PROPOSED RULES

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

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

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 17. MARKETING AND PROMOTION

SUBCHAPTER A. TEXAS COMMODITY REFERENDUM LAW

DIVISION 1. GENERAL RULES

4 TAC §17.1, §17.2

The Texas Department of Agriculture (the department) proposes amendments to §17.1 and new §17.2, concerning general rules for commodity board elections. The amendments and new section are proposed to implement changes made to Texas Agriculture Code, Chapter 41, §41.023, by House Bill 1494 (HB 1494), 83rd Legislature, 2013, which provides that the department by rule shall prescribe the manner for providing public notice in a commodity board election. The amendments to §17.1 are proposed to make the section consistent with new notice requirements. New §17.2 is proposed to establish new notice requirements for commodity board elections, as provided in HB 1494.

Kelley Faulk, Director of Policy, has determined that for the first five years the proposed amendments and new section are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments and new section.

Ms. Faulk also has determined that for each year of the first five years the amendments and new section are in effect the public benefit anticipated as a result of enforcing the amendments and new section will be to provide a more efficient and appropriate method of notice for commodity board elections. For the first five-year period the amendments and new section are in effect, there will be no additional economic cost for micro-businesses, small businesses or individuals who are required to comply with the amendments and new section, as proposed. The proposal will result in a cost savings to boards required to comply with the notice requirements.

Comments on the amendments and new section may be submitted to Kelly Faulk, Director of Policy, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The amendments and new section are proposed under the Texas Agriculture Code, §12.016, which provides the department with the authority to adopt rules to administer its duties under the Code; and §41.023, as amended by HB 1494, which provides the department with the authority to prescribe by rule the manner for providing public notice in a commodity board election; and Texas Government Code, §2001.006, which provides the department with the authority to adopt rules in preparation for the implementation of legislation that has become law, but has not taken effect.

The code affected by the proposal are the Texas Government Code, Chapter 2001, and the Texas Agriculture Code, Chapters 12 and 41.

§17.1. Certification of Commodity Organizations.

(a) (No change.)

(b) If an organization is certified, it is required to submit an election plan for approval, which includes the notice it is required to publish [~~in one or more newspapers having general circulation in the referendum area once a week for three weeks in a row~~]. The election plan includes:

(1) notices for newspaper and industry publication 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) a timeline for newspaper and industry publication notices, notices to county agents, referendum date and canvassing date;

(4) a draft ballot;

(5) a draft press release announcing referendum;

(6) a draft board member petition; and

(7) information on whether the election will be conducted by mail or physical balloting.

(c) (No change.)

§17.2. Notice of Referendum and Election.

(a) The certified organization shall give public notice of a referendum and/or board election. Notice of a commodity board referendum and/or election shall be published at least once in one or more newspapers published and distributed within the boundaries in which the board operates. The notice shall be published at least 60 days before the date of the election and shall include:

(1) if held by physical balloting, the date, hours, and polling places for voting in the referendum and election;

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

(3) whether a producer exemption is to be allowed, or assessment 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.

(b) In addition to the publication requirement provided in subsection (a) of this section, at least 60 days before the date of the election, the certified organization shall give direct written notice to each county agent in any county within the boundaries in which the board operates.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 29, 2013.

TRD-201303087
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: September 8, 2013
For further information, please call: (512) 463-4075

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 5. COMMUNITY AFFAIRS PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §§5.2, 5.3, 5.8, 5.10, 5.12, 5.13, 5.17, 5.19, 5.20

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 5, Subchapter A, §§5.2, 5.3, 5.8, 5.10, 5.12, 5.13, 5.17, 5.19, and 5.20, concerning General Provisions. The purpose of the amendments is to add, clarify, and simplify definitions; clarify procurement and bonding requirements; modify the minimum acquisition cost requiring Department approval; add, clarify, and simplify income calculation requirements, and affect grammatical and capitalization matters.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the proposed amendments will be in effect, enforcing or administering the proposed amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments will be in effect, the public benefit anticipated as a result of the amendments will be to enhance the Department's administration of the Community Affairs programs. There will not be any economic cost to any individuals required to comply with the sections as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941; by email to cadrulecomments@tdhca.state.tx.us; or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. SEPTEMBER 9, 2013.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code, §2306.053, which generally authorizes the Department to adopt rules, and more specifically §2306.092, which authorizes the Department to promulgate rules regarding its community affairs and community development programs.

The proposed amendments affect no other code, article, or statute.

§5.2. Definitions.

(a) To ensure a clear understanding of the terminology used in the context of the Community Affairs Programs, a list of terms and definitions has been compiled as a reference.

(b) The words and terms in this chapter shall have the meanings described in this subsection unless the context clearly indicates otherwise.

(1) Affiliate--If, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both. The ways the Department may determine control include, but are not limited to:

(A) Interlocking management or ownership;

(B) Identity of interests among family members;

(C) Shared facilities and equipment;

(D) Common use of employees; or

(E) A business entity which has been organized following the exclusion of a person which has the same or similar management, ownership, or principal employees as the excluded person.

[~~(1) CAA--Community Action Agency.~~]

(2) CFR--Code of Federal Regulations.

(3) Children--Household dependents not exceeding eighteen (18) years of age.

(4) Collaborative Application--An application from two or more organizations to provide services to the target population. If a unit of general local government applies for only one organization, this will not be considered a Collaborative Application. Partners in the Collaborative Application must coordinate services and prevent duplication of services.

(5) Community Action Agencies (CAAs)--Local private and public nonprofit [~~non-profit~~] organizations that carry out the Community Action Program [~~(CAP)~~], which was established by the 1964 Economic Opportunity Act to fight poverty by empowering the poor in the United States. Each CAA must have a board consisting of at least one-third elected public officials, not fewer than one-third representatives of low-income individuals and families, chosen in accordance with democratic selection procedures, and the remainder are members of business, industry, labor, religious, law enforcement, education, or other major groups and interests in the community.

(6) Community Action Plan--A plan required by the Community Services Block Grant (CSBG) Act which describes the local (Subrecipient) service delivery system, how coordination will be developed to fill identified gaps in services, how funds will be coordinated with other public and private resources and how the local entity will use the funds to support innovative community and neighborhood based initiatives related to the grant.

(7) Community Affairs Division (CAD)--The Division at the Department that administers CEAP, CSBG, [~~ESGP,~~] ESG, HHSP, Section 8 Housing Choice Voucher Program, and WAP.

(8) The Community Services Block Grant (CSBG)--A grant which provides U.S. federal funding for CAAs and other Eligible Entities that seek to address poverty at the community level. Like other block grants, CSBG funds are allocated to the states and other jurisdictions through a formula.

(9) Comprehensive Energy Assistance Program (CEAP)--A LIHEAP funded program to assist low-income Households, particularly those with the lowest incomes, that pay a high proportion of Household income for home energy, primarily in meeting their immediate home energy needs.

(10) [~~(9)~~] CSBG Act--The CSBG Act is a law passed by Congress authorizing the Community Services Block Grant. The CSBG Act was amended by the Community Services Block Grant Amendments of 1994 and the Coats Human Services Reauthorization Act of 1998 under 42 U.S.C. §§9901, et seq. The CSBG Act authorized establishing a community services block grant program to make grants available through the program to states to ameliorate the causes of poverty in communities within the states.

[~~(10) Cooling--Modifications including, but not limited to, the repair or replacement of air conditioning units, evaporative coolers, and refrigerators.~~]

[~~(11) CSBG Subrecipient--Includes CSBG Eligible Entities and other organizations that are awarded CSBG funds.~~]

(11) [~~(12)~~] Declaration of Income Statement (DIS)--A Department approved form for use when an applicant has no documented proof of income.

(12) [~~(13)~~] Department--The Texas Department of Housing and Community Affairs.

(13) [~~(14)~~] Discretionary Funds--Those CSBG funds maintained in reserve by a state, at its discretion, for CSBG allowable uses as authorized by §675C of the CSBG Act, and not designated for distribution on a statewide basis to CSBG Eligible Entities and not held in reserve for state administrative purposes.

[~~(15) DOE--The United States Department of Energy.~~]

(14) [~~(16)~~] DOE WAP Rules--10 CFR Part 440 describes the Weatherization Assistance for Low Income Persons as administered through the Department of Energy.

(15) [~~(17)~~] Dwelling Unit--A house, including a stationary mobile home, an apartment, a group of rooms, or a single room occupied as separate living quarters. This definition does not apply to the ESG or HHSP.

(16) [~~(18)~~] Equipment--A tangible non-expendable personal property including exempt property, charged directly to the award, having a useful life of more than one year, and an acquisition cost of $5,000 or more per unit. If [~~For CSBG, CEAP, and WAP, if~~] the unit acquisition cost exceeds $5,000, approval from the Department's Community Affairs Division must be obtained before the purchase takes place. [~~For ESGP and ESG, if the unit acquisition cost exceeds $500, approval from the Department's Community Affairs Division must be obtained before the purchase is made.~~]

(17) [~~(19)~~] Elderly Person--A person who is sixty (60) years of age or older, except for ESG.

(18) [~~(20)~~] Electric Base-Load Measure--Weatherization measures which address the energy efficiency and energy usage of lighting and appliances.

(19) [~~(21)~~] Eligible Entity--Those local organizations in existence and designated by the federal government to administer programs created under the federal Economic Opportunity Act of 1964. This includes community action agencies, limited-purpose agencies, and units of local government. The CSBG Act defines an eligible entity as an organization that was an eligible entity on the day before the enactment of the Coats Human Services Reauthorization Act of 1998 (October 27, 1998), or is designated by the Governor to serve a given area of the state and that has a tripartite board or other mechanism specified by the state for local governance.

(20) [~~(22)~~] Emergency--Defined by the LIHEAP Act of 1981 (Title XXVI of the Omnibus Budget Reconciliation Act of 1981, 42 U.S.C. §8622):

(A) natural disaster;

(B) a significant home energy supply shortage or disruption;

(C) significant increase in the cost of home energy, as determined by the Secretary;

(D) a significant increase in home energy disconnections reported by a utility, a state regulatory agency, or another agency with necessary data;

(E) a significant increase in participation in a public benefit program such as the food stamp program carried out under the Food Stamp Act of 1977 (7 U.S.C. §§2011, et seq.), the national program to provide supplemental security income carried out under Title XVI of the Social Security Act (42 U.S.C. §§1381, et seq.) or the state temporary assistance for needy families program carried out under Part A of Title IV of the Social Security Act (42 U.S.C. §§601, et seq.), as determined by the head of the appropriate federal agency;

(F) a significant increase in unemployment, layoffs, or the number of Households with an individual applying for unemployment benefits, as determined by the Secretary of Labor; or

(G) an event meeting such criteria as the Secretary, at the discretion of the Secretary, may determine to be appropriate.

(H) This definition does not apply to [~~ESGP,~~] ESG[~~,~~] or HHSP.

[~~(23) Emergency Shelter Grants Program (ESGP)--A federal grant program established by the Homeless Housing Act of 1986 and incorporated into Title IV of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. §§11371 - 11378) and funded through HUD.~~]

(21) [~~(24)~~] Emergency Solutions Grants (ESG)--A federal grant program authorized in Title IV of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. §§11371 - 11378), as amended by the Homeless Emergency Assistance and Rapid Transition to Housing Act (HEARTH Act). ESG is funded through HUD.

(22) [~~(25)~~] Energy Audit--The energy audit software and procedures used to determine the cost effectiveness of weatherization measures to be installed in a Dwelling Unit [~~dwelling unit~~].

(23) [~~(26)~~] Energy Repairs--Weatherization-related repairs necessary to protect or complete regular weatherization energy efficiency measures.

(24) [~~(27)~~] Families with Young Children--A family that includes a child age five (5) or younger.

(25) [~~(28)~~] High Energy Burden--Households with energy burden which exceeds 11% of annual gross income. Determined by dividing a Household's annual home energy costs by the Household's annual gross income.

(26) [~~(29)~~] High Energy Consumption--Household energy expenditures exceeding the median of low-income home energy expenditures, by way of example, at the time of this rulemaking, that amount is $1,000, but is subject to change.

(27) [~~(30)~~] Homeless or homeless individual--An individual as defined by 42 U.S.C. §§11371 - 11378 and 24 CFR §576.2.

(28) [~~(31)~~] Homeless and Housing Services Program (HHSP)--A state funded program established by the State Legislature during the 81st Legislative session with the purpose of providing funds to local programs to prevent and eliminate homelessness in municipalities with a population of 285,500 or more.

(29) [~~(32)~~] Household--Any individual or group of individuals who are living together as one economic unit. For energy programs, these persons customarily purchase residential energy in common or make undesignated payments for energy.

(30) [~~(33)~~] Inverse Ratio of Population Density Factor--The number of square miles of a county divided by the number of poverty Households of that county.

(31) [~~(34)~~] Local Unit [~~Units~~] of Government--City, county, council of governments, and housing authorities.

(32) [~~(35)~~] Low Income--Income in relation to family size and that governs eligibility for a program:

(A) For DOE WAP, at or below 200% of the DOE Income guidelines;

(B) For CEAP, CSBG, and LIHEAP WAP at or below 125% of the HHS Poverty Income guidelines;

[~~(C) For ESGP, at or below 100% of the poverty level, determined in accordance with criteria established by the Director of the Office of Management and Budget;~~]

(C) [~~(D)~~] For ESG, 30% of the Area Median Income (AMI) as defined by HUD's Section 8 Income Limits for persons receiving prevention assistance; and

(D) [~~(E)~~] For HHSP, 30% [~~80%~~] of the AMI as defined by HUD's Section 8 Income Limits for all clients assisted.

(33) [~~(36)~~] Low Income Home Energy Assistance Program (LIHEAP)--A federally funded block grant program that is implemented to serve low income Households who seek assistance for their home energy bills and/or weatherization services.

(34) [~~(37)~~] Migrant Farm worker--An individual or family that is employed in agricultural labor or related industry and is required to be absent overnight from their permanent place of residence.

(35) [~~(38)~~] Modified Cost Reimbursement--A contract sanction whereby reimbursement of costs incurred by the Subrecipient is made only after the Department has reviewed and approved backup documentation provided by the Subrecipient to support such costs.

(36) [~~(39)~~] Multifamily Dwelling Unit--A structure containing more than one Dwelling Unit [~~dwelling unit~~]. This definition does not apply to [~~ESGP,~~] ESG[,] or HHSP.

(37) [~~(40)~~] National Performance Indicator--An individual measure of performance within the Department's reporting system for measuring performance and results of Subrecipients of funds.

(38) [~~(41)~~] Needs Assessment--An assessment of community needs in the areas to be served with CSBG funds.

(39) [~~(42)~~] OMB--Office of Management and Budget, a federal agency.

(40) [~~(43)~~] OMB Circulars--OMB circulars set forth principles and standards for determining costs for federal awards and establishes consistency in the management of grants for federal funds. Cost principles for local governments are set forth in Office of Management and Budget (OMB) Circular A-87, and for nonprofit [~~non-profit~~] organizations in OMB Circular A-122. Uniform administrative requirements for local governments are set forth in OMB Circular A-102, and for nonprofits [~~non-profits~~] in OMB Circular A-110. OMB Circular A-133 "Audits of States, Local Governments, and Nonprofit [~~Non-Profit~~] Organizations," provides audit standards for governmental organizations and other organizations expending federal funds.

(41) [~~(44)~~] Outreach--The method that attempts to identify clients who are in need of services, alerts these clients to service provisions and benefits, and helps them use the services that are available. Outreach is utilized to locate, contact and engage potential clients.

(42) [~~(45)~~] Performance Statement--A document which identifies the services to be provided by a Subrecipient.

(43) [~~(46)~~] Persons with Disabilities--Any individual who is:

(A) a handicapped individual as defined in §7(9) of the Rehabilitation Act of 1973;

(B) under a disability as defined in §1614(a)(3)(A) or §223(d)(1) of the Social Security Act or in §102(7) of the Developmental Disabilities Services and Facilities Construction Act; or

(C) receiving benefits under 38 U.S.C. Chapter 11 or 15.

(44) [~~(47)~~] Population Density--The number of persons residing within a given geographic area of the state.

(45) [~~(48)~~] Poverty Income Guidelines--The official poverty income guidelines as issued by the U.S. Department of Health and Human Services (HHS) annually.

(46) [~~(49)~~] Private Nonprofit Organization--An organization described in §501(c) of the Internal Revenue Code (the "Code") of 1986 and which is exempt from taxation under subtitle A of the Code, has an accounting system and a voluntary board, and practices nondiscrimination in the provision of assistance. For ESG, this does not include a governmental organization such as a public housing authority or a housing finance agency. [~~Private nonprofit organizations applying for ESGP, ESG and HHSP funds must be established for charitable purposes and have activities that include, but are not limited to, the promotion of social welfare and the prevention or elimination of homelessness. The entity's net earnings may not inure to the benefit of any individual(s).~~]

(47) [~~(50)~~] Public Organization--A unit of [~~local~~] government, as established by the Legislature of the State of Texas. Includes, but may not be limited to, cities, counties, and councils of governments.

(48) [~~(51)~~] Referral--The process of providing information to a client Household about an agency, program, or professional person that can provide the service(s) needed by the client.

(49) [~~(52)~~] Rental Unit--A Dwelling Unit [~~dwelling unit~~] occupied by a person who pays rent for the use of the Dwelling Unit [~~dwelling unit~~]. This definition does not apply to [~~ESGP,~~] ESG[,] or HHSP.

(50) [~~(53)~~] Renter--A person who pays rent for the use of the Dwelling Unit [~~dwelling unit~~]. This definition does not apply to [~~ESGP,~~] ESG[~~,~~] or HHSP.

(51) [~~(54)~~] Seasonal Farm Worker--An individual or family that is employed in seasonal or temporary agricultural labor or related industry and is not required to be absent overnight from their permanent place of residence. In addition, at least 20% of the Household annualized income must be derived from the agricultural labor or related industry.

[~~(55) Secretary--Chief Executive of the U.S. Department of Health and Human Services.~~]

[~~(56) Service--The provision of work or labor that does not produce a tangible commodity.~~]

(52) [~~(57)~~] Shelter--Defined by the Department as a Dwelling Unit [~~dwelling unit~~] or units whose principal purpose is to house on a temporary basis individuals who may or may not be related to one another and who are not living in nursing homes, prisons, or similar institutional care facilities. This definition does not apply to ESG or HHSP.

(53) [~~(58)~~] Single Audit--As defined in the Single Audit Act of 1984 (as amended).

(54) [~~(59)~~] Single Family Dwelling Unit--A structure containing no more than one Dwelling Unit [~~dwelling unit~~]. This definition does not apply to [~~ESGP,~~] ESG[~~,~~] or HHSP.

(55) [~~(60)~~] Social Security Act--As defined in 42 U.S.C. §§601, et seq.

(56) [~~(61)~~] State--The State of Texas or the Texas Department of Housing and Community Affairs.

(57) [~~(62)~~] Subcontractor--A person or an organization with whom the Subrecipient contracts with to provide services [~~administer programs~~].

(58) Subgrant--An award of financial assistance in the form of money, or property in lieu of money, made under a grant by a Subrecipient to an eligible Subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases.

(59) Subgrantee--The legal entity to which a subgrant is awarded and which is accountable to the Subrecipient for the use of the funds provided.

(60) [~~(63)~~] Subrecipient--Generally, an organization with whom the Department contracts and provides CSBG, [~~ESGP,~~] CEAP, ESG, HHSP, DOE WAP, or LIHEAP funds. (Refer to Subchapters B, [~~C,~~] D - G, J, and K of this chapter for program specific definitions.)

(61) [~~(64)~~] Supplies--All personal property excluding equipment, intangible property, and debt instruments, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement (subject inventions), as defined in 37 CFR Part 401, "Rights to Inventions Made by Nonprofit [~~Non-Profit~~] Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements."

(62) [~~(65)~~] TAC--Texas Administrative Code.

(63) [~~(66)~~] Targeting--Focusing assistance to Households with the highest program applicable needs.

(64) [~~(67)~~] Terms and Conditions--Binding provisions provided by a funding organization to grantees accepting a grant award for a specified amount of time.

(65) [~~(68)~~] Treatment as a State or Local Agency--For purposes of 5 U.S.C. Chapter 15, any entity that assumes responsibility for planning, developing, and coordinating activities under the CSBG Act and receives assistance under CSBG Act shall be deemed to be a state or local agency.

(66) [~~(69)~~] Unit [~~Units~~] of General Local Government--A unit of local government which has, among other responsibilities, the authority to assess and collect local taxes and to provide general governmental services.

(67) [~~(70)~~] U.S.C.--United States Code.

(68) [~~(71)~~] USDHHS/HHS--U.S. Department of Health and Human Services.

(69) USDOE/DOE--U.S. Department of Energy.

(70) [~~(72)~~] USHUD/HUD--U.S. Department of Housing and Urban Development.

(71) [~~(73)~~] Vendor Agreement--An agreement between the Subrecipient and energy vendors that contains assurance as to fair billing practices, delivery procedures, and pricing for business transactions involving ESG and LIHEAP beneficiaries.

(72) [~~(74)~~] WAP--Weatherization Assistance Program.

(73) [~~(75)~~] WAP PAC--Weatherization Assistance Program Policy Advisory Council. The WAP PAC was established by the Department in accordance with 10 CFR §440.17 to provide advisory services in regards to the WAP program.

(74) [~~(76)~~] Weatherization Material--The material listed in Appendix A of 10 CFR Part 440.

(75) [~~(77)~~] Weatherization Project--A project conducted to reduce heating and cooling demand of Dwelling Units [~~dwelling units~~] that are energy inefficient.

§5.3. Cost Principles and Administrative Requirements.

(a) Except as expressly modified by the terms of a contract, Subrecipients shall comply with the cost principles and uniform administrative requirements set forth in the Uniform Grant and Contract Management Standards, 34 TAC §§20.421, et seq. (the "Uniform Grant Management Standards") provided, however, that all references therein to "local government" shall be construed to mean Subrecipient. Private nonprofit [~~Non-profit~~] Subrecipients of [~~ESGP,~~] ESG[~~,~~] and DOE WAP do not have to comply with UGMS unless otherwise required by NOFA or contract. For federal funds, Subrecipients will follow OMB Circulars as interpreted by the federal funding agency.

(b) In order to maintain adequate separation of duties, no more than two of the functions described in paragraphs (1) - (5) of this subsection are to be performed by a single individual:

(1) Requisition authorization;

(2) Encumbrance into software;

(3) Check creation and/or automated payment disbursement;

(4) Authorized signature/electronic signature; and

(5) Distribution of paper check.

§5.8. Inventory Report.

