is less.~~]

(iii) One-half of the funds allocated to small urban transit districts [~~within each tier provided under clause (i) of this subparagraph~~] will be [~~allocated to urban transit districts as a~~] performance-based allocations. One-half of the funds allocated to large urban transit districts will be based on population by using the latest census data available from the U.S. Census Bureau for each large urbanized area relative to the sum of all large urbanized areas served by urban transit districts. A large urban transit district with an urbanized area population of 300,000 or more will have the population adjusted to reflect a population level of 299,999. One-half of the funds allocated to large urban transit districts will be performance-based allocations. [~~allocation.~~]

(iv) An urban transit district is eligible for a performance-based allocation under clause (ii) or (iii) of this subparagraph, as appropriate, [~~funding under this clause~~] if it is in good standing with the department and has no deficiencies and no findings of noncompliance. The commission will award the performance-based funding based on the following weighted criteria: 30 percent for local funds per operating expense, 20 percent for ridership per capita, 30 percent for ridership per revenue mile, and 20 percent for revenue miles per operating expense. These criteria may be calculated using the urban transit district's annual audit for the previously completed fiscal year, data from other sources, or from the department's records.

(v) [~~(iv)~~] If an urban transit district experiences a negative impact in its performance factor calculations due to the acquisition or loss of service area, a natural disaster, including wind, fire, or flood, or an unforeseen anomaly, the department may mitigate that negative impact with an alternate calculation addressing the specific situation. The alternate calculation may be used in subsequent years at the discretion of the department.

(B) Rural funds allocated under this paragraph will be allocated only to rural transit districts in rural areas based upon need and performance as described in clauses (i) and (ii) of this subparagraph.

(i) Sixty-five percent of the funding under this subparagraph will be allocated to rural transit districts as a need based allocation giving consideration to population weighted at 75 percent and on land area weighted at 25 percent for each rural area relative to the sum of all rural areas.

(ii) Thirty-five percent of the funding under this subparagraph will be allocated to rural transit districts as a performance based allocation. A rural transit district is eligible for funding under this clause if it is in good standing with the department and has no deficiencies and no findings of noncompliance. The commission will award the funding by giving equal consideration to local funds per operating expense, ridership per revenue mile, and revenue miles per operating expense. These criteria may be calculated using the rural transit district's annual audit for the previously completed fiscal year, data from other sources, or from the department's records.

(iii) If a rural transit district experiences a negative impact in its performance factor calculations due to the acquisition or loss of service area, a natural disaster, such as wind, fire, or flood, or an unforeseen anomaly, the department may mitigate that impact with an alternate calculation addressing the specific situation. The alternate calculation may be used in subsequent years at the discretion of the department.

(C) Funds allocated under this section and any local funds may be used for any transit-related activity except that an urban transit district not included in a transit authority but located in an urbanized area that includes one or more transit authorities may use funds allocated under this section only to provide up to:

(i) 65 percent of the local share requirement for federally financed projects for capital improvements;

(ii) 50 percent of the local share requirement for projects for operating expenses and administrative costs;

(iii) 50 percent of the total cost of a public transportation capital improvement, if the urban transit district certifies that federal money is unavailable for the proposed project and the commission finds that the proposed project is vitally important to the development of public transportation in the state; and

(iv) 65 percent of the local share requirement for federally financed planning activities.

(D) Subject to available appropriation, no award to an urban or rural transit district under this paragraph will be less than 90 percent of the award to that transit district for the previous fiscal year. All allocations under subsection (b)(1)(A) and (B) of this section are subject to revision to comply with this standard.

(2) A one-time allocation of state funds appropriated for Fiscal Year 2018 will be made to eligible urban and rural transit districts, consistent with the direction from Transportation Code, Section 456.021(a), as amended by H.B. 1140, 85th Legislature, Regular Session, 2017, to address the impacts of revisions to the state funding formula. This paragraph expires August 31, 2018. [~~If the appropriated amount to which this subsection applies exceeds $57,482,135, the commission will allocate $57,482,135 in accordance with paragraph (1) of this subsection and will allocate all or a part of the excess amount, as necessary to mitigate changes in formula allocations described by subparagraph (A) or (B) of this paragraph, as appropriate, resulting from the application of the 2010 census data.~~]

[~~(A) For an urban transit district, a formula allocation impact may be mitigated if, using 2010 performance data, the total allocation to the district for the need based allocation, as described in subsection (b)(1)(A)(ii) of this section, plus the performance based allocation, as described in subsection (b)(1)(A)(iii) of this section, obtained using 2010 census data, is less than the total corresponding allocation to the district obtained using 2000 census data.~~]

[~~(B) For a rural transit district, a formula allocation impact may be mitigated if, using 2010 performance data, the total allocation to the district for the need based allocation, as described in subsection (b)(1)(B)(i) of this section, plus the performance based allocation, as described in subsection (b)(1)(B)(ii) of this section, obtained using 2010 census data, is less than the total corresponding allocation obtained using 2000 census data.~~]

[~~(C) Allocations under this paragraph are not subject to subsection (b)(1)(D) of this section.~~]

[~~(D) This paragraph expires August 31, 2017.~~]

(3) The commission will award on a pro rata basis, competitively, or using a combination of both any appropriated amount that remains after other allocations made under this subsection. In awarding funds under this paragraph, consideration may be given to coordination and technical support activities, compensation for unforeseen funding anomalies, assistance with eliminating waste and ensuring efficiency, maximum coverage in the provision of public transportation services, funds needed to initiate public transportation service in new designated urbanized areas, adjustment for reductions in purchasing power, reductions in air pollution, or any other appropriate factor. Awards under this paragraph are not subject to subsection (b)(1)(D) of this section in succeeding fiscal years.

(c) Change in service area. If part of an urban or rural transit district's service area is changed due to declaration by the U.S. Census Bureau, or if the service area is otherwise altered, the department and the urban or rural transit district shall negotiate an appropriate adjustment in the funding awarded to that urban or rural transit district for that funding year or any subsequent year, as appropriate. This negotiated adjustment is not subject to subsection (b)(1)(D) of this section.

(d) Unobligated funds. Any money under this section that an urban or rural transit district has not applied for before the November commission meeting in the second year of a state fiscal biennium will be administered by the commission under the discretionary program described in §31.13 of this subchapter (relating to Discretionary Program).

(e) Returned funds. Any money under this section that an urban or rural transit district agrees to return to the department will be administered by the commission under the discretionary program described in §31.13 of this subchapter.

(f) Application. To receive funds allocated under this section, a transit district must first submit a completed application, in the form prescribed by the department. The application must include certification that the proposed public transportation project is consistent with continuing, cooperating, and comprehensive regional transportation planning implemented in accordance with 49 U.S.C. §5301. Federal approval of a proposed public transportation project will be accepted as a determination that all federal planning requirements have been met.

(g) Project evaluation. In evaluating a project under this section, the department will consider the need for fast, safe, efficient, and economical public transportation and the approval of the FTA, or its successor.

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

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SUBCHAPTER C. FEDERAL PROGRAMS

43 TAC §31.17, §31.18

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, §456.022, which provides the commission with authority to adopt rules establishing a formula allocating funds among individual eligible public transportation providers.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, and 461.

§31.17. Section 5316 Grant Program.
§31.18. Section 5317 Grant Program.