(a) The Department requires the submission of an inventory report on an annual basis to be submitted to the Department, no later than forty-five (45) days after the original end date of the contract.

(b) Vehicles, tools, and equipment purchased with funds under a contract with the Department, must be inventoried and reported to the Department during the contract period.

(c) The inventory report is cumulative and is used for vehicles, tools, and equipment with a useful life of one year or more and/or an [~~and a unit~~] acquisition cost of greater than $5,000 [~~for CSBG, CEAP, and WAP and greater than $500 for ESG, ESGP, and HHSP~~]. Property must be inventoried and reported on the Cumulative Inventory Report form. The form and instructions are found on the Department's website.

§5.10. Procurement Standards.

(a) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. Subrecipients must perform a cost or price analysis in connection with every procurement action, including contract modifications. Subrecipients must have written selection procedures for all procurement transactions.

(b) For CSBG, CEAP, WAP, and ESG, any partnership formed by the Subrecipient with an entity that will receive federal funds to provide program services requires a written executed contract or memorandum of understanding. For ESG, except if the Subrecipient is Subgrant(ing) funds to a private nonprofit organization, full and open procurement is required.

(c) For CEAP and WAP, any partnership, contract, or memorandum of understanding, formed by the Subrecipient with an entity that will replace heating and cooling appliances must include a provision that the appliances must be destroyed beyond repair and/or in accordance with local, state, or federal requirements.

(d) [~~(a)~~] In addition to the requirements in subsections (a) - (c) of this section and those described in §5.3 of this chapter (relating to Cost Principles and Administrative Requirements), except for Private Nonprofit Subrecipients of ESG and DOE WAP, Subrecipients [~~who administer Community Services Block Grant (CSBG), Homeless Housing and Services Program (HHSP), and Low Income Housing Energy Assistance Program (LIHEAP)~~] must follow the requirements in Texas Government Code, Chapter 783.

(e) [~~(b)~~] Additional Department requirements are:

(1) Small purchase procedures:

(A) This procedure may be used only on those services, supplies, or equipment costing in the aggregate of $25,000 or less[~~: For Emergency Shelter Grant Program (ESGP), Emergency Solutions Grant (ESG), and the HHSP, the threshold is $500 or less~~];

(B) Subrecipient must establish a clear, accurate description of the specifications for the technical requirements of the material, equipment, or services to be procured;

(C) Subrecipient must obtain a written price or documented rate quotation from an adequate number of qualified sources. An adequate number is, at a minimum, three different sources; and

(D) For a [~~Comprehensive Energy Assistance Program (CEAP), CSBG, or Weatherization Assistance Program (WAP),~~] small purchase procurement that exceeds $500 in the aggregate, and for any single item purchase for any program that exceeds $250, Subrecipients must obtain three (3) written quotes that contain a clear and accurate description of the material product or services to be provided. For any procurement that does not exceed these stated amounts, written documentation of phone quotes is acceptable.

(2) For Sealed bids:

(A) Subrecipient must formally advertise, for a minimum of three (3) days, in newspapers or through notices posted in public buildings throughout the service area. Advertising beyond the Subrecipient's service area is allowable and recommended by the Department. The advertisement should include, at a minimum, a response time of fourteen (14) days prior to the closing date of the bid request. All bids must be publicly opened and the time and place described in the advertisement. A government entity [~~Government Entity~~] must comply with the statutorily imposed publication requirements in addition to those requirements stated herein; and

(B) When advertising for material or labor services, Subrecipient shall indicate a period for which the materials or services are sought (e.g. for a one-year contract with an option to renew for an additional four (4) years). This advertised time period shall determine the length of time which may elapse before re-advertising for material or labor services, except that advertising for labor services must occur at least every five (5) years.

(3) For Competitive proposals:

(A) The Request for Proposal (RFP) or Request for Qualification (RFQ) must be publicized. The preferred method of advertising is the local service area newspapers. This advertisement should, at a minimum, allow fourteen (14) days before the RFP or RFQ is due. The due date must be stated in the advertisement; and

(B) The time period for services shall be one year, plus four (4) additional years at a maximum.

(4) Non-competitive proposals may be used only if:

(A) The service, supply, or equipment is available only from a single source;

(B) A public emergency exists preventing the time required for competitive solicitation; or

(C) After solicitation of a number of sources, competition is determined inadequate.

(5) Contract provisions, including subcontracts shall include the provisions or conditions described in subparagraphs (A) - (G) of this paragraph:

(A) Contracts in excess of $25,000 shall include provisions or conditions that allow for administrative, contractual, or legal remedies in instances where Subcontractors violate or breach the contract terms, and provide for such remedial actions as may be appropriate;

(B) All contracts in excess of $25,000 shall include suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the Subrecipient;

(C) Contracts shall include a provision with regard to independent Subcontractor status, and a provision to hold harmless and indemnify the Subrecipient and the Department from and against any and all claims, demands and course of action asserted by any third party arising out of or in connection with the services to be performed under contract;

(D) Contracts shall include a provision regarding conflicts of interest. Subrecipient's employees, officers, and/or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from Subcontractors, or potential Subcontractors; and

(E) Contracts shall include a provision prohibiting and requiring the reporting of fraud, waste, and abuse.

(i) Subrecipient shall establish, maintain, and utilize internal control systems and procedures sufficient to prevent, detect, and correct incidents of waste, fraud, and abuse in all Department funded programs and to provide for the proper and effective management of all program and fiscal activities funded by this contract. Subrecipient's internal control systems and all transactions and other significant events must be clearly documented and the documentation made readily available for review by Department.

(ii) Subrecipient shall give Department complete access to all of its records, employees, and agents for the purpose of monitoring or investigating the program. Subrecipient shall fully cooperate with Department's efforts to detect, investigate, and prevent waste, fraud, and abuse. Subrecipient shall immediately notify the Department of any identified instances of waste, fraud, or abuse.

(iii) Department will notify the funding source upon identification of possible instances of waste, fraud, and abuse or other serious deficiencies.

(iv) Subrecipient may not discriminate against any employee or other person who reports a violation of the terms of this contract or of any law or regulation to Department or to any appropriate law enforcement authority, if the report is made in good faith.

(F) Contracts shall include a provision to the effect that any alterations, additions, or deletions to the terms of the contract which are required by changes in federal law and regulations or state statute are automatically incorporated into the contract without written amendment, and shall become effective on the date designated by such law and or regulation; and any other alterations, additions, or deletions to the terms of the contract shall be amended hereto in writing and executed by both parties to the contract.

(G) Contracts shall include the provisions described in clauses (i) - (iii) of this subparagraph:

(i) Subcontractor represents that it possesses legal authority to enter into the contract, receive and manage the funds authorized by the contract, and to perform the services Subcontractor has obligated itself to perform under the contract;

(ii) The person signing the contract on behalf of the Subcontractor warrants that he/she has been authorized by the Subcontractor to execute the contract on behalf of the Subcontractor and to bind the Subcontractor to all terms set forth in the contract; and

(iii) Department shall have the right to suspend or terminate the contract if there is a dispute as the legal authority of either the Subcontractor or the person signing the contract to enter into the contract or to render performances thereunder. Should such suspension or termination occur, the Subcontractor is liable to the Subrecipient for any money it has received for performance of provisions of the contract.

§5.12. Purchases.

Purchases of personal property, equipment, goods or services with an [~~a unit~~] acquisition cost of over $5,000 [~~for Community Services Block Grant (CSBG), Comprehensive Energy Assistance Program (CEAP), and Weatherization Assistance Program (WAP), and over $500 for Emergency Shelter Grant Program (ESGP), Emergency Solutions Grants Program (ESG) and Homeless Housing and Services Program (HHSP)~~] require prior written approval from the TDHCA Community Affairs Division before the purchase can take place.

§5.13. Bonding Requirements.

(a) The requirements described in this subsection relate only to construction or facility improvements for DOE WAP and ESG Subrecipients.

(1) For contracts exceeding $100,000 the Department may accept the bonding policy and requirements of the Subrecipient, provided the Department has made a written finding that the Department is adequately protected.

(2) For contracts in excess of $100,000, and for which the Subrecipient cannot make a determination that the Department's interest is adequately protected, a "bid guarantee" from each bidder equivalent to 5% of the bid price shall be requested. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified. A bid bond in the form of any of the documents described in this paragraph may be accepted as a "bid guarantee."

(A) A performance bond on the part of the Subrecipient for 100% of the contract price. A "performance bond" is one executed in connection with a contract, to secure fulfillment of all Subcontractors' obligations under such contract.

(B) A payment bond on the part of the Subcontractor for 100% of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(C) Where bonds are required, in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR Part 223, "Surety Companies Doing Business with the United States."

(b) A Local Unit of Government [~~Entity~~] must comply with the bond requirements of Texas Civil Statutes, Articles 2252, 2253, and 5160, and Local Government Code, §252.044 and §262.032, as applicable.

§5.17. Sanctions and Contract Close Out.

(a) Subrecipients that enter into a contract with the Department to administer programs are required to follow state and federal laws and regulations and rules governing these programs.

(b) If a Subrecipient fails to comply with program and contract requirements, rules, or regulations and in the event monitoring or other reliable sources reveal material deficiencies in performance, or if the Subrecipient fails to correct any deficiency within the time allowed by federal or state law, the Department will apply one or more of the sanctions described in paragraph (1)(A) - (E) of this subsection:

(1) Deny the Subrecipient's requests for advances and place it on a Modified Cost Reimbursement method of payment until proof of compliance with the rules and regulations are received by the Department;

(A) Subrecipients placed on a Modified Cost Reimbursement method of payment must comply with the reporting requirements outlined in §5.211 of this chapter (relating to Subrecipient Reporting Requirements); §5.311 of this chapter (relating to Reports); §5.406 of this chapter (relating to Subrecipient Reporting Requirements); §5.506 of this chapter (relating to Subrecipient Reporting Requirements); §5.1006 of this chapter (relating to Performance and Expenditure Benchmarks); and §5.2007 of this chapter (relating to Reporting), as applicable;

(B) Subrecipients on a Modified Cost Reimbursement method must provide all supporting documentation to the Department no later than seven (7) days after the reporting due date;

(C) If Subrecipient has not submitted documentation required for cost reimbursement review in accordance with reporting

deadlines, Subrecipient will be required to enter a monthly report containing zero amounts and submit documentation required for the review as part of the next's month reporting;

(D) Subrecipients reporting a monthly report containing zero amounts throughout the program year shall submit all required support documentation to the Department for review by the last regular monthly report (before the final report); and/or

(E) The Department will review and assess supporting documentation submitted by Subrecipient no later than the seventh (7th) day of the following month.

(2) Withhold all payments from the Subrecipient (both reimbursements and advances) until proof of compliance with the rules and regulations are received by the Department, reduce the allocation of funds (with the exception of Community Services Block Grant (CSBG) funds to Eligible Entities as described in §5.206 of this chapter (relating to Termination and Reduction of Funding) and as limited for LIHEAP funds as outlined in Texas Government Code, Chapter 2105) or impose sanctions as deemed appropriate by the Department's Executive Director, at any time, if the Department identifies possible instances of fraud, waste, abuse, fiscal mismanagement, or other serious deficiencies in the Subrecipient's performance;

(3) Suspend performance of the contract or reduce funds until proof of compliance with the rules and regulations are received by the Department or a decision is made by the Department to initiate proceedings for contract termination;

(4) Elect not to provide future grant funds to the Subrecipient until appropriate actions are taken to ensure compliance; or

(5) Terminate the contract. Adhering to the requirements governing each specific program administered by the Department, as needed, the Department may determine to proceed with the termination of a contract, in whole or in part, at any time the Department establishes there is good cause for termination. Such cause may include, but is not limited to, fraud, waste, abuse, fiscal mismanagement, or other serious deficiencies in the Subrecipient's performance. For CSBG contract termination procedures, please refer to §5.206 of this chapter.

(c) Contract Close-out. When the Department moves to terminate a contract, the procedures described in paragraphs (1) - (12) of this subsection will be implemented.

(1) The Department will issue a termination letter to the Subrecipient no less than thirty (30) days prior to terminating the contract. The Department may determine to take one of the following actions: suspend funds immediately; establish a Modified Cost Reimbursement plan for closeout proceedings,[~~;~~] or provide instructions to the Subrecipient to prepare a proposed budget and written plan of action that supports the closeout of the contract. The plan must identify the name and current job titles of staff that will perform the close-out and an estimated dollar amount to be incurred.

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

(3) No later than thirty (30) days after the contract is terminated, the Subrecipient will take a physical inventory of client files, including case management files, and will submit to the Department an inventory of equipment with a unit acquisition cost of $5,000 or greater or having a useful life of more than one year. [~~for Comprehensive Energy Assistance Program (CEAP), Weatherization Assistance Program (WAP) and Community Services Block Grant (CSBG) or a unit acquisition cost of $500 or greater for ESGP, ESG, and HHSP.~~]

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

(5) Within thirty (30) days following the Subrecipient's due date for copying and boxing client files, Department staff will retrieve copied client files.

(6) The terminated Subrecipient will prepare and submit no later than sixty (60) days from the date the contract is terminated, a final report containing a full accounting of all funds expended under the contract.

(7) A final monthly expenditure report and a final monthly performance report for all remaining expenditures incurred during the close-out period must be received by the Department no later than sixty (60) days from the date the Department determines that the closeout of the program and the period of transition are complete.

(8) The Subrecipient will submit to the Department no later than sixty (60) days after the termination of the contract, an inventory of the non-expendable personal property acquired in whole or in part with funds received under the contract.

(9) The Department may transfer title to equipment having a unit acquisition cost (the net invoice unit price of an item of equipment) of $5,000 or greater or having a useful life of more than one year, to the Department or to any other entity receiving funds under the program in question. The Department will make arrangements to remove equipment covered by this paragraph within ninety (90) days following termination of the contract.[~~:~~]

[~~(A) $5,000 or greater for CEAP, CSBG, and WAP; or~~]

[~~(B) $500 or greater for ESG, ESGP, and HHSP, to the Department or to any other entity receiving funds under the program in question. The Department will make arrangements to remove equipment covered by this paragraph within ninety (90) days following termination of the contract.~~]

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

(11) As required by OMB Circular A-133, a current year Single Audit must be performed for all agencies that have exceeded the federal expenditure threshold under OMB Circular A-133. The Department will allow a proportionate share of program funds to pay for accrued audit costs, when an audit is required, for a Single Audit that covers the date up to the closeout of the contract. The terminated Subrecipient must have a binding contract with a CPA firm on or before the termination date of the contract. The actual costs of the Single Audit and accrued audit costs including support documentation must be submitted to the Department no later than sixty (60) days from the date the Department determines the close-out is complete.

(12) Subrecipients shall submit within sixty (60) days after the date of the close-out process all financial, performance, and other applicable reports to the Department. The Department may approve extensions when requested by the Subrecipient. However, unless the Department authorizes an extension, the Subrecipient must abide by the sixty (60) day contractual requirement of submitting all referenced reports and documentation to the Department.

§5.19. Client Income Guidelines.

(a) Except for ESG and HHSP, the [~~The~~] Department has defined eligibility for program assistance under the Poverty Income Guidelines. [~~poverty income guidelines provided annually by the Secretary of the U.S. Department of Health and Human Services (USDHHS). For ESG, Subrecipients will adhere to 24 CFR §5.609, subject to the revisions of The Housing and Economic Recovery Act of 2008 (HERA), P.L. 110-289.~~]

(b) For all programs except ESG [~~and HHSP~~], Subrecipients will use the list of included and excluded income to determine eligibility for all programs, as described in paragraphs (1) and (2) of this subsection. Income means Cash Receipts earned and/or received by the applicant before taxes during applicable tax year(s) but not the Excluded Income listed in paragraph (2) of this subsection. Gross Income is to be used, not Net Income.

(1) Included Income:

(A) Temporary Assistance for Needy Families (TANF);

(B) Money, wages and salaries before any deductions;

(C) Net receipts from non-farm or farm self-employment (receipts from a person's own business or from an owned or rented farm after deductions for business or farm expenses);

(D) Regular payments from social security, including Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI);

(E) Railroad retirement;

(F) Unemployment compensation;

(G) Strike benefits from union funds;

(H) Worker's compensation;

(I) Training stipends;

(J) Alimony;

(K) Military family allotments;

(L) Private pensions;

(M) Government employee pensions (including military retirement pay);

(N) Regular insurance or annuity payments; and

(O) Dividends, interest, net rental income, net royalties, periodic receipts from estates or trusts; and net gambling or lottery winnings.

(2) Excluded Income:

(A) Capital gains; any assets drawn down as withdrawals from a bank;

(B) The sale of property, a house, or a car;

(C) One-time payments from a welfare agency to a family or person who is in temporary financial difficulty;

(D) Tax refunds, gifts, loans, and lump-sum inheritances;

(E) One-time insurance payments, or compensation for injury;

(F) Non-cash benefits, such as the employer-paid or union-paid portion of health insurance or other employee fringe benefits;

(G) Food or housing received in lieu of wages;

(H) The value of food and fuel produced and consumed on farms;

(I) The imputed value of rent from owner-occupied non-farm or farm housing;

(J) Federal non-cash benefit programs as Medicare, Medicaid, Food Stamps, and school lunches;

(K) Housing assistance and combat zone pay to the military;

(L) Veterans (VA) Disability Payments;

(M) College scholarships, Pell and other grant sources, assistantships, fellowships and work study, VA Education Benefits (GI Bill); [~~and~~]

(N) Child support payments, whether received by the payee or paid by the payor;[~~.~~]

(O) Income of Household members under eighteen (18) years of age;

(P) Depreciation for farm or business assets;

(Q) Reverse mortgages;

(R) Payments for care of Foster Children; and

(S) Any other income required to be excluded by the federal or state funding program.

§5.20. Determining Income Eligibility.

(a) To determine income eligibility for USDHHS and DOE funded programs, Subrecipients must base annualized eligibility determinations on Household income from thirty (30) days prior to the date of application for assistance. Each Subrecipient must maintain documentation of included and excluded cash income from all sources for all Household members for the entire thirty (30) day period prior to the date of application and multiply the monthly amount by twelve (12) to annualize income. [~~Income documentation must be collected from all income sources for all Household members eighteen (18) years and older for the entire thirty (30) day period.~~]

(b) If proof of income is unobtainable, the applicant must complete and sign a Declaration of Income Statement (DIS). In order to use the DIS form, each Subrecipient shall develop and implement a written policy and procedure on the use of the DIS form. The DIS must be notarized. In developing the policy and procedure, Subrecipients shall limit the use of the DIS form to cases where there are serious extenuating circumstances that justify the use of the form. Such circumstances might include crisis situations such as applicants that are affected by natural disaster which prevents the applicant from obtaining income documentation, applicants that flee a home due to physical abuse, applicants who are unable to locate income documentation of a recently deceased spouse, or whose work is migratory or seasonal in nature. To ensure limited use, the Department will review the written policy and its use, as well as client-provided descriptions of the circumstances requiring use of the form, during on-site monitoring visits. [~~Department approved declaration of income statement or complete income documentation attestations required by the federal funding source.~~]

(c) To determine income for ESG, Subrecipients must use HUD's Section 8 Income Limits for persons receiving prevention assistance.

(d) To determine income for HHSP, Subrecipients may select either the method described in §5.19(b) of this chapter (relating to Client Income Guidelines) or used by ESG, but must be consistent throughout the contract term.

(e) Except for ESG, in the case of migrant, seasonal, part-time, temporary, or self-employed workers a longer period than thirty (30) days may be used for annualizing income. However, the same method must be used for all similarly situated workers.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 29, 2013.

TRD-201303080
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: September 8, 2013
For further information, please call: (512) 475-3916

♦ ♦ ♦

SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT (CSBG)

10 TAC §§5.202, 5.210, 5.212, 5.217

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 5, Subchapter B, §§5.202, 5.210, 5.212, and 5.217, concerning Purpose and Goals, CSBG Needs Assessment and Community Action Plan, CSBG Requirements for Tripartite Board of Directors, and Board Meeting Requirements. The purpose of the amendments are to include local government entities where they had been omitted; to clarify the due dates of Community Action Plans and community needs assessments; to separate state requirements for boards from federal requirements; and to clarify board meeting requirements.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the proposed amendments will be in effect, enforcing or administering the proposed amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments will be in effect, the public benefit anticipated as a result of the amendments will be to enhance the Department's administration of the Community Services Block Grant Program. There will not be any economic cost to any individuals required to comply with the sections as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941; by email to cadrulecomments@tdhca.state.tx.us; or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. SEPTEMBER 9, 2013.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code, §2306.053, which generally authorizes the Department to adopt rules, and more specifically Texas Government Code, §2306.092, which authorizes the Department to promulgate rules regarding its community affairs and community development programs.

The proposed amendments affect no other code, article, or statute.

§5.202. Purpose and Goals.

Community Services Block Grant (CSBG) funds provide assistance to states and local communities, working through a network of local government entities, Community Action Agencies, [~~community action agencies~~] and other neighborhood-based organizations for the reduction of poverty, the revitalization of low-income communities, and the empowerment of low-income families and individuals in rural and urban areas to become fully self-sufficient (particularly families who are attempting to transition off a state program carried out under part A of title IV of the Social Security Act.)

§5.210. CSBG Needs Assessment and Community Action Plan.

(a) In accordance with the CSBG Act and §676 of the Act, the Department is required to secure a Community Action Plan on an annual basis from each CSBG Eligible Entity. The Community Action Plan shall be submitted to the Department on or before October 1 of each year.

(b) Every five (5) years, the CSBG Community Action Plan will include a community needs assessment from every CSBG Eligible Entity. The community needs assessment shall be submitted to the Department on or before August 1 each fifth (5th) year according to the CSBG Eligible Entity(ies') established schedule.

(c) The Community Action Plan shall at a minimum include a description of the delivery of services for the case management system in accordance with the National Performance Indicators and shall include a performance statement that describes the services, programs and activities to be administered by the organization.

(d) Hearing. A board certification that a public hearing was conducted on the proposed use of funds for the Community Action Plan must be submitted to the Department with the plan.

(e) Intake Form. To fulfill the requirements of 42 U.S.C. §9917, CSBG Subrecipients must complete and maintain an intake form which includes the demographic and household characteristic data required for the monthly performance and expenditure report, referenced in Subchapter A of this chapter (relating to General Provisions), for all Households receiving a community action service. A new CSBG intake form or a centralized intake form must be completed and maintained on an annual basis to coincide with the CSBG program year of January 1st through December 31st.

(f) Case Management.

(1) In keeping with the regulations issued under Title II, §676(b) State Application and Plan, the Department requires CSBG Subrecipients to incorporate integrated case management systems in the administration of their CSBG program (Title II, §676(b)). Incorporating case management in the service delivery system and providing assistance that has a long-term impact on the client, such as enabling the client to move from poverty to self-sufficiency, to maintain stable families, and to revitalize the community, supports the requirements of Title II, §676(b). An integrated case management system improves the overall provision of assistance and improves each Subrecipient's ability to transition persons from poverty to self-sufficiency.

(2) Subrecipients must have and maintain documentation of [~~in operation~~] a case management program that has the components described in subparagraphs (A) - (H) of this paragraph:

(A) Intake Form;

(B) Pre-assessment to determine service needs, to determine the need for case management, and to determine which individuals/families to consider enrolling in case management program;

(C) Integrated assessment of individual/family service needs of those accepted into case management program;

(D) Development of case management service plan to meet goals and become self-sufficient;

(E) Provision of services and coordination of services to meet needs and achieve self-sufficiency;

(F) Monitoring and follow-up of participant's progress;

(G) Case closure, once individual has become self-sufficient; and

(H) Evaluation process to determine effectiveness of case management system.

(3) As required by 42 U.S.C. §678G(b)(1-2), CSBG Subrecipients shall inform custodial parents in single-parent families that participate in programs, activities, or services about the services available through the Texas Attorney General's Office with respect to the collection of child support payments and/or refer eligible parents to the Texas Attorney General's Office of Child Support Services Division.

(g) Non-CSBG Eligible Entities receiving state discretionary funds under §5.203(b) of this subchapter (relating to Distribution of CSBG Funds) are not required to submit a Community Action Plan. All CSBG Subrecipients must develop a performance statement which identifies the services, programs, and activities to be administered by the organization.

(h) Subrecipient Requirements for Appeals Process for CSBG Applicants/Clients. Subrecipients shall establish a CSBG denial of service complaint procedure to address written complaints from program applicants/clients. At a minimum, the procedures described in paragraphs (1) - (8) of this subsection shall be included:

(1) Subrecipients shall provide a written denial of assistance notice to applicant/client within ten (10) business days of the adverse determination. This notification shall include written notice of the right to a hearing and specific reasons for the denial by component. The applicant wishing to appeal a decision must provide written notice to Subrecipient within twenty (20) days of receipt of the denial notice;

(2) Subrecipient who receives an appeal or client complaint shall establish an appeal committee composed of at least three persons. Subrecipient shall maintain documentation of appeals/complaints in their client files;

(3) Subrecipient shall hold the hearing within twenty (20) days after the Subrecipient received the appeal/complaint request from the applicant/client;

(4) Subrecipient shall record the hearing;

(5) The hearing shall allow time for a statement by Subrecipient staff with knowledge of the case;

(6) The hearing shall allow the applicant/client at least equal time, if requested, to present relevant information contesting the decision;

(7) Subrecipient shall notify applicant/client of the decision in writing. The Subrecipient shall mail the notification by close of business on the business day following the decision (one (1) day turnaround);

(8) If the denial is solely based on income eligibility, the provisions in paragraphs (2) - (7) of this subsection, do not apply and the applicant may request a recertification of income eligibility based on initial documentation provided at the time of the original application. The recertification will be an analysis of the initial calculation based on the documentation received with the initial application for services and will be performed by an individual other than the person who performed the initial determination. If the recertification upholds the denial based on income eligibility documents provided at the initial application, the applicant is notified in writing and no further appeal is afforded to the applicant.

(i) If the applicant is not satisfied, the applicant may further appeal the decision in writing to the Department within ten (10) days of notification of an adverse decision.

(j) Applicants/clients who allege that the Subrecipient has denied all or part of a service or benefit in a manner that is unjust, violates discrimination laws, or without reasonable basis in law or fact, may request a contested hearing under Texas Government Code, Chapter 2001.

(k) The hearing shall be conducted by the State Office of Administrative Hearings on behalf of the Department in the locality served by the Subrecipient.

(l) If client appeals to the Department, the funds should remain encumbered until the Department completes its decision.

§5.212. CSBG [~~Board of Directors Membership and Meeting~~] Requirements for [~~CSBG Eligible Entity's~~] Tripartite Board of Directors [~~Boards~~].

(a) General Board Requirements:

(1) The Coats Human Services Reauthorization Act (Public Law 105-285) addresses the CSBG program and requires that Eligible Entities administer the CSBG program through a tripartite board. The Act requires that governing boards or a governing body be involved in the development, planning, implementation, and evaluation of the programs serving the low-income sector. [~~Also, the Texas Legislature, through §551.001(3) of the Texas Government Code, addresses specific requirements regarding meetings, meeting notices, and open meeting records through the Open Meetings Act (Texas Government Code, §§551.001, et seq.) and the Public Information Act (Texas Government Code, §§552, et seq.). State legislation has also defined as a governmental body, nonprofit corporation boards that are eligible to receive funds under the federal CSBG program and that are authorized by the state to serve a geographic area of the state.~~]

(2) Federal requirements for establishing a tripartite board require board oversight responsibilities for public entities, which differ from requirements for private organizations. Where differences occur between private and public organizations, requirements for each entity have been noted in related sections of the rule.

(b) Each CSBG Eligible Entity shall comply with the provisions of this rule and if necessary, the Eligible Entity's by-laws shall be amended to reflect compliance with these requirements.

§5.217. Board Meeting Requirements.

(a) Boards of Eligible Entities [~~The Board~~] must [~~follow the Texas Open Meetings Act,~~] meet at least once per calendar quarter and at a minimum five (5) times per year and, must give each Board member a notice of meeting five (5) days in advance of the meeting.

(b) Texas Government Code, Chapter 551, Texas Open Meetings Act, addresses specific requirements regarding meetings and meeting notices. Texas Government Code, §551.001(3)(J), includes in the definition of a governmental body, nonprofit corporations that are eligible to receive funds under the federal CSBG program and that are authorized by the state to serve a geographic area of the state. Thus, the law requires that nonprofit corporations must follow the requirements of the Texas Open Meetings Act.

[~~(b) Open Meetings Training.~~]

(c) [~~(1)~~] Texas Government Code, §551.005 requires elected or [~~and~~] appointed officials to receive training in Texas Open Government laws. The Department requires that all board members of nonprofit corporations that are eligible to receive funds under the federal CSBG program, and that are authorized by the state to serve a geographic area of the state to board members receive training in Texas Open Government laws, according to the requirements of §551.005. [~~This mandate applies to the board of directors for CSBG Eligible Entities, and public sector local officials, and requires that training is received within ninety (90) days of becoming a board member. As part of this requirement, the Office of the Attorney General has established and made available formal training to ensure government officials have a good command of open records and open meeting laws. To fulfill this requirement, the Office of the Attorney General offers free training videos which may be requested by accessing their website at www.oag.state.tx.us/open/og_training.shtml or by calling 1-800-252-8011.~~]

[~~(2) Legislation requires open meetings training for public sector local officials; however, the Department recommends this training for all board members. Boards shall ensure that all members serving on the Board of Directors shall receive this training according to the deadlines described in this subsection.~~]

(d) [~~(3)~~] A copy of the attendance roster for all Board trainings shall be maintained at the Subrecipient level.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 29, 2013.

TRD-201303081
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: September 8, 2013
For further information, please call: (512) 475-3916

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10 TAC §5.209

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 5, Subchapter B, §5.209, concerning the State Application and Plan. The purpose of the proposed repeal is to remove references to the submission of the State Application and Plan, as this is informational only.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the proposed repeal will be in effect, enforcing or administering the proposed repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the repeal of the rule will be in effect, the public benefit anticipated as a result of the repeal of the rule will be to remove references to the submission of the State Application and Plan, as this is informational only. There will not be any economic cost to any individuals required to comply with the repeal of this rule.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941; by email to cadrulecomments@tdhca.state.tx.us; or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. SEPTEMBER 9, 2013.

STATUTORY AUTHORITY. The repeal is proposed pursuant to Texas Government Code, §2306.053, which generally authorizes the Department to adopt rules, and more specifically Texas Government Code, §2306.092, which authorizes the Department to promulgate rules regarding its community affairs and community development programs.

The proposed repeal affects no other code, article, or statute.

§5.209. State Application and Plan.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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SUBCHAPTER J. HOMELESS HOUSING AND SERVICES PROGRAM (HHSP)

10 TAC §§5.1003, 5.1004, 5.1006

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 5, Subchapter J, §§5.1003, 5.1004, and 5.1006, concerning General Homeless Housing and Services Program (HHSP) Requirements, Formula, and Performance and Expenditure Benchmarks. The purpose of the amendments is to strengthen program reporting, improve program administration, and update formula source data.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the proposed amendments will be in effect, enforcing or administering the proposed amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments will be in effect, the public benefit anticipated as a result of the amendments will be strengthened program reporting requirements and the use of more recent source data in the formula. There will not be any economic cost to any individuals required to comply with the sections as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941; by email to cadrulecomments@tdhca.state.tx.us; or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. SEPTEMBER 9, 2013.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code, §2306.053, which generally authorizes the Department to adopt rules, and more specifically Texas Government Code, §2306.092, which authorizes the Department to promulgate rules regarding its community affairs and community development programs.

The proposed amendments affect no other code, article, or statute.

§5.1003. General Homeless Housing and Services Program (HHSP) Requirements.

(a) Each municipality or entity that had in effect as of January 1, 2012, a contract with the Texas Department of Housing and Community Affairs (the "Department") to administer HHSP funds will remain a designated entity to receive HHSP funds in its municipality, whether that entity is the municipality itself or another entity. The Department may add to or change those entities in its discretion based on consideration of the factors enumerated in paragraphs (1) - (4) of this subsection. If the Department proposes to add or change any such entity(ies) it will publish notice thereof on its website at least twenty (20) days prior to such addition or change. If the proposal is to add an entity, the notice will include any proposed sharing of funding with other HHSP providers in the affected municipality:

(1) whether an entity to be removed and replaced was compliantly and efficiently administering its contract;

(2) the specific plans of any new entity to build facilities to provide shelter or services to homeless populations, and/or to provide any specific programs to serve the homeless;

(3) the capacity of any new entity to deliver its planned activities; and

(4) any public comment and comment by state or local elected officials.

(b) The final decision to add or change entities will be approved by the Texas Department of Housing and Community Affairs Governing Board (the "Board").

(c) A municipality or entity receiving HHSP funds is subject to the Department's Previous Participation Rule, found in §1.5 of this title. In addition to the considerations of the Previous Participation Review Rule, a municipality or entity receiving HHSP funds may not:

[~~(1) be in material noncompliance under the Department's rules;~~]

(1) [~~(2)~~] have failed to fully expend funds [~~comply with any benchmarks~~] with respect to any previous HHSP award(s) except as approved by the Executive Director of the Department after review of unique circumstances; or

(2) [~~(3)~~] be in breach, after notice and a reasonable opportunity to cure, of any contract [~~or agreement~~] with the Department.

(d) A municipality or entity receiving HHSP funds, Subrecipient, must enter into a contract [~~an agreement~~] with the Department governing the use of such funds. If the source of funds for HHSP is funding under another specific Department program, such as the Housing Trust Fund, as authorized by Texas Government Code, §2306.2585(c), the contract [~~agreement~~] will incorporate any requirements applicable to such funding source.

[~~(e) Any agreement for HHSP funds will include the following benchmarks:~~]

[~~(1) any funds used for general operations will be expended within twelve (12) months;~~]

[~~(2) any funds used for operation of training, recovery, or other programs will be expended within eighteen (18) months;~~]

[~~(3) any funds used for construction, development, or procurement of housing for homeless persons of facilities will be expended within twenty-four (24) months; and~~]

[~~(4) funds for any other use will be expended within twenty-four (24) months.~~]

[~~(f) Benchmarks may be extended for good cause by the Board.~~]

§5.1004. Formula.

(a) Any funds made available for the Homeless Housing and Services Program (HHSP) that are distributed to eligible municipalities shall be distributed in accordance with a formula that takes into account:

(1) population of the municipality, as determined by the most recent available 1 Year American Community Survey (ACS) [~~census~~] data;

(2) poverty, defined as the number of persons in the municipality's population with incomes at or below the poverty threshold, as determined by the most recent available 1 Year ACS data [~~federal poverty level~~];

(3) veteran populations, defined as that percentage of the municipality's population comprised of veterans, as determined by the most recent available 1 Year ACS data [~~based on the data most recently published by the Texas Veterans Commission~~];

(4) population of Persons with Disabilities [~~persons with disabilities~~], defined as that percentage of the municipality's population comprised of Persons with Disabilities [~~persons with disabilities~~], as determined by the most recent available 1 Year ACS data [~~based on the data most recently available from the U.S. Census Bureau~~]; and

(5) population of Homeless [~~homeless~~] persons, defined as that percentage of the municipality's population comprised of Homeless [~~homeless~~] persons, as determined by [~~based on~~] the most recently available Point-In-Time Counts submitted to HUD [~~prepared~~] by the Continuums of Care in Texas and published on the HUD website.

(b) The factors enumerated in subsection (a)(1) - (5) of this section shall be used to calculate distribution percentages for each municipality based on the following formula:

(1) 20 percent weight for [~~the percentage of~~] population;

(2) 25 percent weight for poverty populations;

(3) 25 percent weight for veteran populations;

(4) 5 percent weight for population of Persons with Disabilities [~~persons with disabilities~~]; and

(5) 25 percent weight for the Homeless [homeless] population[, based on the results of the most recently available Point-In-Time Counts prepared by the Continuums of Care in Texas].

§5.1006. Performance and Expenditure Benchmarks.

The Department may [will] incorporate performance and expenditure benchmarks into each contract.

(1) Performance and expenditure [All performance] benchmarks will be based on budgets, timelines, and [Homeless Management Information Systems performance measures or other] performance measures approved by the Department in writing before the start of the contract period. [All performance benchmarks that are not based on Homeless Management Information System performance measures may not become effective unless the municipality in which they are to be employed has made available for fifteen (15) days an opportunity for citizen participation in accordance with its public comment process.]

(2) Benchmarks may be adjusted for good cause by the Executive Director of the Department.

(3) Department staff will periodically review Subrecipients' progress in meeting benchmarks. If a Subrecipient is out of compliance with performance or expenditure benchmarks, the Department may deobligate all or a portion of any remaining funds under the contract.

[(2) Expenditure benchmarks will be:]

[(A) 10 percent of the contract amount must be expended by the end of the first quarter;]

[(B) 40 percent expended by the end of the second quarter;]

[(C) 75 percent expended by the end of the third quarter;]

[(D) 100 percent expended by the end of the contract period; and]

[(E) a municipality or entity administering a contract may ask for a different expenditure deadline before the start of the contract period and the Department staff will evaluate these requests. The Department may approve, reject, or approve with modifications in its sole discretion based on its assessment of the proposed activities, the legitimate need for alternative benchmarks, the risks of timely and compliant expenditure presented, and other relevant factors presented.]

[(3) Each such municipality or entity will have to submit a quarterly benchmark report to the Department no later than thirty (30) days after the end of each contract quarter and the Department will pro-vide a letter within thirty (30) days if the municipality or entity is out of compliance with benchmarks giving notice of such noncompliance and setting forth any reasonable opportunity for corrective or curative action, the consequences of failure to correct or cure, and any opportunity for appeal of such consequences. If a municipality or entity is out of compliance with performance or expenditure benchmarks, the Department staff may deobligate all or a portion of any remaining funds under the contract.]

[(4) Each municipality or entity will be monitored annually by the Department either through a desk review or in-person monitoring review to determine contract compliance.]

[(5) In the monitoring process if non-compliant expenditures have been made and cannot be corrected or cured, the Department may recapture such funds. Recapture amounts are immediately due and payable to the Department in full.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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10 TAC §5.1007, §5.1008

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 5, Subchapter J, §5.1007 and §5.1008, concerning Subrecipient Reporting Requirements and Subrecipient Data Collection. The purpose of the proposed new sections is to add reporting and data collection requirements.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the proposed new sections will be in effect, enforcing or administering the proposed new sections do not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the new sections will be to add reporting and data collection requirements. There will not be any economic cost to any individuals required to comply with the sections as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941; by email to cadrulecomments@tdhca.state.tx.us; or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. SEPTEMBER 9, 2013.

STATUTORY AUTHORITY. The new sections are proposed pursuant to Texas Government Code, §2306.053, which generally authorizes the Department to adopt rules, and more specifically Texas Government Code, §2306.092, which authorizes the Department to promulgate rules regarding its community affairs and community development programs.

The proposed new sections affect no other code, article, or statute.

§5.1007. Subrecipient Reporting Requirements.

Subrecipients must submit a monthly performance report and a monthly expenditure report through the Community Affairs Contract System no later than the fifteenth (15th) day of the month following each month of the contract period. Reports are required even if a fund reimbursement is not being requested. A final expenditure report and a final performance report must be submitted within forty-five (45) days of the end of the contract term.

§5.1008. Subrecipient Data Collection.

Subrecipients must ensure that data on all persons served and all activities assisted under Homeless Housing and Services Program (HHSP)

be entered into the applicable community-wide Homeless Management Information System in order to integrate HHSP data with data from all homeless assistance and homelessness prevention Projects in a Continuum of Care. The data to be collected will be indicated in the contract.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER K. EMERGENCY SOLUTIONS GRANTS (ESG)

10 TAC §§5.2001, 5.2004, 5.2006, 5.2008, 5.2012

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 5, Subchapter K, §§5.2001, 5.2004, 5.2006, 5.2008, and 5.2012, concerning Background, Eligible Applicants, Contract Execution, Program Income, and Redistribution/Reallocation of Additional Grant Funds and Unexpended Funds. The purpose of the amendments is to define Emergency Solutions Grants (ESG) program participants as Subrecipients, to align ESG with other Community Affairs programs, and to allow the Department greater flexibility in the redistribution or reallocation of additional grant funds and unexpended funds.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the proposed amendments will be in effect, enforcing or administering the proposed amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments will be in effect, the public benefit anticipated as a result of the amendments will be to clarify that ESG program participants are defined as that term is used in other Community Affairs programs. There will not be any economic cost to any individuals required to comply with the rule as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941; by email to cadrulecomments@tdhca.state.tx.us; or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. SEPTEMBER 9, 2013.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code, §2306.053, which generally authorizes the Department to adopt rules, and more specifically Texas Government Code, §2306.092, which authorizes the Department to promulgate rules regarding its community affairs and community development programs.

The proposed amendments affect no other code, article, or statute.

§5.2001. Background.

(a) Emergency Solutions Grants (ESG) funds are federal funds awarded to the State of Texas by the U.S. Department of Housing and Urban Development (HUD) and administered by the Texas Department of Housing and Community Affairs (the "Department").

(b) The regulations in this subchapter govern the administration of ESG funds and establish policies and procedures for use of ESG funds to meet the purposes contained in Title IV of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. §§11371 - 11378) (the "Act"), as amended by the Homeless Emergency Assistance and Rapid Transition to Housing Act (HEARTH Act).

(c) ESG Subrecipients [~~program participants~~] shall comply with the regulations applicable to the ESG program as indicated in this subchapter and as set forth in 24 CFR Part 91 and 24 CFR Part 576 [~~and 24 CFR Part 91~~] (the "Federal Regulations"). ESG Subrecipients [~~program participants~~] must also follow all other applicable federal and state statutes and the regulations established in this chapter, as amended or suspended.

(d) In the event that Congress, the Texas Legislature, or HUD add or change any statutory or regulatory requirements concerning the use or administration of these funds, ESG Subrecipients [~~program participants~~] shall comply with such requirements.

§5.2004. Eligible Applicants.

(a) Eligible Subrecipients [~~applicants~~] are Units of General Local Government [~~units of general purpose local government~~] and those Private Nonprofit Organization(s) [~~private nonprofit organizations~~] that are secular or religious organizations as described in §501(c) of the Internal Revenue Code of 1986, are exempt from taxation under Subtitle A of the Code, have an accounting system and a voluntary board, and practice non-discrimination in the provision of assistance.

(b) The Department reserves the option to limit eligible Subrecipient [~~applicant~~] entities in a given funding cycle.

§5.2006. Contract Execution.

(a) The Department will obligate funds within sixty (60) days of receiving the signed grant agreement from the U.S. Department of Housing and Urban Development (HUD).

(b) Upon approval by the Department's Board of Directors or its designee, Subrecipients [~~applicants~~] receiving Emergency Solutions Grants (ESG) funds shall enter into and execute a contract [~~an agreement~~] for the receipt of ESG funds.

(c) The Department, acting by and through its Executive Director or his/her designee, may authorize, execute, and deliver modifications and/or amendments to the ESG contract.

(d) The Department reserves the right to deobligate funds and redistribute funds.

(e) The Department reserves the right to negotiate the final grant amounts and local match with Subrecipients [~~successful applicants~~].

§5.2008. Program Income.

(a) Program income is gross income received by the Subrecipient, its Affiliates, or Subgrantees [~~grantee or subgrantee~~] directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. Program income received and expended during the contract period will count toward

meeting the Subrecipients' matching requirements, provided the costs are eligible Emergency Solutions Grants (ESG) costs that supplement the ESG program.

(b) In addition, utility and security deposit refunds from vendors should be treated as program income.

(c) In accounting for program income, the Subrecipient must accurately reflect the receipt of such funds separate from the receipt of federal funds and Subrecipient funds.

(d) Program income received by the Subrecipient, its Affiliates, or its Subgrantees during the two (2) years following the end of the contract period must be returned to the Department. Program income must be returned to the Department within ten (10) working days of receipt [~~by the Subrecipient~~].

(e) Program income received [~~by the Subrecipient~~] after the two (2) year period described in subsection (d) of this section has expired, can be retained [~~by the Subrecipient~~].

§5.2012. Redistribution/Reallocation of Additional Grant Funds and Unexpended Funds.

The Department will determine the most equitable and beneficial use of any additional grant year appropriation, unexpended or deobligated program funds. In determining the distribution of funds, the Department will consider program performance, [~~and~~] expenditure rates of eligible applicants or Subrecipients, or other factors deemed appropriate by the Department.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 214. VOCATIONAL NURSING EDUCATION

22 TAC §214.3

Introduction. The Texas Board of Nursing (Board) proposes amendments to §214.3, relating to Program Development, Expansion and Closure. The amendments are proposed under the Occupations Code §§301.155(a), 301.157, and 301.151 and are necessary to: (i) establish, in rule, a $500 filing fee for an out-of-state vocational nursing education program seeking to conduct clinical learning experiences in Texas; and (ii) clarify that the Board may withdraw the approval of any out-of-state vocational nursing education program that fails to maintain the requirements necessary for initial approval to conduct clinical learning experiences in Texas.