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

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43 TAC §§31.30, 31.31, 31.36

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, §456.022, which provides the commission with authority to adopt rules establishing a formula allocating funds among individual eligible public transportation providers.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, and 461.

§31.30. Section 5339 Grant Program.

(a) Purpose. Title 49 U.S.C. §5339 authorizes the Secretary of the U.S. DOT to make grants for bus and bus facilities.

(b) Eligible recipients. Section 5339 funds are available to states and local public entities.

(c) Department role. The department acts as the designated recipient for §5339 grants to §5307 transit districts [~~agencies~~] in small urbanized areas [~~with less than 200,000 population~~] and §5311 rural transit districts [~~agencies~~]. [~~As the administering agency, the department will:~~]

(d) Small urban transit districts. The department will:

(1) allocate the available program funds so that each eligible recipient will receive a proportional share of available funding based on the total vehicle miles reported to the department on an annual basis with no eligible recipient receiving less than one percent of the amount available;

(2) notify the FTA of the results of the allocation calculations;

(3) notify the small urban transit districts of the results of the allocation calculations; and

(4) authorize the small urban transit districts to apply directly with the FTA for the funds, due to their status as direct recipients under the FTA §5307 program.

(e) Rural transit districts. The department will:

(1) allocate the available program funds so that each eligible subrecipient will receive a proportional share of available funding based on the total vehicle miles reported to the department on an annual basis with no eligible subrecipient receiving less than one percent of the amount available [~~allocate the available program funds so that each eligible subrecipient will receive a proportional share of available funding based on the remaining useful life of its public transportation fleet and the cost of replacing that fleet using the department's information system containing transit fleet data~~];

(2) develop application materials and disseminate information to eligible subrecipients;

(3) prepare the state's funding application and submit the application to the FTA for approval;

(4) negotiate and execute contracts with subrecipients;

(5) prepare requests for federal reimbursement and process payment requests from subrecipients;

(6) monitor and evaluate the progress of local projects, including compliance with federal regulations; and

(7) provide technical assistance to subrecipients as necessary.

(f) [~~(d)~~] Eligible assistance categories. Eligible projects are those listed in FTA Circular 5100.1 [~~9300.1B~~] or its latest version. [~~While fleet condition will determine each agency's allocation, §5339 funds can be used for any eligible activity in FTA Circular 9300.1B or its latest version.~~]

(g) [~~(e)~~] Link to asset management plan. At such time as the department implements the requirement of a transit asset management plan, recipient or subrecipient projects must be linked to the asset management plan required by §31.51 of this chapter (relating to Asset Management) and 49 U.S.C. §5326.

(h) [~~(f)~~] Reimbursement rates. For reimbursement:

(1) federal funds may be used to defray up to 80 percent of the cost of eligible capital expenditures;

(2) the federal share may increase to up to 85 percent of the net project cost for a project that involves acquiring vehicles for the purpose of complying with the Americans with Disabilities Act or the Clean Air Act; and

(3) the federal share may increase to up to 90 percent for incremental costs related to compliance with the Clean Air Act in areas of air quality non-attainment or with the Americans with Disabilities Act.

(i) [~~(g)~~] Local share requirements. The non-federal share may be provided by:

(1) cash from state or local governments;

(2) cash from non-government sources other than revenues from providing public transportation services;

(3) revenues from the sale of advertising and concessions;

(4) an undistributed cash surplus, a replacement or depreciation cash fund or reserve, or new capital;

(5) service agreements with a state, local, or private social service organization; or

(6) transportation development credits.

§31.31. Section 5310 Grant Program.

(a) Purpose. Title 49 U.S.C. §5310 authorizes the Secretary of the U.S. DOT to make grants for the provision of transportation services meeting the special needs of seniors and individuals with disabilities. The governor has designated the department to administer the §5310 program.

(b) Goal and objectives. The department's goal in administering the §5310 program is to promote the availability of cost-effective, efficient, and coordinated passenger transportation services planned, designed, and carried out to meet the special needs of seniors and individuals with disabilities when public transportation is insufficient, inappropriate, or unavailable, using the most efficient combination of financial and other resources. To achieve this goal, the department's objectives are to:

(1) promote the development and maintenance of a network of transportation services for seniors and individuals with disabilities throughout the state, in partnership with local stakeholders;

(2) fully integrate the §5310 program with other federal, state, and local resources and programs that are designed to serve similar populations;

(3) promote public transportation projects that exceed the requirements of the Americans with Disabilities Act (ADA);

(4) promote public transportation projects that decrease the reliance of individuals with disabilities on ADA complementary paratransit services;

(5) promote and encourage local participation, especially by seniors and individuals with disabilities or their advocates, in decision-making;

(6) improve the efficiency, effectiveness, and safety of §5310 transit systems through the provision of technical assistance; and

(7) include private sector operators in the overall plan to provide transportation services for seniors and individuals with disabilities.

(c) Department role.

(1) The department acts as the designated recipient for all §5310 funds appropriated to:

(A) a rural area;

(B) an urbanized area with less than 200,000 population; and

(C) an urbanized area with a population of 200,000 or more, on request of the metropolitan planning organization of the urbanized area and concurrence by the commission.

(2) The department recognizes the subrecipients as partners who shall retain control of daily operations. As the administering agency, the department will:

(A) develop application materials and disseminate information to prospective applicants and other interested parties;

(B) develop evaluation criteria and select projects for funding, with input from local entities and local individuals, in accordance with the standards set forth in subsection (i) of this section;

(C) prepare the state's annual program of projects and funding application and submit that material to the FTA for approval;

(D) negotiate and execute contracts with local §5310 recipients;

(E) prepare requests for federal reimbursement and process payment requests from §5310 recipients;

(F) monitor and evaluate the progress of ongoing transportation operations, including compliance with federal regulations and coordination of services; and

(G) provide technical assistance to §5310 recipients to aid them in improving and coordinating transit services.

(3) Failure to expend funds in a timely manner may cause the department to terminate the grant and re-award the unobligated balance to another project.

(d) Eligible recipients.

(1) Existing rural transit districts and urban transit districts serving a population of less than 200,000, local public entities, private non-profit organizations, state and local government authorities that coordinate services for seniors and individuals with disabilities, or private taxi companies that provide shared-ride taxi service to the public or to special categories of users (such as seniors or individuals with disabilities) are eligible [~~will be the primary~~] recipients of funds [~~for their respective service areas~~].

(2) For an area included in a rural or urban transit district's service area [~~not covered by a transit provider or~~] for which the existing transit district [~~provider~~] is not willing or able to provide the transportation, the director may choose a local public entity or a private organization as a [~~an alternate~~] recipient to receive §5310 funds. Private taxi companies that provide shared-ride taxi service to the public or to special categories of users (such as seniors or individuals with disabilities) on a regular basis are also eligible [~~alternate~~] recipients. Any recipient that is not a transit district shall coordinate §5310 service with the existing transit district to ensure service is complementary to and not competitive with existing services.

(3) If the department is the designated recipient for an urbanized area with 200,000 population or more, a recipient for that area will be selected from local transportation providers who are transit authorities or eligible alternate recipients under this program.

(e) Eligible assistance categories. The following categories of expenses are eligible for federal reimbursement under the §5310 program.

(1) State administrative expenses. The department may use up to 10 percent of the annual federal program apportionment to defray its expenses incurred for the administration of the §5310 program. State administrative expenses do not require a non-federal match.

(2) Capital expenses.