Background

Under current Board rule §214.3, an out-of-state vocational nursing education program may seek Board approval to conduct clinical learning experiences in Texas. The requirements that an out-of-state vocational nursing education program must meet in order to receive such approval are currently set out in Board rule §214.3 and Board Education Guideline 3.1.1.f.

The Board is authorized by the Occupations Code §301.155 to establish fees in amounts reasonable and necessary to cover the costs of administering the Nursing Practice Act, including costs associated with reviewing and approving nursing education programs in Texas. Since January 2008, the Board has approved 11 out-of-state nursing education programs to conduct clinical learning experiences in Texas. It has been the Board's historical practice to require these programs to submit a $500 filing fee with their approval requests in lieu of the $2,500 filing fee normally required for the approval of an in-state nursing education program proposal.

The Board has determined that a filing fee of $500 for the review and approval of an out-of-state vocational nursing education program to conduct clinical learning experiences in Texas is appropriate and reasonable. First, the Board anticipates that this proposed filing fee will better assist the Board in offsetting a portion of the costs associated with the review of these requests. When an out-of-state vocational nursing education program submits an approval request under §214.3(e), the proposal must be carefully reviewed by Board Staff to determine if the program meets the requirements of the Board's rule and education guideline. If the program is found to be deficient in any area, Board Staff may need to consult with the program to clarify and/or resolve such deficiencies. This review process can consume Staff time and Board resources. Second, out-of-state nursing education programs must be fully approved/accredited by their own state boards of nursing and approved/accredited/licensed by the appropriate Texas agency (i.e., Texas Higher Education Coordinating Board (THECB), Texas Workforce Commission (TWC)) to conduct business/educational activities in Texas or be deemed exempt from such approval/accreditation/or licensure requirements prior to receiving the Board's approval to operate in Texas. Therefore, while Board Staff must review the program's request carefully, the amount of time that Board Staff must spend reviewing the program's request is typically less than the amount of time Board Staff must spend when reviewing the proposal of an in-state nursing education program seeking initial approval from the Board. Because out-of-state nursing education programs have already been reviewed by at least one other nursing licensing authority and other state licensing entities, such as the THECB or TWC, prior to being approved by the Board, the Board has typically only required a $500 filing fee for these out-of-state nursing education programs, which more accurately reflects the amount of Staff time and Board resources that must be spent in reviewing these types of requests. The proposed amendments formalize the Board's historical practice in this regard in rule.

The Board is simultaneously proposing amendments to §223.1 of this title (relating to Fees) to incorporate the proposed $500 filing fee for the approval of an out-of-state nursing education program to conduct clinical learning experiences in Texas into its existing fee structure. That proposal is being published elsewhere in this issue of the *Texas Register.*

The proposed amendments also clarify that an out-of-state vocational nursing education program's approval may be withdrawn if the program fails to maintain the minimum requirements nec-

essary for initial approval. The proposed amendments authorize the Board to take timely action if a program falls below the minimum standards established by the Board. This is particularly important when clinical learning experiences occur in Texas because clinical learning experiences often involve direct patient care. By consistently approving only those programs that meet the Board's requirements and by withdrawing approval from programs that are unable to sustain the Board's minimum requirements, the Board is better able to ensure quality clinical learning experiences and safe direct patient care for the citizens of Texas.

Section-by-Section Overview. Proposed amended §214.3(e)(2) requires an out-of-state vocational nursing education program seeking to conduct clinical learning experiences in Texas to submit a written request, a filing fee of $500, as set forth in §223.1(a)(27) of this title (relating to Fees), and all required supporting documentation to the Board.

Proposed new §214.3(e)(4) states that the Board may withdraw the approval of any program that fails to maintain the requirements set forth in Board Education Guideline 3.1.1.f. and §214.3.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendments will be in effect, there may be an approximate $1,100 total annual increase in revenue to state government as a result of the enforcement or administration of the proposal due to estimated filing fees associated with out-of-state nursing education program approval requests. These estimates are based on the following factors.

Over the last five years, the Board has approved 11 out-of-state nursing education programs to conduct clinical learning experiences in Texas. The Board anticipates that it may approve a similar number of out-of-state nursing education programs to conduct clinical learning experiences in Texas over the next five years. If the Board approves at least 11 out-of-state nursing education programs to conduct clinical learning experiences in Texas over the next five years, there will be an approximate $1,100 total annual increase in revenue to state government as a result. If the Board approves more than 11 out-of-state nursing education programs to conduct clinical learning experiences in Texas over the next five years, there will be an additional $500 increase in revenue to state government for each additional nursing education program request that is approved. There are no anticipated effects on local employment or the local economy as a result of the proposal.

Public Benefit/cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be the availability of resources that will better enable the Board to ensure quality nursing education in Texas and safe direct patient care interaction in clinical learning experiences. The proposed amendments to §214.3(e)(2) impose a filing fee of $500 for each out-of-state vocational nursing education program that submits an approval request to the Board to conduct clinical learning experiences in Texas. The Board anticipates that this proposed filing fee will assist it in offsetting a portion of the costs associated with the review of these requests. Further, the proposed amendments to §214.3(e)(4) are designed to ensure the sustained compliance of out-of-state nursing education programs that have received Board approval to conduct clinical learning experiences in Texas. By ensuring that each program's clinical learning experiences in Texas, particularly those involving direct patient care, remain in compliance with the Board's minimum requirements, it is anticipated that patients involved in such clinical learning experiences will receive monitored, safe, and effective nursing care.

Potential Costs for Persons Required to Comply with the Proposal

Under the Occupations Code Chapter 301, Board rules, and the proposed amendments, an out-of-state vocational nursing education program may submit a request to the Board to conduct clinical learning experiences in Texas. No person is required by law, however, to do so. For those programs who choose to enter the Texas nursing education market and request such approval from the Board, there will be associated costs of compliance with proposed amended §214.3(e)(2). The Board estimates that the total probable cost of compliance with proposed amended §214.3(e)(2) will be approximately $500 for each out-of-state vocational nursing education program that requests approval to conduct clinical learning experiences in Texas. This estimate is based upon the following factors.

First, the proposed filing fee of $500 applies to every vocational nursing education program outside Texas' jurisdiction that seeks the Board's approval to conduct clinical learning experiences in Texas. Thus, each out-of-state vocational nursing education program seeking such approval will be required to submit a $500 filing fee. Second, the proposed filing fee of $500 is a flat fee. The amount of the fee will not change based upon a program's individual factors, such as the size of the program, the number of students enrolled in the program, or the amount of time that Board Staff may spend reviewing the program's request. Third, the Board estimates that a program should only incur the proposed filing fee one time. There are no renewal or maintenance fees associated with the Board's approval; therefore, once an out-of-state program has been approved by the Board to conduct clinical learning experiences in Texas, the program should not be subject to another filing fee or any other maintenance or renewal fees, unless the program's approval is withdrawn by the Board pursuant to proposed amended §214.3(e)(4). In the event that an out-of-state vocational nursing education program's approval is withdrawn pursuant to proposed amended §214.3(e)(4), the program may be subject to a second $500 filing fee if the program chooses to re-apply for approval to conduct clinical learning experiences in Texas. Any other costs to comply with the proposed amendments result from the legislative enactment of Chapter 301 and are not a result of the adoption, enforcement, or administration of the proposal.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. The Government Code §2006.002(c) and (f) require, that if a proposed rule may have an economic impact on small businesses or micro businesses, state agencies must prepare, as part of the rulemaking process, an economic impact statement that assesses the potential impact of the proposed rule on these businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule.

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

The Board has determined that it highly likely that no out-of-state vocational nursing education program that chooses to submit a request to conduct clinical learning experiences in Texas will qualify as a small or micro business under the Government Code §2006.001(a). This estimate is based upon the following factors.

The Board reviewed each of the 11 out-of-state nursing education programs that were approved by the Board to conduct clinical learning experiences in Texas since 2008. In examining the entities that sponsored/submitted the requests to conduct clinical learning experiences in Texas, the Board determined the following: (i) only 1 of the 11 submitting entities was formed for the purpose of making a profit; (ii) none of the submitting entities employed less than 100 employees or had less than $6 million in annual gross receipts; and (iii) only 1 of the 11 submitting entities was independently owned or operated. Based upon this review, the Board has determined that none of the 11 submitting entities qualify to meet the definition of a small or micro business under the Government Code §2006.001(a). Further, 10% of the submitting entities were large career schools with multiple settings in several states. The Board anticipates that this is generally representative of the types of entities that would apply for approval to conduct clinical learning experiences in Texas. It would be generally inconsistent with the Board's experience for smaller, privately operated career schools that may fall within the definition of a small or micro business under the Government Code §2006.001(a) to pursue out-of-state clinical experiences. Therefore, the Board does not anticipate that the proposal will have an adverse effect on any small or micro business under the Government Code §2006.001(a).

Although the Board does not anticipate that the proposal will have an adverse effect on any small or micro business under the Government Code §2006.001(a), in the event that the proposal does have an adverse economic effect on a small or micro business that elects to enter the Texas nursing education market and, is therefore required to comply with the proposed amendments, the Board has determined that it is still not required to prepare a regulatory flexibility analysis as required in §2006.002(c)(2) of the Government Code for the following two reasons. First, small or micro businesses are not required by statute or by the proposed amendments to enter the Texas nursing education market to conduct clinical learning experiences. Therefore, those out-of-state nursing education programs that may qualify as small and micro businesses that submit a request to conduct clinical learning experiences in Texas do so at their own choice, and as a result, agree to bear any additional costs required for compliance with this proposal. The costs outlined in the Public Benefit/Cost Note part of this proposal provide sufficient cost information for a small or micro business to make an informed business decision regarding whether to enter the Texas nursing education market and submit a request for Board approval to conduct clinical learning experiences in Texas.

Second, the Government Code §2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Section 2006.002(c-1) requires that the regulatory analysis "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." Therefore, an agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small and micro businesses, would not be protective of the health, safety, and environmental and economic welfare of the state.

The Occupations Code §301.157(b) authorizes the Board to approve schools of nursing and educational programs that meet the Board's requirements. The purpose of this statute is to ensure quality nursing education and safe and effective clinical learning experiences. Proposed amended §214.3(e)(2) supports this goal by ensuring that Board Staff is able to adequately review every request from an out-of-state vocational nursing education program that is submitted to the Board for approval to ensure its compliance with statutory and regulatory requirements. Proposed amended §214.3(e)(2) is intended to help the Board adequately utilize its resources in meeting its responsibility to ensure quality nursing education in Texas. Small and micro businesses entering the Texas nursing education market must provide quality nursing education and ensure the safety of their clinical learning experiences. As a result, every out-of-state nursing education program request must be thoroughly reviewed to ensure compliance with this standard of excellence. The purpose of proposed amended §214.3(e)(2) and its authorizing statutes are to protect the health, safety, and economic welfare of Texas consumers and the state of Texas. The Board cannot ensure quality nursing education and safe clinical learning experiences, which is necessary for quality nursing care for all Texas consumers, without properly managing its resources to offset the costs associated with the review of out-of-state nursing education program requests. The appropriate management of the Board's existing resources is important to and protective of the health of Texas consumers. Further, the Board has already determined that lowering the filing fee for an out-of-state vocational nursing education program to $500 (as compared to the filing fee of $2,500 for an in-state nursing education program seeking initial approval) is appropriate. However, eliminating or lowering this already nominal filing fee further would not appropriately offset the amount of Board resources that must be spent in reviewing these requests. As such, the Board has determined that there are no additional regulatory alternatives to the proposed amendments that will sufficiently protect the health, safety, and economic interests of Texas consumers and the welfare of the state.

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

Request for Public Comment. To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on September 9, 2013, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.texas.gov, or faxed to (512) 305-8101. An additional copy of the comments on the proposal or any request for a public hearing must be simultaneously submitted to Jan Hooper, Lead Nursing Consultant for Education, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to jan.hooper@bon.texas.gov, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The amendments are proposed under the Occupations Code §§301.155(a), 301.157, and 301.151.

Section 301.155(a) provides that the Board by rule shall establish fees in amounts reasonable and necessary to cover the costs of administering Chapter 301. Further, §301.155(a) provides that the Board may not set a fee that existed on September 1, 1993, in an amount less than the amount of that fee on that date.

Section 301.157(a) states that Board shall prescribe three programs of study to prepare a person to receive an initial license as a registered nurse under Chapter 301 as follows: (i) a baccalaureate degree program that is conducted by an educational unit in nursing that is a part of a senior college or university and that leads to a baccalaureate degree in nursing; (ii) an associate degree program that is conducted by an educational unit in nursing within the structure of a college or a university and that leads to an associate degree in nursing; and (iii) a diploma program that is conducted by a single-purpose school, usually under the control of a hospital, and that leads to a diploma in nursing.

Section 301.157(a-1) states that a diploma program of study in this state that leads to an initial license as a registered nurse under Chapter 301 and that is completed on or after December 31, 2014, must entitle a student to receive a degree on the student's successful completion of a degree program of a public or private institution of higher education accredited by an agency recognized by the Texas Higher Education Coordinating Board.

Section 301.157(b) states that the Board shall: (i) prescribe two programs of study to prepare a person to receive an initial vocational nurse license under Chapter 301 as follows: a program conducted by an educational unit in nursing within the structure of a school, including a college, university, or proprietary school and a program conducted by a hospital; (ii) prescribe and publish the minimum requirements and standards for a course of study in each program that prepares registered nurses or vocational nurses; (iii) prescribe other rules as necessary to conduct approved schools of nursing and educational programs for the preparation of registered nurses or vocational nurses; (iv) approve schools of nursing and educational programs that meet the Board's requirements; (v) select one or more national nursing accrediting agencies, recognized by the United States Department of Education and determined by the Board to have acceptable standards, to accredit schools of nursing and educational programs; and (vi) deny or withdraw approval from a school of nursing or educational program that fails to meet the prescribed course of study or other standard under which it sought approval by the Board; fails to meet or maintain accreditation with the national nursing accrediting agency selected by the Board under §301.157(b)(5) under which it was approved or sought approval by the Board; or fails to maintain the approval of the state board of nursing of another state and the board under which it was approved.

Section 301.157(b-1) states that the Board may not require accreditation of the governing institution of a school of nursing. The Board shall accept the requirements established by the Texas Higher Education Coordinating Board for accrediting the governing institution of a school of nursing. The governing institution of a professional nursing school, not including a diploma program, must be accredited by an agency recognized by the Texas Higher Education Coordinating Board or hold a certificate of authority from the Texas Higher Education Coordinating Board under provisions leading to accreditation of the institution in due course.

Section 301.157(c) provides that a program approved to prepare registered nurses may not be less than two academic years or more than four calendar years.

Section 301.157(d) states that a person may not be certified as a graduate of any school of nursing or educational program unless the person has completed the requirements of the prescribed course of study, including clinical practice, of a school of nursing or educational program that: (i) is approved by the Board; (ii) is accredited by a national nursing accreditation agency determined by the Board to have acceptable standards; or (iii) is approved by a state board of nursing of another state and the Board, subject to §301.157(d-4).

Section 301.157(d-1) states that a school of nursing or educational program is considered approved by the Board and, except as provided by §301.157(d-7), is exempt from Board rules that require ongoing approval if the school or program: (i) is accredited and maintains accreditation through a national nursing accrediting agency selected by the Board under §301.157(b)(5); and (ii) maintains an acceptable pass rate as determined by the Board on the applicable licensing examination under Chapter 301.

Section 301.157(d-2) states that a school of nursing or educational program that fails to meet or maintain an acceptable pass rate on applicable licensing examinations under Chapter 301 is subject to review by the Board. The Board may assist the school or program in its effort to achieve compliance with the Board's standards.

Section 301.157(d-3) states that a school or program from which approval has been withdrawn under §301.157 may reapply for approval.

Section 301.157(d-4) states that the Board may recognize and accept as approved under §301.157 a school of nursing or educational program operated in another state and approved by a state board of nursing or other regulatory body of that state. The Board shall develop policies to ensure that the other state's standards are substantially equivalent to the Board's standards.

Section 301.157(d-5) provides that the Board shall streamline the process for initially approving a school of nursing or educational program under §301.157 by identifying and eliminating tasks performed by the Board that duplicate or overlap tasks performed by the Texas Higher Education Coordinating Board or the Texas Workforce Commission.

Section 301.157(d-6) states that the Board, in cooperation with the Texas Higher Education Coordinating Board and the Texas Workforce Commission, shall establish guidelines for the initial approval of schools of nursing or educational programs. The guidelines must: (i) identify the approval processes to be conducted by the Texas Higher Education Coordinating Board or the Texas Workforce Commission; (ii) require the approval process identified under §301.157(d-1) to precede the approval process conducted by the Board; and (iii) be made available on the Board's Internet website and in a written form.

Section 301.157(d-7) states that a school of nursing or educational program approved under §301.157(d-1) shall: (i) provide the Board with copies of any reports submitted to or received from the national nursing accrediting agency selected by the Board; (ii) notify the Board of any change in accreditation status; and (iii) provide other information required by the Board as necessary to evaluate and establish nursing education and workforce policy in this state.

Section 301.157(d-8) states that, for purposes of §301.157(d-4), a nursing program is considered to meet standards substantially equivalent to the Board's standards if the program: (i) is part of an institution of higher education located outside this state that is approved by the appropriate regulatory authorities of that state; (ii) holds regional accreditation by an accrediting body recognized by the United States secretary of education and the Council for Higher Education Accreditation; (iii) holds specialty accreditation by an accrediting body recognized by the United States secretary of education and the Council for Higher Education Accreditation, including the National League for Nursing Accrediting Commission; (iv) requires program applicants to be a licensed practical or vocational nurse, a military service corpsman, or a paramedic, or to hold a college degree in a clinically oriented health care field with demonstrated experience providing direct patient care; and (v) graduates students who: (A) achieve faculty-determined program outcomes, including passing criterion-referenced examinations of nursing knowledge essential to beginning a registered nursing practice and transitioning to the role of registered nurse; (B) pass a criterion-referenced summative performance examination developed by faculty subject matter experts that measures clinical competencies essential to beginning a registered nursing practice and that meets nationally recognized standards for educational testing, including the educational testing standards of the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education; and (C) pass the National Council Licensure Examination for Registered Nurses at a rate equivalent to the passage rate for students of approved in-state programs.

Section 301.157(d-9) states that a graduate of a clinical competency assessment program operated in another state and approved by a state board of nursing or other regulatory body of another state is eligible to apply for an initial license under Chapter 301 if: (i) the Board allowed graduates of the program to apply for an initial license under Chapter 301 continuously during the 10-year period preceding January 1, 2007; (ii) the program does not make any substantial changes in the length or content of its clinical competency assessment without the Board's approval; (iii) the program remains in good standing with the state board of nursing or other regulatory body in the other state; and (iv) the program participates in the research study under §105.008, Health and Safety Code.

Section 301.157(d-9) states, that in this section, the terms "clinical competency assessment program" and "supervised clinical learning experiences program" have the meanings assigned by §105.008, Health and Safety Code.

Section 301.157(d-10) states that §301.157(d-8), (d-9), (d-10), and (d-11) expire December 31, 2017. As part of the first review conducted under §301.003 after September 1, 2009, the Sunset Advisory Commission shall: (i) recommend whether §301.157(d-8) and (d-9) should be extended; and (ii) recommend any changes to §301.157(d-8) and (d-9) relating to the eligibility for a license of graduates of a clinical competency assessment program operated in another state.

Section 301.157(e) states that the Board shall give each person, including an organization, affected by an order or decision of the Board under §301.157 reasonable notice of not less than 20 days and an opportunity to appear and be heard regarding the order or decision. The Board shall hear each protest or complaint from a person affected by a rule or decision regarding: (i) the inadequacy or unreasonableness of any rule or order the Board adopts; or (ii) the injustice of any order or decision of the Board.

Section 301.157(f) states that, not later than the 30th day after the date an order is entered and approved by the Board, a person is entitled to bring an action against the Board in a district court of Travis County to have the rule or order vacated or modified, if that person: (i) is affected by the order or decision; (ii) is dissatisfied with any rule or order of the Board; and (iii) sets forth in a petition the principal grounds of objection to the rule or order.

Section 301.151(g) states that an appeal under §301.157 shall be tried de novo as if it were an appeal from a justice court to a county court.

Section 301.151(h) states that the Board, in collaboration with the nursing educators, the Texas Higher Education Coordinating Board, and the Texas Health Care Policy Council, shall implement, monitor, and evaluate a plan for the creation of innovative nursing education models that promote increased enrollment in this state's nursing programs.

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

Cross Reference to Statute. The following statutes are affected by this proposal: Occupations Code §§301.155(a), 301.157, and 301.151.

§214.3. Program Development, Expansion, and Closure.

(a) - (d) (No change.)

(e) Approval of a Vocational Nursing Education Program Outside Texas' Jurisdiction to Conduct Clinical Learning Experiences in Texas.

(1) (No change.)

(2) A written request, the required fee set forth in §223.1(a)(27) of this title, and all [~~the~~] required supporting documentation shall be submitted to the Board office following Board Education Guideline 3.1.1.f. Process for Approval of a Nursing Education Program Outside Texas' Jurisdiction to Conduct Clinical Learning Experiences in Texas.

(3) (No change.)

(4) The Board may withdraw the approval of any program that fails to maintain the requirements set forth in Board Education Guideline 3.1.1.f. and this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 29, 2013.

TRD-201303077
Jena Abel
Assistant General Counsel
Texas Board of Nursing
Earliest possible date of adoption: September 8, 2013
For further information, please call: (512) 305-6822

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CHAPTER 215. PROFESSIONAL NURSING EDUCATION

22 TAC §215.3

Introduction. The Texas Board of Nursing (Board) proposes amendments to §215.3, relating to Program Development, Expansion, and Closure. The amendments are proposed under the Occupations Code §§301.155(a), 301.157, and 301.151 and are necessary to: (i) establish, in rule, a $500 filing fee for an out-of-state professional nursing education program seeking to conduct clinical learning experiences in Texas; and (ii) clarify that the Board may withdraw the approval of any out-of-state professional nursing education program that fails to maintain the requirements necessary for initial approval to conduct clinical learning experiences in Texas.

Background

Under current Board rule §215.3, an out-of-state professional nursing education program may seek Board approval to conduct clinical learning experiences in Texas. The requirements that an out-of-state professional nursing education program must meet in order to receive such approval are currently set out in Board rule §215.3 and Board Education Guideline 3.1.1.f.

The Board is authorized by the Occupations Code §301.155 to establish fees in amounts reasonable and necessary to cover the costs of administering the Nursing Practice Act, including costs associated with reviewing and approving nursing education programs in Texas. Since January 2008, the Board has approved 11 out-of-state nursing education programs to conduct clinical learning experiences in Texas. It has been the Board's historical practice to require these programs to submit a $500 filing fee with their approval requests in lieu of the $2,500 filing fee normally required for the approval of an in-state nursing education program proposal.