(A) With department concurrence, eligible items include:

(i) buses;

(ii) vans or other smaller accessible [~~paratransit~~] vehicles;

(iii) the acquisition of transportation services under a contract, lease, or other arrangement;

(iv) mobility management;

(v) curb cuts, sidewalks, pedestrian signals or other accessible features;

(vi) radios and communication equipment;

(vii) vehicle shelters;

(viii) [~~wheelchair~~] lifts, ramps, and securement devices [~~restraints~~];

(ix) vehicle rehabilitation, remanufacture, or overhaul;

(x) computer [~~microcomputer~~] hardware and software;

(xi) initial component installation costs;

(xii) vehicle procurement, testing, inspection, and acceptance costs;

(xiii) vehicle extended warranties that do not exceed industry standards;

(xiv) the lease of equipment, provided that the local recipient determines a lease is more cost effective than the purchase of equipment after considering management efficiency, availability of equipment, staffing capabilities, and guidelines on capital leases as contained in 49 C.F.R. Part 639;

(xv) transit-related intelligent transportation systems;

(xvi) the introduction of new technology, through innovative and improved products, into mass transportation; and

(xvii) the acquisition of preventive maintenance services and vehicle parts associated with preventive maintenance services.

(B) For reimbursement:

(i) federal funds may be used to defray up to 80 percent of the cost of eligible capital expenditures;

(ii) the federal share may increase to up to 85 percent of the net project cost for a project that involves acquiring vehicles for the purpose of complying with the Americans with Disabilities Act or the Clean Air Act; and

(iii) the federal share may increase to up to 90 percent for incremental costs related to compliance with the Clean Air Act in areas of air quality non-attainment or with the Americans with Disabilities Act.

(3) Operating expenses.

(A) Operating expenses are costs that are directly tied to systems operations, such as costs for fuel, oil, and replacement parts, and driver, mechanic, and dispatcher salaries.

(B) Operating expenses may be reimbursed at 50 percent of net operating expense.

(f) Local share requirements.

(1) Eligible sources to satisfy local share requirements may be derived from the following:

(A) an undistributed cash surplus, or a replacement or depreciation cash fund or reserve;

(B) a service agreement with a state or local social service or workforce agency, or a private social service organization;

(C) amounts appropriated or otherwise made available to a U.S. department or agency that are eligible to be expended for transportation;

(D) funds to carry out the federal lands highways program established by 23 U.S.C. §204;

(E) funds available under §403(a)(5)(C)(vii) of the Social Security Act (42 U.S.C. §603(a)(5)(C)(vii));

(F) in-kind contributions, volunteer services, and donations attributable to the project if the value is documented and previously approved by the department; or

(G) transportation development credits, with prior department approval.

(2) Funds from any other U.S.DOT program are not eligible for use as local matching funds.

(g) Funding distribution. After the state administrative expenses described in subsection (e)(1) of this section are set aside, funds will be allocated on a formula basis as provided by this subsection.

(1) For urbanized areas with a population less than 200,000, 25 percent of the available funds will be allocated equally, using department district boundaries of the districts that include such an area. To allocate the remaining 75 percent, the department will:

(A) calculate the population of seniors and individuals with disabilities in each of those urbanized areas using the latest census figures available from the United States Census Bureau; and

(B) divide each urbanized area's population of seniors and individuals with disabilities, as determined under subparagraph (A) of this paragraph, by the state's total population for urbanized areas with less than 200,000 population to determine that urbanized area's formula allocation.

(2) For rural areas, 25 percent of the available funds will be allocated equally, using department district boundaries of the districts that include such an area. To allocate the remaining 75 percent, the department will:

(A) calculate the population of seniors and individuals with disabilities in each department district using the latest census figures for counties available from the United States Census Bureau; and

(B) divide each department district's subtotal of the population of seniors and individuals with disabilities, as determined under subparagraph (A) of this paragraph, by the state total of that population in rural areas to determine the district's formula allocation.

(3) For urbanized areas with 200,000 population or more for which the department is the designated recipient, funds will be allocated to the respective urbanized area based on the federal apportionment as published in the Federal Register.

(4) Residual funds.

(A) Urbanized areas with populations of less than 200,000 and rural areas. On completion of the project selection procedures described in subsection (i) of this section, if any portion of the allocation described in paragraph (1) or (2) of this subsection is not needed, the commission or the executive director may distribute the balances, as appropriate, to satisfy unmet needs in other areas of the state. This action may require the department to transfer funds, at the state level, between urbanized and rural areas to fully obligate the state's apportionment.

(B) Urbanized areas with populations of 200,000 or more. On completion of the project selection procedures described in subsection (i) of this section, any unallocated funds for urbanized areas with populations of 200,000 or more will remain in that urbanized area until allocated at a future date.

(h) Application requirements. A prospective applicant must submit an application for §5310 grant funds at the time specified by the department. The application must document the need and demand for passenger transportation services for seniors and individuals with disabilities, and also must document inclusion of the project in the coordinated public transit-human service transportation plan.

(i) Project selection. To select projects, the department will consult with all local parties, including metropolitan planning organizations, and follow the procedures set out in this subsection.

(1) The department [~~Department personnel~~] will establish public outreach processes involving[~~, after consultation with~~] local stakeholders[~~, processes for local planning and project development, and public outreach~~]. In an effort to streamline decision-making processes and maximize coordination opportunities, the department may choose to combine contiguous department district boundaries for stakeholder engagement, project selection, and public outreach. The stakeholder groups should include representatives of the following groups, further defined in FTA Circular 9070.1G [~~9070.1F~~], or its latest version:

(A) transportation partners;

(B) passengers and advocates;

(C) human service and work force agencies; and

(D) others, such as emergency management agencies.

(2) In recommending projects, the department will [~~stakeholder groups should~~] consider the program goals and objectives set forth in subsection (b) of this section and consider projects that:

(A) leverage existing resources and promote innovation;

(B) are the only public transportation option for the proposed service area;

(C) are sustainable over time;

(D) demonstrate efficient use of resources;

(E) involve partnerships that include organizations [~~and for-profit transportation providers~~]; or

(F) provide service continuity.

(3) At least 55 percent of the funds allocated by district boundaries or combination of district boundaries shall be used for capital expenses.

(4) [~~(3)~~] Not more than 45 percent of the funds allocated by district boundaries or combination of district boundaries may be used for operating expenses. This cap applies to both urbanized areas and rural areas, respectively.

(5) [~~(4)~~] The requirements of this subparagraph apply to all projects recommended for funding.

(A) There must be a demonstrated need for any capital purchases. Examples of items that may be used to demonstrate need include a needs assessment that documents the demand for new services, a vehicle inventory that establishes the need for replacement of older equipment, dispatcher logs that document requests for service that cannot be met with existing equipment, and purchase of service contracts that substantiate the need for additional vehicles.

(B) The proposed applicant must be able to demonstrate its financial and managerial capability to carry out the project. Examples of items that may be used to demonstrate the capability include audited financial statements and review letters from grantor agencies.

(C) Consideration should be given to the applicant's past efforts to coordinate services and related activities with other local entities. Examples showing those efforts include contracts that outline purchase of service agreements, shared maintenance or dispatching functions, and joint training initiatives.

(D) There should be evidence of local support for the proposal. Examples of that evidence include resolutions by local governing bodies and endorsement letters from other organizations or individuals.

(E) The project must be included in the coordinated public transit-human service transportation plan.