The Board has determined that a filing fee of $500 for the review and approval of an out-of-state professional nursing education program to conduct clinical learning experiences in Texas is appropriate and reasonable. First, the Board anticipates that this proposed filing fee will better assist the Board in offsetting a portion of the costs associated with the review of these requests. When an out-of-state professional nursing education program submits an approval request under §215.3(e), the proposal must be carefully reviewed by Board Staff to determine if the program meets the requirements of the Board's rule and education guideline. If the program is found to be deficient in any area, Board Staff may need to consult with the program to clarify and/or resolve such deficiencies. This review process can consume Staff time and Board resources. Second, out-of-state nursing education programs must be fully approved/accredited by their own state boards of nursing and approved/accredited/licensed by the appropriate Texas agency (i.e., Texas Higher Education Coordinating Board (THECB), Texas Workforce Commission (TWC)) to conduct business/educational activities in Texas or be deemed exempt from such approval/accreditation/or licensure requirements prior to receiving the Board's approval to operate in Texas. Therefore, while Board Staff must review the program's request carefully, the amount of time that Board Staff must spend reviewing the program's request is typically less than the amount of time Board Staff must spend when reviewing the proposal of an in-state nursing education program seeking initial approval from the Board. Because out-of-state nursing education programs have already been reviewed by at least one other nursing licensing authority and other state licensing entities, such as the THECB or TWC, prior to being approved by the Board, the Board has typically only required a $500 filing fee for these out-of-state nursing education programs, which more accurately reflects the amount of Staff time and Board resources that must be spent in reviewing these types of requests. The proposed amendments formalize the Board's historical practice in this regard in rule.

The Board is simultaneously proposing amendments to §223.1 of this title (relating to Fees) to incorporate the proposed $500 filing fee for the approval of an out-of-state nursing education program to conduct clinical learning experiences in Texas into its existing fee structure. That proposal is being published elsewhere in this issue of the *Texas Register.*

The proposed amendments also clarify that an out-of-state professional nursing education program's approval may be withdrawn if the program fails to maintain the minimum requirements necessary for initial approval. The proposed amendments authorize the Board to take timely action if a program falls below the minimum standards established by the Board. This is particularly important when clinical learning experiences occur in Texas because clinical learning experiences often involve direct patient care. By consistently approving only those programs that meet the Board's requirements and by withdrawing approval from programs that are unable to sustain the Board's minimum requirements, the Board is better able to ensure quality clinical learning experiences and safe direct patient care for the citizens of Texas.

Section-by-Section Overview. Proposed amended §215.3(e)(2) requires an out-of-state professional nursing education program seeking to conduct clinical learning experiences in Texas to submit a written request, a filing fee of $500, as set forth in §223.1(a)(27) of this title (relating to Fees), and all required supporting documentation to the Board.

Proposed new §215.3(e)(4) states that the Board may withdraw the approval of any program that fails to maintain the requirements set forth in Board Education Guideline 3.1.1.f. and §215.3.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendments will be in effect, there may be an approximate $1,100 total annual increase in revenue to state government as a result of the enforcement or administration of the proposal due to estimated filing fees associated with out-of-state nursing education program approval requests. These estimates are based on the following factors.

Over the last five years, the Board has approved 11 out-of-state nursing education programs to conduct clinical learning experiences in Texas. The Board anticipates that it may approve a similar number of out-of-state nursing education programs to conduct clinical learning experiences in Texas over the next five years. If the Board approves at least 11 out-of-state nursing education programs to conduct clinical learning experiences in Texas over the next five years, there will be an approximate $1,100 total annual increase in revenue to state government as a result. If the Board approves more than 11 out-of-state nursing education programs to conduct clinical learning experiences in Texas over the next five years, there will be an additional $500 increase in revenue to state government for each additional nursing education program request that is approved. There are no anticipated effects on local employment or the local economy as a result of the proposal.

Public Benefit/cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be the availability of resources that will better enable the Board to ensure quality nursing education in Texas and safe direct patient care interaction in clinical learning experiences. The proposed amendments to §215.3(e)(2) impose a filing fee of $500 for each out-of-state professional nursing education program that submits an approval request to the Board to conduct clinical learning experiences in Texas. The Board anticipates that this proposed filing fee will assist it in offsetting a portion of the costs associated with the review of these requests. Further, the proposed amendments to §215.3(e)(4) are designed to ensure the sustained compliance of out-of-state nursing education programs that have received Board approval to conduct clinical learning experiences in Texas. By ensuring that each program's clinical learning experiences in Texas, particularly those involving direct patient care, remain in compliance with the Board's minimum requirements, it is anticipated that patients involved in such clinical learning experiences will receive monitored, safe, and effective nursing care.

Potential Costs for Persons Required to Comply with the Proposal

Under the Occupations Code Chapter 301, Board rules, and the proposed amendments, an out-of-state professional nursing education program may submit a request to the Board to conduct clinical learning experiences in Texas. No person is required by law, however, to do so. For those programs who choose to enter the Texas nursing education market and request such approval from the Board, there will be associated costs of compliance with proposed amended §215.3(e)(2). The Board estimates that the total probable cost of compliance with proposed amended §215.3(e)(2) will be approximately $500 for each out-of-state professional nursing education program that requests approval to conduct clinical learning experiences in Texas. This estimate is based upon the following factors.

First, the proposed filing fee of $500 applies to every professional nursing education program outside Texas' jurisdiction that seeks the Board's approval to conduct clinical learning experiences in Texas. Thus, each out-of-state professional nursing education program seeking such approval will be required to submit a $500 filing fee. Second, the proposed filing fee of $500 is a flat fee. The amount of the fee will not change based upon a program's individual factors, such as the size of the program, the number of students enrolled in the program, or the amount of time that Board Staff may spend reviewing the program's request. Third, the Board estimates that a program should only incur the proposed filing fee one time. There are no renewal or maintenance fees associated with the Board's approval; therefore, once an out-of-state program has been approved by the Board to conduct clinical learning experiences in Texas, the program should not be subject to another filing fee or any other maintenance or renewal fees, unless the program's approval is withdrawn by the Board pursuant to proposed amended §215.3(e)(4). In the event that an out-of-state professional nursing education program's approval is withdrawn pursuant to proposed amended §215.3(e)(4), the program may be subject to a second $500 filing fee if the program chooses to re-apply for approval to conduct clinical learning experiences in Texas. Any other costs to comply with the proposed amendments result from the legislative enactment of Chapter 301 and are not a result of the adoption, enforcement, or administration of the proposal.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. The Government Code §2006.002(c) and (f) require, that if a proposed rule may have an economic impact on small businesses or micro businesses, state agencies must prepare, as part of the rulemaking process, an economic impact statement that assesses the potential impact of the proposed rule on these businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule.

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

The Board has determined that it highly likely that no out-of-state professional nursing education program that chooses to submit a request to conduct clinical learning experiences in Texas will qualify as a small or micro business under the Government Code §2006.001(a). This estimate is based upon the following factors.

The Board reviewed each of the 11 out-of-state nursing education programs that were approved by the Board to conduct clinical learning experiences in Texas since 2008. In examining the entities that sponsored/submitted the requests to conduct clinical learning experiences in Texas, the Board determined the following: (i) only 1 of the 11 submitting entities was formed for the purpose of making a profit; (ii) none of the submitting entities employed less than 100 employees or had less than $6 million in annual gross receipts; and (iii) only 1 of the 11 submitting entities was independently owned or operated. Based upon this review, the Board has determined that none of the 11 submitting entities qualify to meet the definition of a small or micro business under the Government Code §2006.001(a). Further, 10% of the submitting entities were large career schools with multiple settings in several states. The Board anticipates that this is generally representative of the types of entities that would apply for approval to conduct clinical learning experiences in Texas. It would be generally inconsistent with the Board's experience for smaller, privately operated career schools that may fall within the definition of a small or micro business under the Government Code §2006.001(a) to pursue out-of-state clinical experiences. Therefore, the Board does not anticipate that the proposal will have an adverse effect on any small or micro business under the Government Code §2006.001(a).

Although the Board does not anticipate that the proposal will have an adverse effect on any small or micro business under the Government Code §2006.001(a), in the event that the proposal does have an adverse economic effect on a small or micro business that elects to enter the Texas nursing education market and, is therefore required to comply with the proposed amendments, the Board has determined that it is still not required to prepare a regulatory flexibility analysis as required in §2006.002(c)(2) of the Government Code for the following two reasons. First, small or micro businesses are not required by statute or by the proposed amendments to enter the Texas nursing education market to conduct clinical learning experiences. Therefore, those out-of-state nursing education programs that may qualify as small and micro businesses that submit a request

to conduct clinical learning experiences in Texas do so at their own choice, and as a result, agree to bear any additional costs required for compliance with this proposal. The costs outlined in the Public Benefit/Cost Note part of this proposal provide sufficient cost information for a small or micro business to make an informed business decision regarding whether to enter the Texas nursing education market and submit a request for Board approval to conduct clinical learning experiences in Texas.

Second, the Government Code §2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Section 2006.002(c-1) requires that the regulatory analysis "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." Therefore, an agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small and micro businesses, would not be protective of the health, safety, and environmental and economic welfare of the state.

The Occupations Code §301.157(b) authorizes the Board to approve schools of nursing and educational programs that meet the Board's requirements. The purpose of this statute is to ensure quality nursing education and safe and effective clinical learning experiences. Proposed amended §215.3(e)(2) supports this goal by ensuring that Board Staff is able to adequately review every request from an out-of-state professional nursing education program that is submitted to the Board for approval to ensure its compliance with statutory and regulatory requirements. Proposed amended §215.3(e)(2) is intended to help the Board adequately utilize its resources in meeting its responsibility to ensure quality nursing education in Texas. Small and micro businesses entering the Texas nursing education market must provide quality nursing education and ensure the safety of their clinical learning experiences. As a result, every out-of-state nursing education program request must be thoroughly reviewed to ensure compliance with this standard of excellence. The purpose of proposed amended §215.3(e)(2) and its authorizing statutes are to protect the health, safety, and economic welfare of Texas consumers and the state of Texas. The Board cannot ensure quality nursing education and safe clinical learning experiences, which is necessary for quality nursing care for all Texas consumers, without properly managing its resources to offset the costs associated with the review of out-of-state nursing education program requests. The appropriate management of the Board's existing resources is important to and protective of the health of Texas consumers. Further, the Board has already determined that lowering the filing fee for an out-of-state professional nursing education program to $500 (as compared to the filing fee of $2,500 for an in-state nursing education program seeking initial approval) is appropriate. However, eliminating or lowering this already nominal filing fee further would not appropriately offset the amount of Board resources that must be spent in reviewing these requests. As such, the Board has determined that there are no additional regulatory alternatives to the proposed amendments that will sufficiently protect the health, safety, and economic interests of Texas consumers and the welfare of the state.

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

Request for Public Comment. To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on September 9, 2013, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.texas.gov, or faxed to (512) 305-8101. An additional copy of the comments on the proposal or any request for a public hearing must be simultaneously submitted to Jan Hooper, Lead Nursing Consultant for Education, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to jan.hooper@bon.texas.gov, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The amendments are proposed under the Occupations Code §§301.155(a), 301.157, and 301.151.

Section 301.155(a) provides that the Board by rule shall establish fees in amounts reasonable and necessary to cover the costs of administering Chapter 301. Further, §301.155(a) provides that the Board may not set a fee that existed on September 1, 1993, in an amount less than the amount of that fee on that date.

Section 301.157(a) states that Board shall prescribe three programs of study to prepare a person to receive an initial license as a registered nurse under Chapter 301 as follows: (i) a baccalaureate degree program that is conducted by an educational unit in nursing that is a part of a senior college or university and that leads to a baccalaureate degree in nursing; (ii) an associate degree program that is conducted by an educational unit in nursing within the structure of a college or a university and that leads to an associate degree in nursing; and (iii) a diploma program that is conducted by a single-purpose school, usually under the control of a hospital, and that leads to a diploma in nursing.

Section 301.157(a-1) states that a diploma program of study in this state that leads to an initial license as a registered nurse under Chapter 301 and that is completed on or after December 31, 2014, must entitle a student to receive a degree on the student's successful completion of a degree program of a public or private institution of higher education accredited by an agency recognized by the Texas Higher Education Coordinating Board.

Section 301.157(b) states that the Board shall: (i) prescribe two programs of study to prepare a person to receive an initial professional nurse license under Chapter 301 as follows: a program conducted by an educational unit in nursing within the structure of a school, including a college, university, or proprietary school and a program conducted by a hospital; (ii) prescribe and publish the minimum requirements and standards for a course of study in each program that prepares registered nurses or professional nurses; (iii) prescribe other rules as necessary to conduct approved schools of nursing and educational programs for the preparation of registered nurses or professional nurses; (iv) approve schools of nursing and educational programs that meet the Board's requirements; (v) select one or more national nursing accrediting agencies, recognized by the United States Department of Education and determined by the Board to have acceptable standards, to accredit schools of nursing and educational programs; and (vi) deny or withdraw approval from a school of nursing or educational program that fails to meet the prescribed course of study or other standard under which it sought approval

by the Board; fails to meet or maintain accreditation with the national nursing accrediting agency selected by the Board under §301.157(b)(5) under which it was approved or sought approval by the Board; or fails to maintain the approval of the state board of nursing of another state and the board under which it was approved.

Section 301.157(b-1) states that the Board may not require accreditation of the governing institution of a school of nursing. The Board shall accept the requirements established by the Texas Higher Education Coordinating Board for accrediting the governing institution of a school of nursing. The governing institution of a professional nursing school, not including a diploma program, must be accredited by an agency recognized by the Texas Higher Education Coordinating Board or hold a certificate of authority from the Texas Higher Education Coordinating Board under provisions leading to accreditation of the institution in due course.

Section 301.157(c) provides that a program approved to prepare registered nurses may not be less than two academic years or more than four calendar years.

Section 301.157(d) states that a person may not be certified as a graduate of any school of nursing or educational program unless the person has completed the requirements of the prescribed course of study, including clinical practice, of a school of nursing or educational program that: (i) is approved by the Board; (ii) is accredited by a national nursing accreditation agency determined by the Board to have acceptable standards; or (iii) is approved by a state board of nursing of another state and the Board, subject to §301.157(d-4).

Section 301.157(d-1) states that a school of nursing or educational program is considered approved by the Board and, except as provided by §301.157(d-7), is exempt from Board rules that require ongoing approval if the school or program: (i) is accredited and maintains accreditation through a national nursing accrediting agency selected by the Board under §301.157(b)(5); and (ii) maintains an acceptable pass rate as determined by the Board on the applicable licensing examination under Chapter 301.

Section 301.157(d-2) states that a school of nursing or educational program that fails to meet or maintain an acceptable pass rate on applicable licensing examinations under Chapter 301 is subject to review by the Board. The Board may assist the school or program in its effort to achieve compliance with the Board's standards.

Section 301.157(d-3) states that a school or program from which approval has been withdrawn under §301.157 may reapply for approval.

Section 301.157(d-4) states that the Board may recognize and accept as approved under §301.157 a school of nursing or educational program operated in another state and approved by a state board of nursing or other regulatory body of that state. The Board shall develop policies to ensure that the other state's standards are substantially equivalent to the Board's standards.

Section 301.157(d-5) provides that the Board shall streamline the process for initially approving a school of nursing or educational program under §301.157 by identifying and eliminating tasks performed by the Board that duplicate or overlap tasks performed by the Texas Higher Education Coordinating Board or the Texas Workforce Commission.

Section 301.157(d-6) states that the Board, in cooperation with the Texas Higher Education Coordinating Board and the Texas Workforce Commission, shall establish guidelines for the initial approval of schools of nursing or educational programs. The guidelines must: (i) identify the approval processes to be conducted by the Texas Higher Education Coordinating Board or the Texas Workforce Commission; (ii) require the approval process identified under §301.157(d-1) to precede the approval process conducted by the Board; and (iii) be made available on the Board's Internet website and in a written form.

Section 301.157(d-7) states that a school of nursing or educational program approved under §301.157(d-1) shall: (i) provide the Board with copies of any reports submitted to or received from the national nursing accrediting agency selected by the Board; (ii) notify the Board of any change in accreditation status; and (iii) provide other information required by the Board as necessary to evaluate and establish nursing education and workforce policy in this state.

Section 301.157(d-8) states that, for purposes of §301.157(d-4), a nursing program is considered to meet standards substantially equivalent to the Board's standards if the program: (i) is part of an institution of higher education located outside this state that is approved by the appropriate regulatory authorities of that state; (ii) holds regional accreditation by an accrediting body recognized by the United States secretary of education and the Council for Higher Education Accreditation; (iii) holds specialty accreditation by an accrediting body recognized by the United States secretary of education and the Council for Higher Education Accreditation, including the National League for Nursing Accrediting Commission; (iv) requires program applicants to be a licensed practical or professional nurse, a military service corpsman, or a paramedic, or to hold a college degree in a clinically oriented health care field with demonstrated experience providing direct patient care; and (v) graduates students who: (A) achieve faculty-determined program outcomes, including passing criterion-referenced examinations of nursing knowledge essential to beginning a registered nursing practice and transitioning to the role of registered nurse; (B) pass a criterion-referenced summative performance examination developed by faculty subject matter experts that measures clinical competencies essential to beginning a registered nursing practice and that meets nationally recognized standards for educational testing, including the educational testing standards of the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education; and (C) pass the National Council Licensure Examination for Registered Nurses at a rate equivalent to the passage rate for students of approved in-state programs.

Section 301.157(d-9) states that a graduate of a clinical competency assessment program operated in another state and approved by a state board of nursing or other regulatory body of another state is eligible to apply for an initial license under Chapter 301 if: (i) the Board allowed graduates of the program to apply for an initial license under Chapter 301 continuously during the 10-year period preceding January 1, 2007; (ii) the program does not make any substantial changes in the length or content of its clinical competency assessment without the Board's approval; (iii) the program remains in good standing with the state board of nursing or other regulatory body in the other state; and (iv) the program participates in the research study under §105.008, Health and Safety Code.

Section 301.157(d-9) states, that in this section, the terms "clinical competency assessment program" and "supervised clinical learning experiences program" have the meanings assigned by §105.008, Health and Safety Code.

Section 301.157(d-10) states that §301.157(d-8), (d-9), (d-10), and (d-11) expire December 31, 2017. As part of the first review conducted under §301.003 after September 1, 2009, the Sunset Advisory Commission shall: (i) recommend whether §301.157(d-8) and (d-9) should be extended; and (ii) recommend any changes to §301.157(d-8) and (d-9) relating to the eligibility for a license of graduates of a clinical competency assessment program operated in another state.

Section 301.157(e) states that the Board shall give each person, including an organization, affected by an order or decision of the Board under §301.157 reasonable notice of not less than 20 days and an opportunity to appear and be heard regarding the order or decision. The Board shall hear each protest or complaint from a person affected by a rule or decision regarding: (i) the inadequacy or unreasonableness of any rule or order the Board adopts; or (ii) the injustice of any order or decision of the Board.

Section 301.157(f) states that, not later than the 30th day after the date an order is entered and approved by the Board, a person is entitled to bring an action against the Board in a district court of Travis County to have the rule or order vacated or modified, if that person: (i) is affected by the order or decision; (ii) is dissatisfied with any rule or order of the Board; and (iii) sets forth in a petition the principal grounds of objection to the rule or order.

Section 301.151(g) states that an appeal under §301.157 shall be tried de novo as if it were an appeal from a justice court to a county court.

Section 301.151(h) states that the Board, in collaboration with the nursing educators, the Texas Higher Education Coordinating Board, and the Texas Health Care Policy Council, shall implement, monitor, and evaluate a plan for the creation of innovative nursing education models that promote increased enrollment in this state's nursing programs.

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

Cross Reference to Statute. The following statutes are affected by this proposal: Occupations Code §§301.155(a), 301.157, and 301.151.

§215.3. Program Development, Expansion, and Closure.

(a) - (d) (No change.)

(e) Approval of a Professional Nursing Education Program Outside Texas' Jurisdiction to Conduct Clinical Learning Experiences in Texas.

(1) (No change.)

(2) A written request, the required fee set forth in §223.1(a)(27) of this title, and all [~~the~~] required supporting documentation shall be submitted to the Board office following Board Education Guideline 3.1.1.f. Process for Approval of a Nursing Education Program Outside Texas' Jurisdiction to Conduct Clinical Learning Experiences in Texas.

(3) (No change.)

(4) The Board may withdraw the approval of any program that fails to maintain the requirements set forth in Board Education Guideline 3.1.1.f. and this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 29, 2013.

TRD-201303078
Jena Abel
Assistant General Counsel
Texas Board of Nursing
Earliest possible date of adoption: September 8, 2013
For further information, please call: (512) 305-6822

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CHAPTER 222. ADVANCED PRACTICE REGISTERED NURSES WITH PRESCRIPTIVE AUTHORITY

22 TAC §§222.1 - 222.12

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Board of Nursing or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

Introduction. The Texas Board of Nursing (Board) proposes the repeal of Chapter 222, §§222.1 - 222.12, concerning Advanced Practice Registered Nurses with Prescriptive Authority. This repeal is necessary because the Board is proposing a new chapter concerning advanced practice registered nurses (APRNs) with prescriptive authority. The proposed new chapter, 22 TAC Chapter 222, is necessary to implement the provisions of Senate Bill (SB) 406, which was enacted by the 83rd Texas Legislature, Regular Session, effective November 1, 2013. The proposed new chapter also includes provisions that are consistent with the Advanced Practice Registered Nurse Consensus Model of the National Council of State Boards of Nursing. Proposed new 22 TAC Chapter 222 is published elsewhere in this issue of the *Texas Register,* in conjunction with this proposed repeal.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed repeal will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. There will be no anticipated effect on local employment or the local economy as a result of the proposed repeal.

Public Benefit/Cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed repeal is in effect, the anticipated public benefit will be the repeal of outdated requirements and the adoption of new requirements that implement the provisions of SB 406. There are no anticipated economic costs to persons who are required to comply with the proposed repeal.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code §2006.002(c) and (f), the Board has determined that the proposed repeal will not have an adverse economic effect on any small or micro business because there are no anticipated

economic costs to any person who is required to comply with the proposed repeal.

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

Request for Public Comment. To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on September 9, 2013, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.texas.gov, or faxed to (512) 305-8101. An additional copy of the comments on the proposal or any request for a public hearing must be simultaneously submitted to Jolene Zych, Advanced Practice Nursing Consultant, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to jolene.zych@bon.texas.gov, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The repeal of §§222.1 - 222.12 is proposed under the Occupations Code §301.151.

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

Cross Reference to Statute. The following statutes are affected by the proposed repeal: Occupations Code §301.151.

§222.1. Definitions.
§222.2. Approval for Prescriptive Authority.
§222.3. Renewal of Prescriptive Authority.
§222.4. Minimum Standards for Signing Prescriptions.
§222.5. Prescriptions for Dangerous Drugs.
§222.6. Prescriptions for Controlled Substances.
§222.7. Prescribing at Sites Serving Certain Medically Underserved Populations.
§222.8. Prescribing at Physicians' Primary Practice Sites.
§222.9. Prescribing at Alternate Sites.
§222.10. Prescribing at Facility-based Practice Sites.
§222.11. Conditions for Obtaining and Distributing Drug Samples.
§222.12. Enforcement.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 29, 2013.

TRD-201303076
Jena Abel
Assistant General Counsel
Texas Board of Nursing
Earliest possible date of adoption: September 8, 2013
For further information, please call: (512) 305-6822

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22 TAC §§222.1 - 222.10

Introduction. The Texas Board of Nursing (Board) proposes new Chapter 222, §§222.1 - 222.10, concerning Advanced Practice Registered Nurses with Prescriptive Authority, in conjunction with a proposed repeal of existing Chapter 222, also concerning Advanced Practice Registered Nurses with Prescriptive Authority. The proposed repeal of Chapter 222 is being published elsewhere in this issue of the *Texas Register.*

The new chapter is proposed under the authority of the Occupations Code Chapter 157 and §§301.151, 301.152, 301.452, 301.453, and 301.4531 and is necessary to implement Senate Bill (SB) 406, which was enacted by the 83rd Texas Legislature, Regular Session, effective November 1, 2013. The proposed new chapter also includes provisions that are consistent with the Advanced Practice Registered Nurse Consensus Model of the National Council of State Boards of Nursing; clarifies the Board's endorsement and enforcement processes; and requires advanced practice registered nurses (APRNs) who prescribe controlled substances to complete an additional 3 hours of continuing education related to prescribing controlled substances each biennium. Although the Board is proposing the adoption of a new chapter, many of the provisions of existing Chapter 222 are incorporated into the proposed new chapter and remain unchanged from their current structure. The Board has chosen to repeal existing Chapter 222 and propose a new chapter for adoption primarily because of the many organizational changes to the chapter.

Background

Many of the changes in the proposed new chapter result from the enactment of SB 406. SB 406 was intended to improve the process by which physicians delegate and supervise the prescribing and/or ordering of drugs to APRNs and physician assistants. Further, SB expands the scope of APRNs by authorizing APRNs to prescribe and/or order Schedule II controlled substances in certain practice settings. SB 406 also eliminates alternate practice site and primary practice site requirements. In addition to prescribing new terminology for use throughout the Occupations Code Chapter 157, SB 406 also authorizes the use of a prescriptive authority agreement for physician delegation of ordering and/or prescribing drugs and devices. Further, SB 406 continues to recognize the use of protocols or other written authorization for physician delegation of ordering and/or prescribing drugs and devices in facility-based practice settings. Finally, SB 406 requires collaboration among the Board, the Texas Medical Board, and the Texas Physician Assistant Board regarding the sharing of disciplinary information and maintaining public lists of practitioners who have entered into prescriptive authority agreements.

Collaboration

The proposed new provisions were considered by the Advanced Practice Nursing Advisory Committee (Committee) on May 31, 2013. The Committee reviewed SB 406 and considered its impact on the prescriptive authority of APRNs in this state. Following its discussions of the proposed new chapter and SB 406, the Committee voted to approve the proposed new provisions and recommended their adoption to the Board, with one exception. Instead of requiring additional continuing education for APRNs who prescribe controlled substances, the Committee voted to recommend that the Board encourage, but not require, APRNs who prescribe controlled substances to complete pharmacotherapeutics continuing education activities related to controlled substances.

Board Staff also met with Staff of the Texas Medical Board to discuss the provisions of SB 406 and their implication. Following preliminary discussions, Board Staff felt that the provisions of the proposed new chapter were consistent with the Texas Medical Board's interpretation and projected implementation of SB 406. As a result, Staff recommended the adoption of the proposed new requirements to the Board at its July 2013 meeting. The Board considered the proposed new requirements, the Committee's recommendations, and Staff's recommendations at its July 2013 meeting. Following discussion and deliberation, the Board determined that it was appropriate to require additional continuing education for APRNs who prescribe controlled substances. The Board then voted to approve the publication of the proposed new chapter in the *Texas Register.*

Proposed new Chapter 222

Proposed new §222.1 sets forth definitions of the terms to be used throughout the new chapter. The proposed new definitions are consistent with the definitions and terminology used in SB 406. Also consistent with SB 406, the terms "alternate site", "eligible sites", "health manpower shortage area", "medically underserved area (MUA)", "physician's primary practice site", and "site serving a medically underserved population" have been removed from the proposed new chapter, and the term "prescriptive authority agreement" has been added.

Proposed new §222.2 sets forth the requirements that an APRN must meet in order to receive a prescription authorization number. The requirements in proposed new §222.2 are similar to the existing provisions of Chapter 222, with the exception that the requirements related to practice sites have been eliminated for consistency with the provisions of SB 406.

Proposed new §222.4 addresses the minimum standards applicable to an APRN who orders drugs and/or devices pursuant to physician delegation. SB 406 authorizes the use of a prescriptive authority agreement to effectuate such delegation in all settings except for certain facility-based practices. In facility-based practices, SB 406 continues to recognize the use of protocols or other written authorization for physician delegation, provided that a physician does not delegate at more than 1 hospital or more than 2 long-term care facilities. Consistent with the bill's requirements, the proposed provisions of §222.4 require the use of a prescriptive authority agreement in all settings, except for facility-based practices, where either a prescriptive authority agreement or protocols or other written authorization may be used for physician delegation.

In settings where a prescriptive authority agreement is utilized by a physician and an APRN, SB 406 prescribes the particular requirements that the prescriptive authority agreement must meet. In addition to several other requirements, SB 406 requires periodic face to face meetings between a physician who delegates the act of prescribing and/or ordering drugs and devices to an APRN through a prescriptive authority agreement. Proposed new §222.4 makes clear that an APRN must comply with the requirements of SB 406 that relate to chart review and periodic face to face meetings. Further, for an APRN who orders and/or prescribes drugs or devices under facility-based protocols or other written authorization, proposed new §222.4 clarifies that the APRN must also comply with any requirements set forth in the protocols or other written authorization. Also pursuant to SB 406, proposed new §222.4 requires an APRN to cooperate with Board representatives or representatives from the Texas Medical Board during any audit or inspection relating to the operation and implementation of a prescriptive authority agreement.

The remaining provisions of proposed new §222.4 contain essentially the same requirements as existing Chapter 222 regarding prescription information, generic substitution, off label use, and prescribing medications for sexually transmitted diseases for partners of an established patient.

Proposed new §222.5 contains the requirements applicable to a prescriptive authority agreement. A prescriptive authority agreement is a mechanism by which an APRN is delegated the authority to order and/or prescribe drugs or devices by a physician. in all practice settings, except for facility-based practices where protocols or other written authorization are utilized instead. SB 406 sets forth specific requirements that apply to the use of a prescriptive authority agreement. Consistent with the provisions of SB 406, proposed new §222.5 sets forth the minimum requirements that a prescriptive authority agreement must meet and requires an APRN to be in good standing with the Board in order to enter into a prescriptive authority agreement with a physician. "Good standing" under proposed new §222.5 means that the APRN's license is not in delinquent status and that there is no current disciplinary action, disciplinary probation, or pending investigation of the APRN's nursing license and/or authorization.

Although a prescriptive authority agreement must meet the requirements of proposed new §222.5, the agreement may also include additional provisions or information agreed to by the delegating physician and APRN, including any provisions that may have been previously included in protocols or other written authorization. Thus, under proposed new §222.5, a prescriptive authority agreement may be utilized in a facility-based practice if the parties to the agreement choose to do so in lieu of utilizing protocols or other written authorization for physician delegation. The parties, however, are not required to do so, and SB 406, as well as the proposed new chapter, recognizes the continued use of protocols or other written authorization for physician delegation in such practice settings.

The provisions of proposed new §222.6 are consistent with the proposed provisions of §222.5 as they relate to the use of a prescriptive authority agreement in a facility-based practice. As previously stated, both SB 406 and the proposed new chapter, authorize the use of either a prescriptive authority agreement or protocols or other written authorization for physician delegation in a facility-based practice. The provisions of proposed new §222.6 set forth the requirements applicable to the use of either mechanism in a facility-based practice.

Proposed new §222.7 clarifies that APRNs with a valid prescription authorization number are eligible to order or prescribe non-prescription drugs, dangerous drugs, and devices, including durable medical equipment. However, in order for an APRN to be eligible to also order and/or prescribe controlled substances, the APRN must meet the applicable requirements of the proposed new chapter.

Proposed new §222.8 sets forth the requirements that apply to ordering and/or prescribing controlled substances. Consistent with the existing provisions of Chapter 222, an APRN may order and/or prescribe controlled substances in Schedules III through V, pursuant to certain limitations. First, the prescription may not exceed a 90 day supply, including a refill of the prescription. The proposed new section does not alter this existing limitation. However, the proposed new section clarifies that this limitation applies to a prescription, either in the form of a new prescription or in the form of a refill, for the same controlled substance that a patient has been previously issued within a 90 day time period. Therefore, an APRN may not circumvent the limitations of

this section by writing a new prescription for the same controlled substance for longer than 90 days without consulting with the APRN's delegating physician and documenting the consultation in the patient's chart. Limitations relating to the prescription of a controlled substance for a child less than two years of age remain unchanged from the current provisions of Chapter 222.

SB 406 authorizes APRNs to prescribe Schedule II controlled substances in certain circumstances. Consistent with this expanded authority, proposed new §222.8 authorizes APRNs to prescribe Schedule II controlled substances in a hospital facility-based practice for a patient who has been admitted to the hospital for an intended length of stay of 24 hours or greater or is receiving services in the emergency department of the hospital or as part of the plan of care for a patient who is receiving hospice treatment from a qualified hospice provider.

Proposed new §222.9 contains substantially similar requirements as current Chapter 222, with slight modifications made to incorporate the use of prescriptive authority agreements.

The remaining provisions of the proposed new chapter are necessary for consistency with the provisions of the Advanced Practice Registered Nurse Consensus Model of the National Council of State Boards of Nursing; to clarify the Board's endorsement and enforcement processes, and to require APRNs who prescribe controlled substances to complete additional continuing education requirements each biennium.

Proposed new §222.1(4) includes a new definition of the term "advanced practice registered nurse (APRN)", which is consistent with the definition of "APRN" in the Occupations Code §301.152 and the provisions of the Advanced Practice Registered Nurse Consensus Model of the National Council of State Boards of Nursing.

Proposed new §222.2 clarifies that an APRN applying for prescriptive authority in this state based upon his/her advanced practice licensure and prescriptive authority issued in another state (by endorsement) must provide evidence to the Board that all education requirements for prescriptive authority in this state have been met.

Proposed new §222.3 requires an APRN who prescribes controlled substances to complete 3 additional contact hours of continuing education related to prescribing controlled substances each biennium. The Board has determined that this additional continuing education is reasonably related to the expanded scope authorized by SB 406 with regard to the prescription of Schedule II controlled substances and is necessary to ensure that APRNs who prescribe controlled substances stay abreast of current industry practices, enhance their professional competence, learn about new treatment regimens, and continually update their clinical skills. The proposed new requirement permits an APRN to complete the additional continuing education in any area related to prescribing controlled substances. Thus, the Board anticipates that many different types of continuing education courses could meet this proposed new requirement. For instance, courses in pain management, content related to recognition of patients with addictions/pseudo addictions, and medical management of patients with conditions such as Attention Deficit Hyperactivity Disorder could appropriately meet the proposed new requirements. So long as the content of a course relates to the prescription of controlled substances in a meaningful way, the Board anticipates that the course would be sufficient to meet the new proposed continuing education requirements.

Finally, new proposed §222.10 clarifies that an APRN may be subject to disciplinary action by the Board for ordering and/or prescribing in a manner that is inconsistent with the standard of care and/or for violating a provision of the proposed new chapter. Further, the proposed new section outlines examples of behavior that may subject an APRN to discipline and identifies the procedures that will be followed if an APRN becomes the subject of a Board investigation and/or receives a disciplinary order from the Board.

Section-by-Section Overview. The proposed new title of Chapter 222 is Advanced Practice Registered Nurses with Prescriptive Authority.

Proposed new §222.1 sets forth the definitions used in the proposed new chapter.

Proposed new §222.2(a) sets forth the requirements an RN must meet in order to be issued a prescription authorization number to prescribe or order a drug or device. Specifically, an RN must have full licensure from the Board to practice as an APRN and file a complete application for prescriptive authority and submit such evidence as required by the Board to verify successful completion of graduate level courses in advanced pharmacotherapeutics, advanced pathophysiology, advanced health assessment, and diagnosis and management of diseases and conditions within the role and population focus area.

Nurse Practitioners, Nurse-Midwives, and Nurse Anesthetists will be considered to have met the course requirements of proposed new §222.2 on the basis of courses completed in the advanced practice nursing educational program. Clinical Nurse Specialists must submit documentation of successful completion of separate, dedicated, graduate level courses in the content areas described in proposed new §222.2. These courses shall be academic courses with a minimum of 45 clock hours per course from a nursing program accredited by an organization recognized by the Board. Clinical Nurse Specialists who were previously approved by the Board as APRNs by petition on the basis of completion of a non-nursing master's degree shall not be eligible for prescriptive authority.

Proposed new §222.2(b) provides that APRNs applying for prescriptive authority on the basis of endorsement of advanced practice licensure and prescriptive authority issued in another state must provide evidence that all education requirements for prescriptive authority in this state have been met.

Proposed new §222.3(a) requires an APRN to renew his/her privilege to sign prescription drug orders in conjunction with his/her RN and advanced practice license renewal application.

Proposed new §222.3(b) requires an APRN seeking to maintain his/her prescriptive authority to complete at least five contact hours of continuing education in pharmacotherapeutics within the preceding biennium. For APRNs who order or prescribe controlled substances, proposed new §222.3(b) requires the APRN to complete at least 3 additional contact hours of continuing education related to prescribing controlled substances within the preceding biennium.

Proposed new §222.3(c) makes clear that the continuing education requirements in proposed new §222.3(b) are in addition to the continuing education required under Chapter 216 of this title (relating to Continuing Competency).

Proposed new §222.4(a) provides that an APRN with a valid prescription authorization number is authorized to order or prescribe only those drugs or devices that are: (i) authorized by a prescrip-

tive authority agreement or, if practicing in a facility-based practice, authorized by either a prescriptive authority agreement or protocols or other written authorization; and (ii) ordered or prescribed for patient populations within the accepted scope of professional practice for the APRN's license. Further, the APRN must comply with the requirements for chart reviews specified in the prescriptive authority agreement and periodic face to face meetings set forth in the proposed new chapter and comply with the requirements set forth in protocols or other written authorization, if ordering or prescribing drugs or devices under facility-based protocols or other written authorization.

Proposed new §222.4(b) requires the format and essential elements of a prescription drug order to comply with the requirements of the Texas State Board of Pharmacy. Further, the following information must be provided on each prescription: (i) the patient's name and address; (ii) the name, strength, and quantity of the drug to be dispensed; (iii) directions to the patient regarding taking of the drug and the dosage; (iv) the intended use of the drug, if appropriate; (v) the name, address, and telephone number of the physician with whom the APRN has a prescriptive authority agreement or facility-based protocols or other written authorization; (vi) address and telephone number of the site at which the prescription drug order was issued; (vii) the date of issuance; (viii) the number of refills permitted; (ix) the name, prescription authorization number, and original signature of the APRN who authorized the prescription drug order; and (x) the United States Drug Enforcement Administration numbers of the APRN and the collaborating physician, if the prescription drug order is for a controlled substance.

Proposed new §222.4(c) permits an APRN to authorize or prevent generic substitution on a prescription in compliance with the current rules of the Texas State Board of Pharmacy relating to generic substitution.

Proposed new §222.4(d) permits an APRN to order or prescribe medications for sexually transmitted diseases for partners of an established patient, if the APRN assesses the patient and determines that the patient may have been infected with a sexually transmitted disease. However, nothing in proposed new §222.4(d) requires the APRN to issue prescriptions for partners of patients.

Proposed new §222.4(e) permits an APRN to order or prescribe only those medications that are FDA approved unless done through protocol registration in a United States Institutional Review Board or Expanded Access authorized clinical trial. "Off label" use, or prescription of FDA-approved medications for uses other than that indicated by the FDA, is only permitted when such practices are: (i) within the current standard of care for treatment of the disease or condition; and (ii) supported by evidence-based research.

Proposed new §222.4(f) requires the APRN with prescriptive authority to cooperate with representatives of the Board and the Texas Medical Board during an inspection and audit relating to the operation and implementation of a prescriptive authority agreement.

Proposed new §222.5(a) defines the prescriptive authority agreement as the mechanism by which an APRN is delegated the authority to order or prescribe drugs or devices by a physician.

Proposed new §222.5(b) states that an APRN with prescriptive authority and a physician are eligible to enter into or be parties to a prescriptive authority agreement only if the APRN holds an active license to practice in this state that is in good standing. Good standing means that the nurse's license is not in delinquent status and that there is no current disciplinary action, disciplinary probation, or pending investigation(s) on his/her nursing license(s) or authorization(s). Further, an APRN with prescriptive authority and a physician are eligible to enter into or be parties to a prescriptive authority agreement only if the APRN (i) is not currently prohibited by the Board from executing a prescriptive authority agreement; and (ii) before executing the prescriptive authority agreement, the APRN and the physician disclose to the other prospective party to the agreement any prior disciplinary action by the applicable licensing board.

Proposed new §222.5(c) requires a prescriptive authority agreement to, at a minimum: (i) be in writing and signed and dated by the parties to the agreement; (ii) state the name, address, and all professional license numbers of the parties to the agreement; (iii) state the nature of the practice, practice locations, or practice settings; (iv) identify either the types or categories of drugs or devices that may be prescribed or the types of categories of drugs or devices that may not be prescribed; (v) provide a general plan for addressing consultation and referral; (vi) provide a plan for addressing patient emergencies; (vii) state the general process for communication and the sharing of information between the APRN and the physician related to the care and treatment of patients; (viii) designate one or more alternate physicians who may participate in the execution of the prescriptive authority agreement in accordance with the rules of the Texas Medical Board if an alternate physician arrangement is to be utilized; and (ix) describe a prescriptive authority quality assurance and improvement plan and specify methods for documenting the implementation of the plan that includes chart review, with the number of charts to be reviewed determined by the APRN and physician and periodic face to face meetings between the APRN and the physician at a location agreed upon by both providers.

Proposed new §222.5(d) requires the periodic face to face meetings described by proposed new §222.5(c) to: (i) include the sharing of information relating to patient treatment and care, needed changes in patient care plans, and issues relating to referrals and discussion of patient care improvement; and (ii) be documented and occur, except as provided by proposed new §222.5(d), at least monthly until the third anniversary of the date the agreement is executed; and at least quarterly after the third anniversary of the date the agreement is executed, with monthly meetings held between the quarterly meetings by means of a remote electronic communications system, including video conferencing technology or the internet; or (iii) if during the seven years preceding the date the agreement is executed, the APRN was in a practice for at least five years that included the exercise of prescriptive authority with required physician supervision, at least monthly until the first anniversary of the date the agreement was executed; and at least quarterly after the first anniversary of the date the agreement is executed, with monthly meetings held between the quarterly meetings by means of a remote electronic communications system, including video conferencing technology or the internet.

Proposed new §222.5(e) makes clear that, although a prescriptive authority agreement must include the information specified by proposed new §222.5, the agreement may include other provisions agreed to by the APRN and physician, including provisions that were previously contained in protocols or other written authorization.

Proposed new §222.5(f) requires an APRN to participate in quality assurance meetings with an alternate physician in a physician group practice, if the alternate physician has been designated to conduct and document the meeting.

Proposed new §222.5(g) states that a prescriptive authority agreement is not required to describe the exact steps that an APRN must take with respect to each specific condition, disease, or symptom.

Proposed new §222.5(h) requires an APRN who is a party to a prescriptive authority agreement to retain a copy of the agreement until the second anniversary of the date the agreement is terminated.

Proposed new §222.5(i) prohibits a party to a prescriptive authority agreement from waiving, voiding, or nullifying the provisions of the rule by contract.

Proposed new §222.5(j) states that, in the event that a party to a prescriptive authority agreement is notified that the individual has become the subject of an investigation by the respective licensing board, the individual shall immediately notify the other party to the prescriptive authority agreement.

Proposed new §222.5(k) requires the prescriptive authority agreement and any amendments to be reviewed at least annually, dated, and signed by the parties to the agreement. Further, the prescriptive authority agreement must be made available to the Board, the Texas Medical Board, or the Texas Physician Assistant Board not later than the third business day after the date of receipt of the request from the respective licensing board.

Proposed new §222.5(l) states that the prescriptive authority agreement should promote the exercise of professional judgment by the APRN commensurate with the APRN's education and experience and the relationship between the APRN and the physician.

Proposed new §222.6(a) requires an APRN, when ordering or prescribing a drug or device at a facility-based practice site, to: (i) maintain either a prescriptive authority agreement that meets the requirements of proposed new §222.6 or protocols or other written authorization developed in accordance with facility medical staff policies and review the authorizing documents with the appropriate medical staff at least annually; (ii) order or prescribe drugs and devices in a hospital-based facility in which the delegating physician is the medical director, the chief of medical staff, the chair of the credentialing committee, or a department chair, or a physician who consents to the request of the medical director or chief of the medical staff to delegate; (iii) order or prescribe drugs and devices in a long-term care facility in which the delegating physician is the medical director; and (iv) order or prescribe drugs and devices for the care or treatment of only those patients for whom physicians have given their prior consent.

Proposed new §222.6(b) requires protocols or other written authorization to provide medical aspects of patient care to be agreed upon and signed by the APRN and the physician, reviewed and signed at least annually, and maintained in the practice setting of the APRN. Further, protocols or other written authorization are defined to promote the exercise of professional judgment by the APRN commensurate with his/her education and experience. Finally, proposed new §222.6(b) makes clear that protocols or other written authorization need not describe the exact steps that the APRN must take with respect to each specific condition, disease, or symptom and may state types or categories of drugs that may be ordered or prescribed.