(6) [~~(5)~~] Based on stakeholder input, department personnel assigned to cover district areas will rank projects in priority order.

(7) [~~(6)~~] On receipt of the applications recommended for funding, the director, or the director's designee, will review all funding requests for completeness and compliance with all statutory and program administrative requirements. Following commission approval, the department will negotiate a contract with the selected local entities and organizations to implement the projects selected for funding.

(j) Vehicle leasing. Vehicles acquired under the §5310 program may be leased to other entities, such as local public entities or agencies, other private nonprofit agencies, or private for-profit operators. The lessee shall operate the vehicles on behalf of the §5310 recipient and provide the transportation services as described in the original grant application.

(k) Incidental vehicle use. A vehicle that is purchased with §5310 funds may be used for incidental uses that do not conflict with the primary use of the vehicle to provide transportation services for seniors and individuals with disabilities. Examples of permissible incidental uses are allowing riders who are neither senior nor an individual with a disability to occupy vacant seats, delivering meals, or using the vehicle for other public transportation activities when it is not required for seniors or individuals with disabilities project purposes. The vehicle shall not be altered in any way to accommodate incidental use.

(l) Private for-profit transportation business participation. Taxi companies that provide only exclusive-ride service are not eligible subrecipients; however, they may participate in the §5310 program as contractors. Exclusive-ride taxi companies may receive §5310 funds to purchase accessible taxis under contract with an eligible subrecipient.

§31.36. Section 5311 Grant Program.

(a) Purpose. Section 5311, Federal Transit Act (49 U.S.C. §5311), authorizes the Secretary of the U.S. DOT to make grants for public transportation projects in rural areas. The department has been designated by the governor to administer the §5311 program.

(b) Goal and objectives. The department's goal in administering the §5311 program is to promote the availability of cost-effective, efficient, and coordinated passenger transportation services to the general public in rural areas using the most efficient combination of financial and other resources. To achieve this goal, the objectives of the department are to:

(1) promote the development and maintenance of a network of general public transportation services, including intercity services, in rural areas throughout the state, in partnership with local officials;

(2) fully integrate the §5311 program with other federal, state, and local resources that are designed to serve rural populations;

(3) improve the efficiency, effectiveness, and safety of §5311 systems through the provision of technical assistance; [~~and~~]

(4) include private sector operators in the overall plan to provide public transportation services; and[~~.~~]

(5) minimize negative impacts from changes in public transportation district boundaries.

(c) Department role. The department acts as the designated recipient for all §5311 funds apportioned to the state and has an oversight responsibility for all rural transit services within the state. The department, however, recognizes the subrecipients as partners who shall retain control of daily operations. As the administering agency, the department will:

(1) develop application materials and disseminate information to prospective applicants and other interested parties;

(2) allocate the available program funds in a fair and equitable manner as described in subsection (g) of this section (the department will not provide §5311 funds to more than one transit system in a geographical area);

(3) develop evaluation criteria and select projects for funding;

(4) prepare the state's annual program of projects and funding application and submit that material to the FTA for approval;

(5) negotiate and execute contracts with local §5311 subrecipients;

(6) prepare requests for federal reimbursement, and process payment requests from §5311 subrecipients;

(7) monitor and evaluate the progress of ongoing transportation operations, including compliance with federal regulations; and

(8) provide technical assistance to §5311 subrecipients to aid them in improving transit services.

(d) Eligible subrecipients. State agencies, local public entities, private nonprofit organizations, Native American tribes and organizations, and operators of public transportation services are eligible to receive §5311 funds through the department. Private for-profit operators of public transportation services may participate in the program through contracts with eligible subrecipients. An entity must be a rural transit district to receive §5311 funds except that private for-profit operators of public transportation services and entities that are not rural transit districts are eligible to receive §5311 funds through the department under the intercity bus program, as set forth in subsections (g)(1) and (i) of this section.

(e) Eligible assistance categories. The following categories of expenses are eligible for federal reimbursement under the §5311 program.

(1) State administrative expenses. The department may use up to 10 percent of the annual federal apportionment to defray its expenses incurred for the administration of the §5311 program. These funds may also be used to provide technical assistance to subrecipients. Technical assistance may include project planning, program development, management development, coordination of public transportation projects, and related research. Projects are solicited from subrecipients and other interested parties. State administrative and technical assistance expenses do not require a non-federal match.

(2) Capital expenses.

(A) Eligible items include:

(i) buses;

(ii) vans or smaller accessible [~~other paratransit~~] vehicles;

(iii) radios and communications equipment;

(iv) passenger shelters, bus stop signs, and similar passenger amenities;

(v) wheelchair lifts and restraints;

(vi) vehicle rehabilitation, remanufacture, or overhaul;

(vii) preventive maintenance, including all maintenance costs;

(viii) extended warranties that do not exceed the industry standard;

(ix) the public transportation [~~mass transit~~] portion of ferry boats and terminals;

(x) operational support such as computer hardware or software;

(xi) installation costs and vehicle procurement, testing, inspection, and acceptance costs;

(xii) construction or rehabilitation of transit facilities, including design, engineering, and land acquisition;

(xiii) facilities to provide access for bicycles to [~~mass~~] transit facilities and equipment for transporting bicycles on [~~mass~~] transit vehicles;

(xiv) the lease of equipment or facilities, provided that the local subrecipient, with the concurrence of the department, determines that a lease is more cost effective than the purchase of equipment or facilities after considering management efficiency, availability of equipment, staffing capabilities and guidelines on capital leases as contained in 49 C.F.R. Part 639;

(xv) the capital portions of costs for service under contract;

(xvi) joint development projects (FTA Circular 9300.1B, or its latest version, provides guidelines for joint development projects);

(xvii) the introduction of new technology, through innovative and improved products, into mass transportation;

(xviii) transit-related intelligent transportation systems;

(xix) the provision of ADA paratransit service, which shall not exceed 10 percent of the state's annual apportionment of §5311 funds and shall be used only by subrecipients that are in compliance with ADA requirements for both fixed route and demand responsive service;

(xx) mobility management consisting of short-range planning, management activities and projects for improving coordination among public transportation, and other transportation service providers carried out through an agreement entered into with a person, including a governmental authority, but excluding operating expenses; and

(xxi) crime prevention and security.

(B) The capital cost of contracting includes depreciation, interest on facilities and equipment, and those allowable capital costs that would otherwise be incurred directly, including maintenance. No capital assets (vehicle, equipment, or facility) that have any remaining federal interest in them and no items purchased with state or local government funds may be capitalized under the grant agreement.

(C) For reimbursement:

(i) federal funds may be used to reimburse up to 80 percent of eligible capital expenditures;

(ii) the federal share may increase up to 85 percent of the net project cost for a project that involves acquiring vehicles for the purpose of complying with the Americans with Disabilities Act or the Clean Air Act;

(iii) the federal share may increase to up to 90 percent for bicycle equipment or facilities projects or for incremental costs related to compliance with the Clean Air Act or with the Americans with Disabilities Act of 1990; and

(iv) the federal share may also increase in accordance with 23 U.S.C. §120(b)(2) as determined by FTA regarding the area of nontaxable Native American lands, individual and tribal, public domain lands (reserved and unreserved), national forest, and national parks and monuments, with eligibility standards for the higher federal share being defined in FTA Circular 9040.1G [~~9040.1F~~], or its latest version.