Proposed new §222.7 clarifies that APRNs with full licensure and valid prescription authorization numbers are eligible to order or prescribe non-prescription drugs, dangerous drugs, and devices, including durable medical equipment, in accordance with the standards and requirements of the proposed new chapter. Further, proposed new §222.7 clarifies that APRNs with full licensure and valid prescription authorization numbers are not eligible to order or prescribe controlled substances unless they meet the applicable requirements of the proposed new chapter.

Proposed new §222.8(a) permits APRNs with full licensure and valid prescription authorization numbers to obtain authority to order and prescribe certain categories of controlled substances. However, the APRN must comply with all federal and state laws and regulations relating to the ordering and prescribing of controlled substances in Texas, including but not limited to, requirements set forth by the Texas Department of Public Safety and the United States Drug Enforcement Administration.

Proposed new §222.8(b) permits orders and prescriptions for controlled substances in Schedules III through V to be authorized, provided the following criteria are met. First, prescriptions for a controlled substance in Schedules III through V, including a refill of the prescription, shall not exceed a 90 day supply. This requirement includes a prescription, either in the form of a new prescription or in the form of a refill, for the same controlled substance that a patient has been previously issued within the time period described by this subsection. Second, beyond the initial 90 days, the refill of a prescription for a controlled substance in Schedules III through V shall not be authorized prior to consultation with the delegating physician and notation of the consultation in the patient's chart. Third, a prescription of a controlled substance in Schedules III through V shall not be authorized for a child less than two years of age prior to consultation with the delegating physician and notation of the consultation in the patient's chart.

Proposed new §222.8(c) states that orders and prescriptions for controlled substances in Schedule II may be authorized only (i) in a hospital facility-based practice, in accordance with policies approved by the hospital's medical staff or a committee of the hospital's medical staff as provided by the hospital's bylaws to ensure patient safety and as part of care provided to a patient who has been admitted to the hospital for an intended length of stay of 24 hours or greater or is receiving services in the emergency department of the hospital; or (ii) as part of the plan of care for the treatment of a person who has executed a written certification of a terminal illness, has elected to receive hospice care, and is receiving hospice treatment from a qualified hospice provider.

Proposed new §222.8(d) requires APRNs with full licensure and valid prescription authorization to comply with all federal and state laws and regulations relating to the prescribing of controlled substances in Texas, including but not limited to, requirements set forth by the Texas Department of Public Safety and the United States Drug Enforcement Administration.

Proposed new §222.9 permits an APRN with full licensure and a valid prescription authorization number to request, receive, possess, and distribute prescription drug samples provided: (i) all requirements for the APRN to order and prescribe medications and devices are met; (ii) a prescriptive authority agreement or facility-based protocols or other written authorization authorizes the

APRN to order and prescribe the medications and devices; (iii) the samples are for only those drugs or devices that the APRN is eligible to order or prescribe in accordance with the standards and requirements set forth in this chapter; and (iv) a record of the sample is maintained and samples are labeled as specified in the Dangerous Drug Act (Chapter 483, Health and Safety Code) or the Texas Controlled Substances Act (Chapter 481, Health and Safety Code) and 37 Texas Administrative Code Chapter 13.

Proposed new §222.10(a) states that any APRN who violates the sections of the Board's rules or orders or prescribes in a manner that is not consistent with the standard of care shall be subject to removal of the authority to prescribe under proposed new §222.10 and disciplinary action by the Board. Behaviors associated with ordering and prescribing medications for which the Board may impose disciplinary action include, but are not limited to: (i) ordering, prescribing, dispensing, or administering medications or devices for other than evidenced based therapeutic or prophylactic purposes that meet the minimum standards of care; (ii) ordering, prescribing, or dispensing medications or devices for personal use; (iii) failing to properly assess and document the assessment prior to ordering, prescribing, dispensing, or administering a medication or device; (iv) selling, purchasing, trading, or offering to sell, purchase, or trade a prescription drug sample; and (v) delegation of authority to any other person to order, prescribe, or dispense of an order or prescription for a drug or device.

Proposed new §222.10(b) states that failure to cooperate with a representative of the Board who conducts an onsite investigation may result in disciplinary action. Further, failure to cooperate with a representative of the Board or the Texas Medical Board who inspects and audits the practice relating to the implementation and operation of the prescriptive authority agreement may result in disciplinary action.

Proposed new §222.10(c) states that the Board shall immediately notify the Texas Medical Board and the Texas Physician Assistant Board when an APRN licensed by the Board becomes the subject of an investigation involving the delegation and supervision of prescriptive authority and upon the final disposition of an investigation involving an APRN licensed by the Board and the delegation and supervision of prescriptive authority.

Proposed new §222.10(d) provides that, upon receipt of notice from the Texas Medical Board and/or the Texas Physician Assistant Board that a licensee of one of those boards is under investigation involving the delegation and supervision of prescriptive authority, the Board may open an investigation against an APRN who is a party to the prescriptive authority agreement with the licensee who is under investigation by the board that provided the notice.

Proposed new §222.10(e) states that the Board shall report to the Texas Department of Public Safety and the United States Drug Enforcement Administration any of the following: (i) any significant changes in the status of the RN license or advanced practice license; or (ii) disciplinary action impacting an APRN's ability to authorize or issue prescription drug orders.

Proposed new §222.10(f) states that the practice of the APRN approved by the Board to sign prescription drug orders is subject to monitoring by the Board on a periodic basis.

Proposed new §222.10(g) states that the Board shall maintain a list of APRNs who have been subject to a final adverse disciplinary action for an act involving the delegation and supervision of prescriptive authority.

Proposed new §222.10(h) states that the Board shall provide information to the public regarding APRNs who are prohibited from entering into or practicing under a prescriptive authority agreement.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed new chapters are in effect, there will be no additional fiscal implications for state or local government as a result of implementing the proposal.

Public Benefit/Cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed new chapter is in effect, the anticipated public benefit will be the repeal of outdated requirements and the adoption of new requirements that implement the provisions of SB 406, clarify the Board's endorsement and enforcement processes, and ensure the protection of the public health, safety, and welfare through the demonstration of competent, quality nursing care.

Under the proposal, APRNs who prescribe controlled substances are required to complete an additional 3 hours of continuing education related to prescribing controlled substances. The proposed new continuing education requirements are designed to assist APRNs in maintaining and improving their knowledge and skills and further developing their expertise in their current area of practice. Requiring a nurse to maintain competence in his or her current area of practice, such as where he/she prescribes controlled substances, is especially important because it ensures that the nursing skills necessary for that particular setting are thoroughly developed and enriched. As a result, the nurse's patients directly benefit because the nurse is more knowledgeable and competent in his or her practice. In this way, the proposed new requirements seek to provide a higher quality of care in this area of nursing.

Potential Costs for Individuals Required to Comply with the Proposal.

Although the proposed new chapter implements the provisions of SB 406, many of the existing provisions of Chapter 222 are also included in the proposal. Much of the new chapter has been re-organized and several existing provisions of Chapter 222 have been eliminated, pursuant to the requirements of SB 406. However, the majority of the changes to the proposed new chapter result from the use of prescriptive authority agreements and the elimination of practice site requirements. The provisions related to receiving prescriptive authority authorization remain largely unchanged from the current requirements of Chapter 222, as do the requirements related to renewal of prescriptive authority, orders and prescriptions for controlled substances, conditions for obtaining and distributing drug samples, and the Board's endorsement and enforcement processes. Further, although the proposal contains new provisions related to prescriptive authority agreements and facility-based practice sites, the Board does not anticipate that the proposal will result in any new associated costs of compliance, with the exception of the additional continuing education requirements in proposed new §222.3(b). Further, the Board does not anticipate that an individual APRN's method of compliance with the current requirements of Chapter 222 will be altered so substantially by the proposal as to cause new associated costs of compliance, with the exception of the additional continuing education requirements of proposed new §222.3(b).

Proposed new §222.3(b) requires an APRN who prescribes controlled substances to complete an additional 3 hours of continu-

ing education related to prescribing controlled substances each biennium. An APRN who prescribes controlled substances may incur compliance costs associated with this proposed requirement. The probable costs of compliance with proposed new §222.3(b) may vary among individual APRNs based upon a variety of factors. However, the Board anticipates that the probable economic costs of compliance with proposed new §222.3(b) to range between $0.00 to $800. This estimated cost is based upon the following considerations.

The Board collected a sampling of continuing education courses currently being offered by various continuing education providers. It should be noted that several continuing education providers offer free online continuing education courses. Of the continuing education courses surveyed that were not free, the credit hours ranged from .5 hours to larger numbers of credit hours, such as 40 hours, for courses ranging over a 6 week period. Under the proposal, an APRN must complete 3 hours of continuing education that is sufficiently related to prescribing controlled substances each biennium. This proposed requirement can be met with a variety of continuing education courses, structured in a variety of ways, including online courses, conferences, or week long courses. Because the proposed requirements can be met through a variety of ways, each individual APRN has the flexibility to choose the most economic method of compliance. Further, some APRNs may be able to meet the proposed additional continuing education requirements through the education the APRN completes to maintain his/her certification. Additionally, an APRN must only meet the additional continuing education requirements each biennium, so the associated costs of compliance may be somewhat offset. Each APRN has the information necessary to estimate his or her own individual costs of compliance. Further, any other costs to comply with the proposed new requirements result from the enactment of SB 406 and the Occupations Code Chapter 301 and are not a result of the adoption, enforcement, or administration of the proposal.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. The Government Code §2006.002(c) and (f) require, that if a proposed rule may have an economic impact on small businesses or micro businesses, state agencies must prepare, as part of the rulemaking process, an economic impact statement that assesses the potential impact of the proposed rule on these businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule.

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

The Board has determined that the proposal will not have an adverse economic effect on any individual, Board regulated entity, or other entity required to comply with the proposal because no individual, Board regulated entity, or other entity required to comply with the proposal meets the definition of a small or micro business under the Government Code §2006.001(1) or §2006.001(2). Each of the elements in §2006.001(1) and §2006.001(2) must be met in order for an entity to qualify as a micro business or small business. The only entities subject to the proposal are individuals. Because individuals are not independently owned and operated legal entities that are formed for the purpose of making a profit, no individual licensee or applicant qualifies as a micro business or small business under the Government Code §2006.001(1) or §2006.001(2). Therefore, in accordance with the Government Code §2006.002(c) and (f), the Board is not required to prepare a regulatory flexibility analysis.

Takings Impact Assessment.

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

Request for Public Comment. To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on September 9, 2013, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.texas.gov, or faxed to (512) 305-8101. An additional copy of the comments on the proposal or any request for a public hearing must be simultaneously submitted to Jolene Zych, Advanced Practice Nursing Consultant, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to jolene.zych@bon.texas.gov, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority.

The new chapter is proposed under the Occupations Code Chapter 157 and §§301.151, 301.152, 301.452, 301.453, and 301.4531.

Section 157.051 sets forth the definitions utilized in Chapter 157, Subchapter B.

Section 157.0511(a) provides that a physician's authority to delegate the prescribing or ordering of a drug or device under Chapter 157, Subchapter B is limited to: (i) nonprescription drugs; (ii) dangerous drugs; and (iii) controlled substances to the extent provided by Subsections (b) and (b-1).

Section 157.0511(b) provides that, except as provided by Chapter 157, Subsection (b-1), a physician may delegate the prescribing or ordering of a controlled substance only if: (i) the prescription is for a controlled substance listed in Schedule III, IV, or V as established by the commissioner of the Department of State Health Services under Chapter 481, Health and Safety Code; (ii) the prescription, including a refill of the prescription, is for a period not to exceed 90 days; (iii) with regard to the refill of a prescription, the refill is authorized after consultation with the delegating physician and the consultation is noted in the patient's chart; and (iv) with regard to a prescription for a child less than two years of age, the prescription is made after consultation with the delegating physician and the consultation is noted in the patient's chart.

Section 157.0511(b-1) provides that a physician may delegate the prescribing or ordering of a controlled substance listed in Schedule II as established by the commissioner of the Department of State Health Services under Chapter 481, Health and Safety Code, only: (i) in a hospital facility-based practice under

§157.054, in accordance with policies approved by the hospital's medical staff or a committee of the hospital's medical staff as provided by the hospital bylaws to ensure patient safety, and as part of the care provided to a patient who: (A) has been admitted to the hospital for an intended length of stay of 24 hours or greater; or (B) is receiving services in the emergency department of the hospital; or (ii) as part of the plan of care for the treatment of a person who has executed a written certification of a terminal illness, has elected to receive hospice care, and is receiving hospice treatment from a qualified hospice provider.

Section 157.0511(b-2) provides that the board shall adopt rules that require a physician who delegates the prescribing or ordering of a drug or device to register with the board the name and license number of the physician assistant or advanced practice registered nurse to whom a delegation is made. Further, the board may develop and use an electronic online delegation registration process for registration under Chapter 157, Subchapter B.

Section 157.0511(c) states that Chapter 157, Subchapter B does not modify the authority granted by law for a licensed registered nurse or physician assistant to administer or provide a medication, including a controlled substance listed in Schedule II as established by the commissioner of the Department of State Health Services under Chapter 481, Health and Safety Code, that is authorized by a physician under a physician's order, standing medical order, standing delegation order, or protocol.

Section 157.0512(a) provides that a physician may delegate to an advanced practice registered nurse or physician assistant, acting under adequate physician supervision, the act of prescribing or ordering a drug or device as authorized through a prescriptive authority agreement between the physician and the advanced practice registered nurse or physician assistant, as applicable.

Section 157.0512(b) states that a physician and an advanced practice registered nurse or physician assistant are eligible to enter into or be parties to a prescriptive authority agreement only if: (i) if applicable, the Texas Board of Nursing has approved the advanced practice registered nurse's authority to prescribe or order a drug or device as authorized under Chapter 157, Subchapter B; (ii) the advanced practice registered nurse or physician assistant: (A) holds an active license to practice in this state as an advanced practice registered nurse or physician assistant, as applicable, and is in good standing in this state; and (B) is not currently prohibited by the Texas Board of Nursing or the Texas Physician Assistant Board, as applicable, from executing a prescriptive authority agreement; and (iii) before executing the prescriptive authority agreement, the physician and the advanced practice registered nurse or physician assistant disclose to the other prospective party to the agreement any prior disciplinary action by the board, the Texas Board of Nursing, or the Texas Physician Assistant Board, as applicable.

Section 157.0512(c) states that, except as provided by §157.0512(d), the combined number of advanced practice registered nurses and physician assistants with whom a physician may enter into a prescriptive authority agreement may not exceed seven advanced practice registered nurses and physician assistants or the full-time equivalent of seven advanced practice registered nurses and physician assistants.

Section 157.0512(d) states that §157.0512(c) does not apply to a prescriptive authority agreement if the prescriptive authority is being exercised in: (i) a practice serving a medically underserved population; or (ii) a facility-based practice in a hospital under §157.054.

Section 157.0512(e) provides that a prescriptive authority agreement must, at a minimum: (i) be in writing and signed and dated by the parties to the agreement; (ii) state the name, address, and all professional license numbers of the parties to the agreement; (iii) state the nature of the practice, practice locations, or practice settings; (iv) identify the types or categories of drugs or devices that may be prescribed or the types or categories of drugs or devices that may not be prescribed; (v) provide a general plan for addressing consultation and referral; (vi) provide a plan for addressing patient emergencies; (vii) state the general process for communication and the sharing of information between the physician and the advanced practice registered nurse or physician assistant to whom the physician has delegated prescriptive authority related to the care and treatment of patients; (viii) if alternate physician supervision is to be utilized, designate one or more alternate physicians who may: (A) provide appropriate supervision on a temporary basis in accordance with the requirements established by the prescriptive authority agreement and the requirements of Chapter 157, Subchapter B, and (B) participate in the prescriptive authority quality assurance and improvement plan meetings required under §157.0512; and (ix) describe a prescriptive authority quality assurance and improvement plan and specify methods for documenting the implementation of the plan that includes the following: (A) chart review, with the number of charts to be reviewed determined by the physician and advanced practice registered nurse or physician assistant; and (B) periodic face-to-face meetings between the advanced practice registered nurse or physician assistant and the physician at a location determined by the physician and the advanced practice registered nurse or physician assistant.

Section 157.0512(f) provides that the periodic face-to-face meetings described by §157.0512(e)(9)(B) must: (i) include: (A) the sharing of information relating to patient treatment and care, needed changes in patient care plans, and issues relating to referrals; and (B) discussion of patient care improvement; and (ii) be documented and occur: (A) except as provided by Paragraph (B): (i) at least monthly until the third anniversary of the date the agreement is executed; and (ii) at least quarterly after the third anniversary of the date the agreement is executed, with monthly meetings held between the quarterly meetings by means of a remote electronic communications system, including videoconferencing technology or the Internet; or (B) if during the seven years preceding the date the agreement is executed the advanced practice registered nurse or physician assistant for at least five years was in a practice that included the exercise of prescriptive authority with required physician supervision: (i) at least monthly until the first anniversary of the date the agreement is executed; and (ii) at least quarterly after the first anniversary of the date the agreement is executed, with monthly meetings held between the quarterly meetings by means of a remote electronic communications system, including videoconferencing technology or the Internet.

Section 157.0512(g) provides that the prescriptive authority agreement may include other provisions agreed to by the physician and advanced practice registered nurse or physician assistant.

Section 157.0512(h) provides that if the parties to the prescriptive authority agreement practice in a physician group practice, the physician may appoint one or more alternate supervising physicians designated under §157.0512(e)(8), if any, to conduct

and document the quality assurance meetings in accordance with the requirements of Chapter 157, Subchapter B.

Section 157.0512(i) provides that the prescriptive authority agreement need not describe the exact steps that an advanced practice registered nurse or physician assistant must take with respect to each specific condition, disease, or symptom.

Section 157.0512(j) provides that a physician, advanced practice registered nurse, or physician assistant who is a party to a prescriptive authority agreement must retain a copy of the agreement until the second anniversary of the date the agreement is terminated.

Section 157.0512(k) provides that a party to a prescriptive authority agreement may not by contract waive, void, or nullify any provision of §157.0512 or §157.0513.

Section 157.0512(l) provides that in the event that a party to a prescriptive authority agreement is notified that the individual has become the subject of an investigation by the board, the Texas Board of Nursing, or the Texas Physician Assistant Board, the individual shall immediately notify the other party to the prescriptive authority agreement.

Section 157.0512(m) provides that the prescriptive authority agreement and any amendments must be reviewed at least annually, dated, and signed by the parties to the agreement. The prescriptive authority agreement and any amendments must be made available to the board, the Texas Board of Nursing, or the Texas Physician Assistant Board not later than the third business day after the date of receipt of request, if any.

Section 157.0512(n) provides that the prescriptive authority agreement should promote the exercise of professional judgment by the advanced practice registered nurse or physician assistant commensurate with the advanced practice registered nurse's or physician assistant's education and experience and the relationship between the advanced practice registered nurse or physician assistant and the physician.

Section 157.0512(o) provides that §157.0512 shall be liberally construed to allow the use of prescriptive authority agreements to safely and effectively utilize the skills and services of advanced practice registered nurses and physician assistants.

Section 157.0512(p) provides that the board may not adopt rules pertaining to the elements of a prescriptive authority agreement that would impose requirements in addition to the requirements under §157.0512. The board may adopt other rules relating to physician delegation under Chapter 157.

Section 157.0512(q) provides that the board, the Texas Board of Nursing, and the Texas Physician Assistant Board shall jointly develop responses to frequently asked questions relating to prescriptive authority agreements not later than January 1, 2014. Chapter 157, Subchapter B expires January 1, 2015.

Section 157.0513(a) states that the board, the Texas Board of Nursing, and the Texas Physician Assistant Board shall jointly develop a process: (i) to exchange information regarding the names, locations, and license numbers of each physician, advanced practice registered nurse, and physician assistant who has entered into a prescriptive authority agreement; (ii) by which each board shall immediately notify the other boards when a license holder of the board becomes the subject of an investigation involving the delegation and supervision of prescriptive authority, as well as the final disposition of any such investigation; and (iii) by which each board shall maintain and share a list of the board's license holders who have been subject to final adverse disciplinary action for an act involving the delegation and supervision of prescriptive authority.

Section 157.0513(b) states that if the board, the Texas Board of Nursing, or the Texas Physician Assistant Board receives a notice under §157.0513(a)(2), the board that received notice may open an investigation against a license holder of the board who is a party to a prescriptive authority agreement with the license holder who is under investigation by the board that provided notice under §157.0513(a)(2).

Section 157.0513(c) states that the Board shall maintain and make available to the public a searchable online list of physicians, advanced practice registered nurses, and physician assistants who have entered into a prescriptive authority agreement authorized under §157.0512 and identify the physician, advanced practice registered nurse, or physician assistant with whom each physician, advanced practice registered nurse, and physician assistant has entered into a prescriptive authority agreement.

Section 157.0513(d) states that the Board shall collaborate with the Texas Board of Nursing and the Texas Physician Assistant Board to maintain and make available to the public a list of physicians, advanced practice registered nurses, and physician assistants who are prohibited from entering into or practicing under a prescriptive authority agreement.

Section 157.0514 states that if the board receives a notice under §157.0513(a)(2), the board or an authorized board representative may enter, with reasonable notice and at a reasonable time, unless the notice would jeopardize an investigation, a site where a party to a prescriptive authority agreement practices to inspect and audit any records or activities relating to the implementation and operation of the agreement. To the extent reasonably possible, the board and the board's authorized representative shall conduct any inspection or audit under §157.0514 in a manner that minimizes disruption to the delivery of patient care.

Section 157.054(a) states that one or more physicians licensed by the board may delegate, to one or more physician assistants or advanced practice registered nurses acting under adequate physician supervision whose practice is facility-based at a hospital or licensed long-term care facility, the administration or provision of a drug and the prescribing or ordering of a drug or device if each of the delegating physicians is: (i) the medical director or chief of medical staff of the facility in which the physician assistant or advanced practice registered nurse practices; (ii) the chair of the facility's credentialing committee; (iii) a department chair of a facility department in which the physician assistant or advanced practice registered nurse practices; or (iv) a physician who consents to the request of the medical director or chief of medical staff to delegate the prescribing or ordering of a drug or device at the facility in which the physician assistant or advanced practice registered nurse practices.

Section 157.054(a-1) states that the limits on the number of advanced practice registered nurses or physician assistants to whom a physician may delegate under §157.0512 do not apply to a physician under §157.054(a) whose practice is facility-based under §157.054 provided that the physician is not delegating in a freestanding clinic, center, or practice of the facility.