(3) Project administrative expenses. Costs not directly tied, but essential, to the operations of passenger transportation systems may be reimbursed at up to 80 percent with federal funds. The federal share may also increase in accordance with 23 U.S.C. §120(b)(2) as determined by FTA regarding the area of nontaxable Native American lands, individual and tribal, public domain lands (reserved and unreserved), national forest, and national parks and monuments. Eligibility standards for the higher federal share are defined in FTA Circular 9040.1G [~~9040.1F~~], or its latest version.

(4) Operating expenses. Costs directly tied to systems operations, such as costs for fuel, oil, and replacement parts, and driver, mechanic, and dispatcher salaries, may be reimbursed at 50 percent of net operating costs. The federal share may also increase in accordance with 23 U.S.C. §120(b)(2) as determined by FTA regarding the area of nontaxable Native American lands, individual and tribal, public domain lands (reserved and unreserved), national forest, and national parks and monuments. Eligibility standards for the higher federal share are defined in FTA Circular 9040.1G [~~9040.1F~~], or its latest version. The local subrecipient must provide a match, either in cash or with in-kind donations.

(5) Planning expenses may be reimbursed at up to 80 percent with federal funds. FTA Circular 8100.1C or its latest version has a complete list of eligible activities, which include:

(A) studies relating to management, planning, operations, capital requirements, and economic feasibility;

(B) evaluation of previous planning projects;

(C) work elements and related activities preliminary to and in preparation for constructing, acquiring, or improving the operations of facilities and equipment;

(D) safety, security, and emergency transportation and evacuation planning; and

(E) coordinated public transit-human service transportation planning.

(f) Local share requirements.

(1) FTA program funds cannot be used as the local share required for §5311 grants.

(2) Cash from local or state programs, donations, or unrestricted federal funds is allowed.

(3) In-kind contributions, volunteer services, and donations are eligible as local share if the value is documented.

(4) For an intercity bus project that includes both feeder service and an unsubsidized segment of intercity bus service to which the feeder service connects, in-kind match may be derived from the costs of a private operator for the unsubsidized segment of intercity bus services for the operating costs of connecting rural intercity bus feeder services. The private operator must agree in writing to the use of the costs of the unsubsidized segment of intercity bus services as in-kind match.

(5) Subrecipients may request transportation development credits be used for all or part of the local match.

(g) Allocation of funds. As part of its administration of the §5311 program, the department is charged with ensuring that there is a fair and equitable distribution of funds within the state (FTA Circular 9040.1G [~~9040.1F~~] or its latest version). After subtracting funds for state administrative expenses in accordance with subsection (e)(1) of this section, the department will allocate §5311 funds to local subrecipients in the following manner and order.

(1) Intercity bus allocation. Unless the chief executive officer of the state or the executive officer's authorized designee certifies to the Secretary of the U.S. DOT that the intercity bus service needs of the state are being adequately met, the department will allocate not less than 15 percent of the annual §5311 federal apportionment for the development and support of intercity bus transportation facilities and services providing access and connections to rural areas. If it is determined that all or a portion of the set-aside monies is not required for intercity bus service, those funds will be applied to the formula apportionment process described in paragraph (2) of this subsection. Procedures for determining if a certification of adequacy is warranted are as follows.

(A) The department will review all data on intercity bus service availability, including outstanding requests from intercity operators and rural transit districts, and levels of service.

(B) The department will consult with affected intercity bus service providers and rural transit districts.

(C) The department will consult with other state agencies that have jurisdiction with respect to intercity bus regulation and seek their recommendations as to the adequacy of current service.

(D) Based on the findings of subparagraphs (A), (B), and (C) of this paragraph, the commission, the chief executive officer of the state or the executive officer's authorized designee may certify to the adequacy of intercity bus service.

(2) Need and performance allocation. Excluding the amounts allocated under paragraph (1) of this subsection, the balance of the annual §5311 federal apportionment, plus the remaining balance of previous §5311 federal apportionments, not to exceed $20,104,352, will be allocated to transit providers as described in subparagraphs (A) and (B) of this paragraph.

(A) The need based allocation is 65 percent giving consideration to population weighted at 75 percent and on land area weighted at 25 percent by using the latest census data available from, and as defined by, the U.S. Census Bureau for each rural area relative to the sum of all rural areas.

(B) The performance based allocation is 35 percent. The subrecipient is eligible for funding under this subparagraph if it is in good standing with the department and has no deficiencies and no findings of noncompliance. The commission will award the funding by giving equal consideration to local funds per operating expense, ridership per vehicle revenue mile, and vehicle revenue miles per operating expense. These criteria may be calculated using the subrecipient's annual audit for the previously completed fiscal year, data from other sources, or from the department's records.

(C) Funding stability.

(i) Subject to the available apportionment, no award to a transit district under this paragraph will be less than 90 percent of the award to that transit district for the previous fiscal year. All allocations under subparagraphs (A) and (B) of this paragraph are subject to revision to comply with this standard.

(ii) If a rural transit district experiences a negative impact in its performance factor calculations due to the acquisition or loss of service area, a natural disaster, such as wind, fire, or flood, or unforeseen anomaly, the department may mitigate that impact with an alternate calculation addressing the specific situation. This calculation may be repeated in subsequent years at the discretion of the department.

(3) Discretionary allocation. If the amount of the §5311 federal apportionments exceeds the maximum amount that may be allocated under paragraph (2) of this subsection, a part of that excess, not

to exceed 10 percent of the amount computed by subtracting, from the annual §5311 federal apportionment, the funds for state administrative expenses under subsection (e)(1) of this section and funds allocated for intercity bus transportation under paragraph (1) of this subsection, will be available to the commission for award at any time during the fiscal year on a pro rata basis, competitively, [~~or~~] a combination of both pro rata and competitive, or as a one-time award to address changes in transit district boundaries. Consideration for the award of these additional funds may include, but is not limited to, coordination and technical support activities, compensation for unforeseen funding anomalies, assistance with eliminating waste and ensuring efficiency, maximum coverage in the provision of public transportation services, adjustment for reductions in purchasing power, furtherance of the department's goals, and reductions in air pollution. An award under this subparagraph will not be considered for the purpose of applying the funding stability allocation process under paragraph (2)(C) of this subsection in succeeding fiscal years.

(4) Total vehicle [~~Vehicle revenue~~] mile allocation. Any amount of the annual §5311 federal apportionment that is not otherwise allocated under this subsection will be allocated to rural areas, with the amount allocated to a rural area based on the proportion of total vehicle [~~revenue~~] miles for that rural area to the total of total vehicle [~~revenue~~] miles for all rural areas.

(5) Adjustments to allocation.

(A) If part of a transit district's service area is changed due to declaration by the United States Census Bureau or the service area is otherwise altered, the department and that subrecipient shall negotiate an appropriate adjustment in the funding year or any subsequent year, as appropriate. This negotiated adjustment is not subject to the minimum and maximum standards set forth in paragraph (2)(C) of this subsection.

(B) If a previously designated urbanized area is declared rural by the United States Census Bureau, a public transportation subrecipient serving that area must apply for funds in accordance with paragraph (6) of this subsection.

(6) Application and contract. Prior to receiving funds a subrecipient must complete and comply with all application requirements, rules, and regulations applicable to the §5311 program. A completed application must be submitted, in a form prescribed by the department, and document the need and demand for general public passenger transportation services. A contract shall be for no less than 12 months unless authorized by the department.

(h) Program of projects. All projects for a fiscal year will be identified in accordance with the allocation rules included in subsection (g) of this section. After commission approval of the allocation, these projects will be submitted to the FTA as the annual program of projects for the fiscal year.

(i) Intercity bus. For funding from allocations made under subsection (g)(1) of this section, an annual request for proposals will be issued for projects complying with FTA definitions of intercity bus transportation. To ensure a balanced investment in access and connectivity to intercity bus travel, the department may establish investment targets among eligible applicant groups or project types prior to solicitation of project proposals.

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

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SUBCHAPTER D. PROGRAM ADMINISTRATION

43 TAC §§31.42 - 31.45, 31.47, 31.48

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, §456.022, which provides the commission with authority to adopt rules establishing a formula allocating funds among individual eligible public transportation providers.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, and 461.

§31.42. Standard Federal Requirements.

(a) Federal Transit Administration programs are subject to 2 C.F.R. Part 200 and Part 1201, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards [~~the Common Rule~~].

(b) The programs are also subject to the program regulations promulgated by the Federal Transit Administration and applicable program circulars.

(c) Changes to federal rules, regulations, and circulars applicable to the programs will be implemented and incorporated into the rules governing the specific program.

§31.43. Contracting Requirements.

(a) Purpose. This section describes contracting standards and related requirements for recipients of state and federal public transportation grant funds.

(b) Standards. The standards contained in 2 C.F.R. Part 200 and Part 1201, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards [~~the Common Rule~~] apply to public transportation contracting activities. The department will monitor subrecipient compliance with those standards.

(c) Subcontracts. Subrecipients shall furnish to the department notice of the intent to award a purchase order or contract to any individuals or organizations not a part of the subrecipient's organization when the amount of the purchase meets or exceeds the threshold level in the Government Code or Local Government Code (or greater than $25,000 for those entities not covered by the Government Code or Local Government Code) requiring formal competitive procurement. Purchases shall not be split out to stay below the threshold amount. No subcontract will relieve the subrecipient of the subrecipient's legal responsibilities to the department.

§31.44. Procurement Requirements.

(a) Purpose. This section describes procurement standards and related requirements for recipients of state and federal public transportation grant funds.

(b) Standards. The standards contained in 2 C.F.R. Part 200 and Part 1201, Uniform Administrative Requirements, Cost Principles,

and Audit Requirements for Federal Awards [~~the Common Rule~~] apply to public transportation procurement activities. All subrecipients shall maintain written procurement policies. Those policies shall, at a minimum, provide the following.

(1) Goods, services and equipment purchases.

(A) Goods, services, or equipment requiring formal competitive procurement in accordance with the applicable provisions in the Government Code or Local Government Code (greater than $25,000 for those entities not covered by the Government Code or Local Government Code) shall require sealed bids or proposals. Bids for computer and radio systems shall include all subcomponents necessary for the system to be operated in the unit cost. Exceptions will be allowed for those entities that are eligible to purchase items through the state open contract procedures.

(B) Goods, services, or equipment not requiring formal competitive procurement in accordance with the applicable provisions in the Government Code or Local Government Code ($25,000 or less for those entities not covered by the Government Code or Local Government Code) do require the solicitation of quotes or offers from at least three sources. Purchases of goods, services, or equipment with a total cost of $3,000 or less do not require quotes or offers from at least three sources but are to be distributed equitably among qualified suppliers. The subrecipient shall retain a written record of these solicitations. Exceptions will be allowed for those entities that are eligible to purchase items through the state open contract procedures.

(2) Real property.

(A) Acquisition of real property shall be accomplished in accordance with federal and state statutes, regulations, and policies. In particular, projects that receive federal funds shall comply with the uniform relocation and real property acquisition standards established in 49 C.F.R. Part 25.

(B) Specific standards for construction and rehabilitation projects will be negotiated as part of the project agreement between the department and the subrecipient.

(3) Records retention. All procurement documents are public information and shall be maintained by the subrecipient for at least three years after grant closeout, or, in the case of a capital project, the life of the asset plus three years.

(c) Department role.

(1) Oversight and approval. The subrecipient shall furnish the department notice of the intent to award a purchase order or contract to any individuals or organizations not a part of the subrecipient's organization when the amount of the purchase meets or exceeds the threshold level in the Government Code or Local Government Code (or greater than $25,000 for those entities not covered by the Government Code or Local Government Code) requiring formal competitive procurement. Purchases shall not be split out to stay below the threshold amount. The subrecipient shall at a minimum provide the following documentation as requested by the department describing the procurement history:

(A) the rationale the subrecipient used for the method of procurement;

(B) the rationale the subrecipient used for the selection of contract type;

(C) the reasons the bidder or proposer was selected; and

(D) the methodology used to determine the contract price, including a cost justification.

(2) Technical assistance. The department will provide vehicle specifications, guidance on competitive procurement procedures, and assistance in developing procurement documentation to a subrecipient upon request. If subrecipients choose to develop their own specifications, they assume full responsibility for ensuring that the specifications do not restrict competition.

§31.45. Accounting and Financial Recordkeeping Requirements.

(a) Purpose. This section describes accounting and financial recordkeeping standards and related requirements for recipients of state and federal public transportation grant funds.

(b) Standards. The contractor's financial management system shall meet or exceed the requirements of 2 C.F.R. Part 200 and Part 1201, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards [~~the Common Rule~~]. Those requirements include:

(1) accurate, current, and complete disclosure of the financial transactions of each grant program in accordance with state and federal reporting requirements;

(2) records that identify adequately the source and application of funds for grant-supported activities (records shall contain information pertaining to grant awards and authorization, obligations, commitments, assets, liabilities, outlays, and income);

(3) effective control over and accountability for all funds, property, and other assets (the recipient shall adequately safeguard all assets and shall assure that they are used solely for authorized purposes);

(4) comparison of actual with budgeted amounts for each contract, and relation of financial information to performance or productivity data, including the production of unit cost information;

(5) procedures for determining the eligibility for reimbursement and proper allocation of cost;

(6) accounting records that are supported by source documentation; and

(7) a systematic method to assure timely and appropriate resolution of audit findings and recommendations.

§31.47. Audit and Project Close-Out Standards.

(a) Purpose. This section describes audit and close-out requirements for recipients of state and federal public transportation grant funds.

(b) Audit standards. Contractor audit procedures shall meet or exceed the single audit report requirement of 2 C.F.R. Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards [~~outlined in Office of Management and Budget (OMB) publications as follows: state or local governments follow OMB Circular A-128; and institutions of higher education and other nonprofit organizations follow OMB Circular A-133~~].

(1) Access. The United States Secretary of Transportation, the Comptroller General of the United States, the executive director of the department, and the State Auditor, and any of their authorized representatives, shall have access to the financial and other project records at all reasonable times during the contract period and for the record retention period for the purpose of making audits, examinations, excerpts and transcripts.

(2) Documentation. The contractor shall maintain financial records, supporting documents, statistical records, and all other records of the public transportation grant.

(3) Records retention. Financial records, supporting documents, statistical records, and all other records of the public transportation grant shall be retained for a period of three years after grant closeout, with the following qualifications.

(A) Litigation. If any litigation, claim, or audit is started before the expiration of the three-year period, the records shall be retained until all litigations, claims, and audit findings involving the records have been resolved.

(B) Nonexpendable property. Records for nonexpendable property acquired with federal or state funds shall be retained for three years after its final disposition.

(C) Transfer of records. The three-year retention requirement is not applicable to the contractor when the records are transferred to or maintained by the federal or state grantor agency.

(D) Procurement records. The three-year retention requirement is not applicable to capital projects covered under §31.44(b)(3) of this chapter.

(4) Project close-outs. The contractor shall make every reasonable effort to complete all project activities and request appropriate reimbursements within the time period specified in the project agreement. Project audits shall also be completed within the specified time period and any findings resolved with all practicable speed. Upon completion of these activities, the contractor shall provide the department written notification of project close-out and the release of any unspent project balances.

§31.48. Project Oversight.

(a) Purpose. This section describes reporting requirements for designated recipients and subrecipients of state or federal public transportation grant funds and monitoring activities to be performed by the department.

(b) Reporting requirements. The subrecipient shall submit reports to the department in a format prescribed by the department within deadlines established by the department.

(1) Incident reports. Subrecipients shall report all incidents that meet criteria established by the department. The subrecipient shall submit the report within five days of the incident or discovery of the incident.

(2) Asset inventory. Each subrecipient shall provide information on state and federally funded equipment as described in §31.50 of this chapter (relating to Recordkeeping and Inventory Requirements).

(3) Charter service. Section 5311 subrecipients shall provide charter service only under the specific circumstances established by the FTA. Operators shall advise the department of any charter service provided and the exemption under which charter service is provided.

(4) Disadvantaged Business Enterprises [~~and Historically Underutilized Businesses~~]. Subrecipients shall submit reports in accordance with 49 C.F.R. Part 26, Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs [~~Chapter 9, Subchapter L of this title (relating to Historically Underutilized Business (HUB) Program)~~].

(5) Operations reports. All FTA recipients and subrecipients shall submit quarterly and annual operations reports.

(A) Pursuant to the requirements of 49 U.S.C. §5311 and §5335, subrecipients of assistance under §5311 shall submit to the department data required by the department for reporting to the National Transit Database.

(B) Pursuant to the requirements of 49 U.S.C. §5326, subrecipients of FTA assistance through the department shall provide the data required by the department to report on transit asset management.

(C) Pursuant to the requirements of Transportation Code, §456.008(a) and (b), the department will collect monthly data from transit operators in urbanized areas, including transit authorities, and publish annually data on industry utilized standards that best reflect ridership, mileage, revenue by source and service effectiveness. These standards include:

(i) Service efficiency--Operating expense per vehicle revenue hour and operating expense per vehicle revenue mile.

(ii) Cost effectiveness--Operating expense per unlinked passenger trip.

(iii) Service effectiveness--Unlinked passenger trips per vehicle revenue mile and unlinked passenger trips per vehicle revenue hour.

(iv) Safety--Total incidents per 100,000 miles of service and average number of miles between revenue vehicle mechanical system failures that prevent the vehicle from completing a scheduled revenue trip.

(D) Pursuant to the requirements of Transportation Code, §456.008(a) and (b), and 49 U.S.C. §5311, the department will collect monthly from transit operators in rural areas, and publish annually data on industry utilized standards that best reflect ridership, mileage, revenue by source and service effectiveness. These standards include:

(i) Service efficiency--Operating expense per vehicle mile.

(ii) Cost effectiveness--Operating expense per unlinked passenger trip.

(iii) Service effectiveness--Unlinked passenger trips per vehicle mile.

(iv) Safety--Total incidents per 100,000 miles of service and average number of miles between revenue vehicle mechanical system failures that prevent the vehicle from completing a scheduled revenue trip.

(E) Pursuant to the requirements of Transportation Code, §456.008(a) and (b), the department will collect monthly from public transportation providers, as defined in Transportation Code, §461.002, that receive funding under 49 U.S.C. §5310, or §5316 and §5317 (with regard to the grant of funds appropriated under federal authorization bills prior to MAP-21), and publish annually data on industry utilized standards that best reflect ridership, mileage, revenue by source and service effectiveness. These standards include:

(i) Service efficiency--Operating expense per vehicle mile.

(ii) Cost effectiveness--Operating expense per unlinked passenger trip.

(iii) Service effectiveness--Unlinked passenger trips per vehicle mile.

(iv) Any other measure appropriate to the type of project financed using funds from §5310, or §5316 and §5317 with regard to the grant of funds appropriated under federal authorization bills prior to MAP-21.

(6) Significant events. The recipient shall promptly advise the department in writing of events that have a significant effect on the delivery of public transportation services, including:

(A) problems, delays, and adverse conditions that will materially affect the ability to attain program objectives, prevent the meeting of time schedules and goals, or preclude the attainment of project work units by established time periods, accompanied by a statement of the action taken or contemplated and any departmental assistance needed to resolve the situation; and

(B) favorable developments and events that will enable meeting time schedules and goals sooner than anticipated or producing more work units than originally projected.

(7) Miscellaneous reports. Entities receiving funds from either the department or the FTA shall cooperate with the department in providing other information as requested by state and federal funding agencies.

(c) Department monitoring. The department will rely on subrecipient reports as described in subsection (b) of this section as the primary means of monitoring subrecipient performance. In addition, department personnel and the subrecipient at least quarterly will discuss problems encountered by the subrecipient, the subrecipient's need for technical assistance, and other topics related to the provision of public transportation services. Routine monitoring activity will occur in the following areas according to a schedule that accommodates federal deadlines and department and operator workloads. Most, but not all, monitoring activities will occur on a quarterly basis.

(1) Civil rights. The department will monitor subrecipients for compliance with Title VI Civil Rights requirements.

(2) Drugs and alcohol.

(A) Each §5311 subrecipient and each of its subcontractors with safety-sensitive employees shall have policies and programs in place that comply with drug and alcohol standards established by the FTA. The department will monitor subrecipients for compliance with these regulations. In addition, the FTA requires each subrecipient to file a calendar year report (January 1 - December 31) with the department on drug and alcohol testing and compliance activities.

(B) Each §5310 subrecipient, and each §5316 and §5317 subrecipients with regard to the grant of funds appropriated under federal authorization bills prior to MAP-21, shall comply with Federal Motor Carrier Safety Administration requirements for drug and alcohol compliance if it owns a vehicle that requires a commercial driver's license to operate. If the subrecipient also receives §5307 or §5311 funding, the subrecipient shall include §§5310, 5316, and 5317 employees in their FTA testing program.

(3) Fiscal responsibility. A department employee quarterly will [~~make on-site quarterly visits to~~] review agency financial records that support requests for payment.

(4) Insurance. Subrecipients of state or federal funds through the department shall insure all facilities, equipment, and vehicles from loss. Checks for appropriate insurance levels will occur at the time the local agency renews its policies.

(5) Maintenance. Subrecipients are required to have written maintenance plans, schedules, and logs to ensure the proper care and longevity of vehicles and facilities in accordance with §31.53(d) of this chapter (relating to Maintenance Requirements). The plans, schedules, and logs are subject to periodic on-site inspection by the department.

(6) Incidental vehicle use. A vehicle purchased with federal or state funds may be used for incidental uses that do not conflict with the primary purposes for which the vehicle was purchased. An example of permissible incidental use is using the vehicle for other public transportation activities when it is not required for project purposes. The vehicle shall not be altered in any way to accommodate an incidental use.

(7) Procurement. The department will work with subrecipients to ensure that procurement activities meet applicable state and federal requirements and that all required documents are received and actions completed in a timely manner. Check sheets will be maintained by the department to ensure all benchmark activities are accomplished in the proper sequence.

(d) Noncompliance. A subrecipient that fails 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, is subject to actions under Chapter 9, Subchapter H of this title (relating to Grant Sanctions).

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

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SUBCHAPTER E. PROPERTY MANAGEMENT STANDARDS

43 TAC §31.50, §31.57

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, §456.022, which provides the commission with authority to adopt rules establishing a formula allocating funds among individual eligible public transportation providers.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, and 461.

§31.50. Recordkeeping and Inventory Requirements.

(a) Purpose. To protect the public investment in real property and equipment purchased in whole or in part with state or federal public transportation funds administered by the department, subrecipients shall comply with the standards described in this section.

(b) Property records. The subrecipient shall maintain records that include:

(1) a description of the property;

(2) a serial number or other identification number;

(3) the source of the property;

(4) who holds title;

(5) the acquisition date and cost of the property;

(6) the percentage of state and the percentage of federal participation in the cost of the property;

(7) the location, use, and condition of the property; and

(8) any ultimate disposition data, including the date of disposal and sale price of the property.

(c) Inventory. The subrecipient shall cooperate with department representatives in performing at least once every two years a physical inventory of all real property and equipment, as defined in §31.3 of this chapter, purchased in whole or in part with state or federal capital funds administered by the department. However, during the time period between these physical inventories, the subrecipient shall promptly notify the department in writing of all changes in the status of that real property and equipment in order that department records may be kept current. On or before November 1 of each year, the subrecipient shall provide the department with an accurate inventory, including the mileage, of all vehicles used in public transportation service. Property shall remain on the department's and subrecipient's inventories until such time as the property is formally disposed of in accordance with the requirements outlined in §31.57 of this subchapter. Notwithstanding the foregoing, the subrecipient shall, where applicable, be bound by, and shall comply with, the inventory requirements specified in 2 C.F.R Part 200 and Part 1201, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards [~~the common rule~~].

(d) Control system. The subrecipient must develop a control system to ensure adequate safeguards to prevent loss, damage, or theft of the property. The subrecipient shall investigate any loss, damage, or theft.

§31.57. Disposition.

(a) Purpose. This section describes the standards that apply to the disposition of equipment purchased in whole or in part with state or federal public transportation funds.

(b) Like-kind exchanges. In the case of like-kind exchanges, the percentage of the department's original contractual interest shall be applied to the fair market value of the equipment being sold at the time of the exchange. That dollar value shall then be transferred as the department's interest in the equipment being acquired and, as appropriate, added to any additional funding provided by the department towards the purchase of the new equipment.

(c) Federal standards. The federal standards contained in 2 C.F.R Part 200 and Part 1201, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards [~~the Common Rule~~] shall govern the disposition of real property and equipment purchased under contracts in which the department provides all or part of the local share requirement of federally assisted capital improvements. In cases in which 2 C.F.R. Part 200 and Part 1201, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards [~~the Common Rule~~] does not require reimbursement of the federal grantor agency, the department will similarly release the state interest in the capital improvement provided that the state's percentage share of any proceeds derived by the subrecipient in the disposition process shall be used by the subrecipient for public transportation purposes similar to those for which the contract award was originally made. If the subrecipient does not intend to use the state's percentage share of the proceeds for public transportation purposes, those monies shall be refunded as described in subsection (d)(2)(B) of this section. In cases in which 2 C.F.R. Part 200 and Part 1201, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards [~~the Common Rule~~] requires reimbursement of the federal grantor agency, the subrecipient shall provide the department a percentage of the proceeds of the disposition equal to the percentage of the state's original investment in the property or equipment. Once disposition is authorized, the subrecipient shall relinquish title to the property through either sale, auction, or transfer to another recipient of FTA funding. The department shall be notified of the disposition and shall be provided information necessary to delete the property from inventory records described in §31.50 of this subchapter (relating to Recordkeeping and Inventory Requirements).

(d) State standards. All real property and equipment obtained through contracts in which the department's contractual interest includes federal funds or state monies shall be governed by the disposition standards contained in paragraphs (1) and (2) of this subsection. The department shall be notified of the subrecipient's intent to proceed with the dispositions and provided information necessary to delete the property from inventory records described in §31.50 of this subchapter. Prior to disposition of property under the terms of this subsection, the subrecipient shall obtain written concurrence from the department and receive disposition instructions. Once disposition is authorized, the subrecipient shall relinquish title to the property through either sale, auction, or transfer to another recipient of FTA or state funding.

(1) Disposition criteria.

(A) Vehicles. Disposition may occur when the current per-unit market value is less than $5,000.

(B) Other equipment. Disposition may occur when the current per-unit market value is less than $5,000.

(C) Real property. When real property is no longer needed for the originally authorized purpose, the subrecipient shall request disposition instructions from the department pursuant to this subsection.

(2) Distribution of disposition proceeds.

(A) Refund not required. In cases in which the disposition criteria contained in paragraph (1)(A) and (B) of this subsection have been met, the department will release its contractual interest in the capital improvement. The department will similarly release its contractual interest in cases in which exceptions are granted for early disposition in accordance with the provisions contained in subsection (e) of this section. However, the department's release of its interest in a capital improvement is contingent upon the subrecipient's assurance that the department's contractually specified percentage share of any proceeds derived by the subrecipient in the disposition process will be used by the subrecipient for public transportation purposes similar to those for which the contract award was originally made. In the case of transfers to non-transit uses, as allowed under 49 U.S.C. §5334(h), the department will release only the federal portion of its contractual interest. The department will consult with FTA as necessary to ensure compliance with federal standards. The state's percentage share shall be refunded as described in subparagraph (B) of this paragraph.

(B) Refund required. In cases in which the disposition criteria contained in paragraph (1)(A) and (B) of this subsection have not been met, but the subrecipient has received authorization from the department to proceed with the disposition of equipment or property, the subrecipient shall provide the department a percentage of the proceeds of the disposition equal to the percentage of the department's original contractual interest in the property or equipment. In cases of real property, as described in paragraph (1)(C) of this subsection, and when exceptions are not granted for early disposition, as described in subsection (e) of this section, the subrecipient shall similarly provide the department a percentage of the proceeds of the disposition equal to the percentage of the department's original contractual interest in the

property or equipment. In the case of transfers to non-transit uses, as allowed under 49 U.S.C. §5334(h), the subrecipient shall provide the department a percentage of the proceeds of the disposition equal to the percentage of the original state percentage interest in the property or equipment, excluding any federal percentage interest that might have been included in the contract of assistance. The department will consult with FTA as necessary to ensure compliance with federal standards.

(C) Net proceeds from sale of capital assets. In cases in which 2 C.F.R. Part 200 and Part 1201, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards [~~the Common Rule~~] requires a reimbursement, when the subrecipient receives proceeds from the disposition of the capital property or equipment and those funds will be used for subsequent federal public transportation purposes, the subrecipient shall establish a record of liability demonstrating that these funds are owed. The liability will be removed when the subrecipient uses the proceeds for a subsequent transit project.

(e) Exceptions. The department will consider exceptions to this section on a case-by-case basis. The subrecipient must furnish information requested by the department to determine if an exception is warranted due to special circumstances. The department will consult with FTA as necessary to ensure compliance with federal standards.

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

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