Section 157.054(b) states that a physician's authority to delegate under §157.054(a) is limited as follows: (i) the delegation must be made under a physician's order, standing medical or-

der, standing delegation order, or another order or protocol developed in accordance with policies approved by the facility's medical staff or a committee of the facility's medical staff as provided by the facility bylaws; (ii) the delegation must occur in the facility in which the physician is the medical director, the chief of medical staff, the chair of the credentialing committee, a department chair, or a physician who consents to delegate under §157.054(a)(4); (iii) the delegation may not permit the prescribing or ordering of a drug or device for the care or treatment of the patients of any other physician without the prior consent of that physician; and (iv) delegation in a long-term care facility must be by the medical director and is limited to the prescribing or ordering of a drug or device to not more than seven advanced practice registered nurses or physician assistants or their full-time equivalents.

Section 157.054(b-1) states that a facility-based physician may not delegate at more than one hospital or more than two long-term care facilities under this section unless approved by the board. The facility-based physician may not be prohibited from delegating the prescribing or ordering of drugs or devices under §157.0512 at other practice locations, including hospitals or long-term care facilities, provided that the delegation at those locations complies with all the requirements of §157.0512.

Section 157.054(c) states that physician supervision of the prescribing or ordering of a drug or device must conform to what a reasonable, prudent physician would find consistent with sound medical judgment but may vary with the education and experience of the particular advanced practice registered nurse or physician assistant. A physician shall provide continuous supervision, but the constant physical presence of the physician is not required.

Section 157.055 states that a protocol or other order shall be defined in a manner that promotes the exercise of professional judgment by the advanced practice registered nurse and physician assistant commensurate with the education and experience of that person. Under §157.055, an order or protocol used by a reasonable and prudent physician exercising sound medical judgment: (i) is not required to describe the exact steps that an advanced practice registered nurse or a physician assistant must take with respect to each specific condition, disease, or symptom; and (ii) may state the types or categories of medications that may be prescribed or the types or categories of medications that may not be prescribed.

Section 157.057 states that the board may adopt additional methods to implement: (i) a physician's prescription; or (ii) the delegation of prescriptive authority.

Section 157.059(b) states that a physician may delegate to a physician assistant offering obstetrical services and certified by the board as specializing in obstetrics or an advanced practice registered nurse recognized by the Texas Board of Nursing as a nurse midwife the act of administering or providing controlled substances to the physician assistant's or nurse midwife's clients during intrapartum and immediate postpartum care.

Section 157.059(d) states that the delegation of authority to administer or provide controlled substances under §157.059(b) must be under a physician's order, medical order, standing delegation order, prescriptive authority agreement, or protocol that requires adequate and documented availability for access to medical care.

Section 157.059(e) states that the physician's orders, medical orders, standing delegation orders, prescriptive authority agreements, or protocols must require the reporting of or monitoring of each client's progress, including complications of pregnancy and delivery and the administration and provision of controlled substances by the nurse midwife or physician assistant to the clients of the nurse midwife or physician assistant.

Section 157.059(f) states that the authority of a physician to delegate under §157.059 is limited to: (i) seven nurse midwives or physician assistants or their full-time equivalents; and (ii) the designated facility at which the nurse midwife or physician assistant provides care.

Section 157.059(j) states that §157.059 does not limit the authority of a physician to delegate the prescribing or ordering of a controlled substance under Chapter 157, Subchapter B.

Section 157.060 states that, unless the physician has reason to believe the physician assistant or advanced practice registered nurse lacked the competency to perform the act, a physician is not liable for an act of a physician assistant or advanced practice registered nurse solely because the physician signed a standing medical order, a standing delegation order, or another order or protocol, or entered into a prescriptive authority agreement, authorizing the physician assistant or advanced practice registered nurse to administer, provide, prescribe, or order a drug or device.

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

Section 301.152(a) states that "advanced practice registered nurse" means a registered nurse licensed by the board to practice as an advanced practice registered nurse on the basis of completion of an advanced educational program. The term includes a nurse practitioner, nurse midwife, nurse anesthetist, and clinical nurse specialist. The term is synonymous with "advanced nurse practitioner" and "advanced practice nurse."

Section 301.152(b) states that the Board shall adopt rules to: (i) license a registered nurse as an advanced practice registered nurse; (ii) establish: (A) any specialized education or training, including pharmacology, that an advanced practice registered nurse must have to prescribe or order a drug or device as delegated by a physician under §157.0512 or §157.054; (B) a system for approving an advanced practice registered nurse to prescribe or order a drug or device as delegated by a physician under §157.0512 or §157.054 on the receipt of evidence of completing the specialized education and training requirement under paragraph (A); and (C) a system for issuing a prescription authorization number to an advanced practice registered nurse approved under paragraph (B); and (iii) concurrently renew any license or approval granted to an advanced practice registered nurse under §301152(b) and a license renewed by the advanced practice registered nurse under§301.301.

Section 301.152(c) states that at a minimum, the rules adopted under §301.152(b)(2) must: (i) require completion of pharmacology and related pathophysiology education for initial approval; and (ii) require continuing education in clinical pharmacology and related pathophysiology in addition to any continuing education otherwise required under §301.303.

Section 301.452(a) defines intemperate use to include practicing nursing or being on duty or on call while under the influence of alcohol or drugs.

Section 301.452(b) provides that a person is subject to denial of a license or to disciplinary action under Subchapter J for: (i) a violation of Chapter 301, a rule or regulation not inconsistent with Chapter 301, or an order issued under Chapter 301; (ii) fraud or deceit in procuring or attempting to procure a license to practice professional nursing or vocational nursing; (iii) a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude; (iv) conduct that results in the revocation of probation imposed because of conviction for a felony or for a misdemeanor involving moral turpitude; (v) use of a nursing license, diploma, or permit, or the transcript of such a document, that has been fraudulently purchased, issued, counterfeited, or materially altered; (vi) impersonating or acting as a proxy for another person in the licensing examination required under §301.253 or §301.255; (vii) directly or indirectly aiding or abetting an unlicensed person in connection with the unauthorized practice of nursing; (viii) revocation, suspension, or denial of, or any other action relating to, the person's license or privilege to practice nursing in another jurisdiction; (ix) intemperate use of alcohol or drugs that the Board determines endangers or could endanger a patient; (x) unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public; (xi) adjudication of mental incompetency; (xii) lack of fitness to practice because of a mental or physical health condition that could result in injury to a patient or the public; or (xiii) failure to care adequately for a patient or to conform to the minimum standards of acceptable nursing practice in a manner that, in the Board's opinion, exposes a patient or other person unnecessarily to risk of harm.

Section 301.452(c) provides that the Board may refuse to admit a person to a licensing examination for a ground described under §301.452(b).

Section 301.452(d) provides that the Board by rule shall establish guidelines to ensure that any arrest information, in particular information on arrests in which criminal action was not proven or charges were not filed or adjudicated, that is received by the Board under §301.452 is used consistently, fairly, and only to the extent the underlying conduct relates to the practice of nursing.

Section 301.453(a) provides that, if the Board determines that a person has committed an act listed in §301.452(b), the Board shall enter an order imposing one or more of the following: (i) denial of the person's application for a license, license renewal, or temporary permit; (ii) issuance of a written warning; (iii) administration of a public reprimand; (iv) limitation or restriction of the person's license, including limiting to or excluding from the person's practice one or more specified activities of nursing or stipulating periodic Board review; (v) suspension of the person's license for a period not to exceed five years; (vi) revocation of the person's license; or (vii) assessment of a fine.

Section 301.453(b) provides that, in addition to or instead of an action under 301.453(a), the Board, by order, may require the person to: (i) submit to care, counseling, or treatment by a health provider designated by the Board as a condition for the issuance or renewal of a license; (ii) participate in a program of education or counseling prescribed by the Board; (iii) practice for a specified period under the direction of a registered nurse or vocational nurse designated by the Board; or (iv) perform public service the Board considers appropriate.

Section 301.453(c) provides that the Board may probate any penalty imposed on a nurse and may accept the voluntary surrender of a license. The Board may not reinstate a surrendered license unless it determines that the person is competent to resume practice.

Section 301.453(d) states that if the Board suspends, revokes, or accepts surrender of a license, the Board may impose conditions for reinstatement that the person must satisfy before the Board may issue an unrestricted license.

Section 301.4531(a) states that the Board by rule shall adopt a schedule of the disciplinary sanctions that the Board may impose under Chapter 301. In adopting the schedule of sanctions, the Board shall ensure that the severity of the sanction imposed is appropriate to the type of violation or conduct that is the basis for disciplinary action.

Section 301.4531(b) states, in determining the appropriate disciplinary action, including the amount of any administrative penalty to assess, the Board shall consider: (i) whether the person is being disciplined for multiple violations of either Chapter 301 or a rule or order adopted under Chapter 301 or has previously been the subject of disciplinary action by the Board and has previously complied with Board rules and Chapter 301; (ii) the seriousness of the violation; (iii) the threat to public safety; and (iv) any mitigating factors.

Section 301.4531(c) provides that, in the case of a person described by §301.4531(b)(1)(A), the Board shall consider taking a more severe disciplinary action, including revocation of the person's license, than the disciplinary action that would be taken for a single violation; and in the case of a person described by §301.4531(b)(1)(B), the Board shall consider taking a more severe disciplinary action, including revocation of the person's license, than the disciplinary action that would be taken for a person who has not previously been the subject of disciplinary action by the Board.

Cross Reference to Statute. The following statutes are affected by this proposal: Occupations Code Chapter 157 and §§301.151, 301.152, 301.452, 301.453, and 301.4531.

§222.1. Definitions.

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

(1) Advanced health assessment--A course that offers content supported by related clinical experience such that students gain the knowledge and skills needed to perform comprehensive assessments to acquire data, make diagnoses of health status, and formulate effective clinical management plans. Content must include assessment of all human systems, advanced assessment techniques, concepts, and approaches.

(2) Advanced Pharmacotherapeutics--A course that offers advanced content in pharmacokinetics, pharmacodynamics, pharmacotherapeutics of all broad categories of agents, and the application of drug therapy to the treatment of disease and/or the promotion of health.

(3) Advanced Physiology and Pathophysiology--A dedicated, comprehensive, system-focused pathology course(s) that provides students with the knowledge and skills to analyze the relationship between normal physiology and pathological phenomena produced by altered states across the life span.

(4) Advanced practice registered nurse (APRN)--A registered nurse who:

(A) has completed a graduate-level advanced practice nursing education program that prepares him/her for one of the four APRN roles;

(B) has passed a national certification examination recognized by the Board that measures APRN role and population focused competencies;

(C) maintains continued competence as evidenced by re-certification/certification maintenance in the role and population focus through the national certification program;

(D) practices by building on the competencies of registered nurses by demonstrating a greater depth and breadth of knowledge, a greater synthesis of data, and greater role autonomy, as permitted by state law;

(E) is educationally prepared to assume responsibility and accountability for health promotion and/or maintenance, as well as the assessment, diagnosis, and management of patient problems, including the use and prescription of pharmacologic and non-pharmacologic interventions in compliance with state law;

(F) has clinical experience of sufficient depth and breadth to reflect the intended practice; and

(G) has been granted a license to practice as an APRN in one of the four APRN roles and at least one population focus area recognized by the Board.

(5) Board--The Texas Board of Nursing.

(6) Controlled Substance--A substance, including a drug, adulterant, and dilutant, listed in Schedules I through V or Penalty Groups 1, 1-A, or 2 through 4 of Chapter 481, Health and Safety Code (Texas Controlled Substances Act). The term includes the aggregate weight of any mixture, solution, or other substance containing a controlled substance.

(7) Dangerous Drug--A device or drug that is unsafe for self-medication and that is not included in Schedules I through V or Penalty Groups 1 through 4 of Chapter 481, Health and Safety Code (Texas Controlled Substances Act). The term includes a device or drug that bears, or is required to bear, the legend: "Caution: federal law prohibits dispensing without prescription" or "Rx only" or another legend that complies with federal law.

(8) Device--An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including a component part or accessory, that is required under federal or state law to be ordered or prescribed by a practitioner. The term includes durable medical equipment.

(9) Diagnosis and management course--A course offering both didactic and clinical content in clinical decision-making and aspects of medical diagnosis and medical management of diseases and conditions. Supervised clinical practice must include the opportunity to provide pharmacological and non-pharmacological management of diseases and conditions considered within the scope of practice of the APRN's population focus area and role.

(10) Durable medical equipment--Equipment, furnished by a supplier or a home health agency that meets the following conditions:

(A) can withstand repeated use;

(B) is primarily and customarily used to serve a medical purpose;

(C) generally is not useful to an individual in the absence of an illness or injury; and

(D) is appropriate for use in the home.

(11) Facility-based practice site--A licensed hospital or licensed long term care facility that serves as the practice location for the APRN.

(12) General hospital--An establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals requiring diagnosis, treatment, or care for illness, injury, deformity, abnormality, or pregnancy; and

(B) regularly maintains, at a minimum, clinical laboratory services, diagnostic x-ray services, treatment facilities, including surgery or obstetrical care or both, and other definitive medical or surgical treatment of similar extent.

(13) Health professional shortage area--

(A) An urban or rural area of this state that:

(i) is not required to conform to the geographic boundaries of a political subdivision but is a rational area for the delivery of health services;

(ii) the Secretary of Health and Human Services determines has a health professional shortage; and

(iii) is not reasonably accessible to an adequately served area;

(B) A population group that the Secretary of Health and Human Services determines has a health professional shortage; or

(C) A public or non-profit private medical facility or other facility that the Secretary of Health and Human Services determines has a health profession shortage as described by 42 U.S.C. §254e(a)(1).

(14) Hospital--A facility that:

(A) is:

(i) a general hospital or a special hospital, as those terms are defined by §241.003, Health and Safety Code, including a hospital maintained or operated by a state; or

(ii) a mental hospital licensed under Chapter 577, Health and Safety Code; and

(B) has an organized medical staff.

(15) Medication order--An order for administration of a drug or device to a patient in a hospital for administration while the patient is in the hospital or for emergency use on the patient's release from the hospital, as defined by §551.003, Occupations Code and §481.002, Health and Safety Code.

(16) Non-prescription drug--A non-narcotic drug or device that may be sold without a prescription and that is labeled and packaged in compliance with state or federal law.

(17) Physician group practice--An entity through which two or more physicians deliver health care to the public through the practice of medicine on a regular basis and that is:

(A) owned and operated by two or more physicians; or

(B) a freestanding clinic, center, or office of a non-profit health organization certified by the Texas Medical Board that complies with the requirements of Chapter 162, Occupations Code.

(18) Population focus area--The section of the population with which the APRN has been licensed to practice by the Board.

(19) Practice serving a medically under-served population--

(A) A practice in a health professional shortage area;

(B) A clinic designated as a rural health clinic under 42 U.S.C. §1395X(aa);

(C) A public health clinic or a family planning clinic under contract with the Health and Human Services Commission or the Department of State Health Services;

(D) A clinic designated as a federally qualified health center under 42 U.S.C. §1396d(1)(2)(B);

(E) A county, state, or federal correctional facility;

(F) A practice:

(i) that either:

(I) is located in an area in which the Department of State Health Services determines there is an insufficient number of physicians providing services to eligible clients of federally, state, or locally funded health care programs; or

(II) is a practice that the Department of State Health Services determines serves a disproportionate number of clients eligible to participate in federally, state, or locally funded health care programs; and

(ii) for which the Department of State Health Services publishes notice of the department's determination in the *Texas Register* and provides an opportunity for public comment in the manner provided for a proposed rule under Chapter 2001, Government Code; or

(G) A practice at which a physician was delegating prescriptive authority to an APRN or physician assistant on or before March 1, 2013, based on the practice qualifying as a site serving a medically under-served population.

(20) Prescribe or order a drug or device--Determining the dangerous drugs, controlled substances, or devices that shall be used by or administered to a patient exercised in compliance with state and federal law, including the issuance of a prescription drug order or a medication order.

(21) Prescription drug--

(A) A substance for which federal or state law requires a prescription before the substance may be legally dispensed to the public;

(B) A drug or device that under federal law is required, before being dispensed or delivered, to be labeled with the statement "Caution: federal law prohibits dispensing without prescription" or "Rx only" or another legend that complies with federal law; or

(C) A drug or device that is required by federal or state statute or regulation to be dispensed on prescription or that is restricted to use by a practitioner only.

(22) Prescriptive authority agreement--An agreement entered into by an APRN and a physician through which the physician delegates the act of prescribing or ordering a drug or device to the APRN.

(23) Protocols or other written authorization--Written authorization to provide medical aspects of patient care that are agreed upon and signed by the APRN and collaborating physician, reviewed and signed at least annually, and maintained in the practice setting of the APRN. Protocols or other written authorization shall be defined to promote the exercise of professional judgment by the APRN commensurate with his/her education and experience. Such protocols or other written authorization need not describe the exact steps that the APRN must take with respect to each specific condition, disease, or symptom and may state types or categories of drugs that may be prescribed rather than just list specific drugs.

(24) Shall and must--Mandatory requirements.

(25) Should--A recommendation.

(26) Special hospital--An establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals who are regularly admitted, treated, and discharged and who require services more intensive than room, board, personal services, and general nursing care;

(B) has clinical laboratory facilities, diagnostic x-ray facilities, treatment facilities, or other definitive medical treatment;

(C) has a medical staff in regular attendance as required by the rules of the Department of State Health Services; and

(D) maintains records of the clinical work performed for each patient.

§222.2. Approval for Prescriptive Authority.

(a) To be issued a prescription authorization number to prescribe or order a drug or device, a registered nurse (RN) shall:

(1) have full licensure from the Board to practice as an APRN. RNs with Interim Approval to practice as APRNs are not eligible for prescriptive authority; and

(2) file a complete application for Prescriptive Authority and submit such evidence as required by the Board to verify successful completion of graduate level courses in advanced pharmacotherapeutics, advanced pathophysiology, advanced health assessment, and diagnosis and management of diseases and conditions within the role and population focus area.

(A) Nurse Practitioners, Nurse-Midwives, and Nurse Anesthetists will be considered to have met the course requirements of this section on the basis of courses completed in the advanced practice nursing educational program.

(B) Clinical Nurse Specialists shall submit documentation of successful completion of separate, dedicated, graduate level courses in the content areas described in paragraph (2) of this subsection. These courses shall be academic courses with a minimum of 45 clock hours per course from a nursing program accredited by an organization recognized by the Board.

(C) Clinical Nurse Specialists who were previously approved by the Board as APRNs by petition on the basis of completion of a non-nursing master's degree shall not be eligible for prescriptive authority.

(b) APRNs applying for prescriptive authority on the basis of endorsement of advanced practice licensure and prescriptive authority issued in another state must provide evidence that all education requirements for prescriptive authority in this state have been met.

§222.3. Renewal of Prescriptive Authority.

(a) The APRN shall renew the privilege to sign prescription drug orders in conjunction with the RN and advanced practice license renewal application.

(b) The APRN seeking to maintain prescriptive authority shall attest, on forms provided by the Board, to completing at least five contact hours of continuing education in pharmacotherapeutics within the

preceding biennium. Those APRNs seeking to maintain prescriptive authority who order or prescribe controlled substances shall attest, on forms provided by the Board, to completing at least three additional contact hours of continuing education related to prescribing controlled substances within the preceding biennium.

(c) The continuing education requirements in subsection (b) of this section shall be in addition to continuing education required under Chapter 216 of this title (relating to Continuing Competency).

§222.4. Minimum Standards for Prescribing or Ordering Drugs and Devices.

(a) The APRN with a valid prescription authorization number shall:

(1) order or prescribe only those drugs or devices that are:

(A) authorized by a prescriptive authority agreement or, if practicing in a facility-based practice, authorized by either a prescriptive authority agreement or protocols or other written authorization; and

(B) ordered or prescribed for patient populations within the accepted scope of professional practice for the APRN's license;

(2) comply with the requirements for chart reviews specified in the prescriptive authority agreement and periodic face to face meetings set forth in this chapter; and

(3) comply with the requirements set forth in protocols or other written authorization if ordering or prescribing drugs or devices under facility-based protocols or other written authorization.

(b) Prescription Information. The format and essential elements of a prescription drug order shall comply with the requirements of the Texas State Board of Pharmacy. The following information must be provided on each prescription:

(1) the patient's name and address;

(2) the name, strength, and quantity of the drug to be dispensed;

(3) directions to the patient regarding taking of the drug and the dosage;

(4) the intended use of the drug, if appropriate;

(5) the name, address, and telephone number of the physician with whom the APRN has a prescriptive authority agreement or facility-based protocols or other written authorization;

(6) address and telephone number of the site at which the prescription drug order was issued;

(7) the date of issuance;

(8) the number of refills permitted;

(9) the name, prescription authorization number, and original signature of the APRN who authorized the prescription drug order; and

(10) the United States Drug Enforcement Administration numbers of the APRN and the collaborating physician, if the prescription drug order is for a controlled substance.

(c) Generic Substitution. The APRN shall authorize or prevent generic substitution on a prescription in compliance with the current rules of the Texas State Board of Pharmacy relating to generic substitution.

(d) An APRN may order or prescribe medications for sexually transmitted diseases for partners of an established patient, if the APRN assesses the patient and determines that the patient may have been infected with a sexually transmitted disease. Nothing in this subsection shall be construed to require the APRN to issue prescriptions for partners of patients.

(e) APRNs may order or prescribe only those medications that are FDA approved unless done through protocol registration in a United States Institutional Review Board or Expanded Access authorized clinical trial. "Off label" use, or prescription of FDA-approved medications for uses other than that indicated by the FDA, is permitted when such practices are:

(1) within the current standard of care for treatment of the disease or condition; and

(2) supported by evidence-based research.

(f) The APRN with prescriptive authority shall cooperate with representatives of the Board and the Texas Medical Board during an inspection and audit relating to the operation and implementation of a prescriptive authority agreement.

§222.5. Prescriptive Authority Agreement.

(a) The prescriptive authority agreement is the mechanism by which an APRN is delegated the authority to order or prescribe drugs or devices by a physician.

(b) An APRN with prescriptive authority and a physician are eligible to enter into or be parties to a prescriptive authority agreement only if the APRN:

(1) holds an active license to practice in this state that is in good standing. For purposes of this chapter, good standing means that the nurse's license is not in delinquent status and that there is no current disciplinary action, disciplinary probation, or pending investigation(s) on his/her nursing license(s) or authorization(s);

(2) is not currently prohibited by the Board from executing a prescriptive authority agreement; and

(3) before executing the prescriptive authority agreement, the APRN and the physician disclose to the other prospective party to the agreement any prior disciplinary action by the applicable licensing board.

(c) A prescriptive authority agreement must, at a minimum:

(1) be in writing and signed and dated by the parties to the agreement;

(2) state the name, address, and all professional license numbers of the parties to the agreement;

(3) state the nature of the practice, practice locations, or practice settings;

(4) identify either:

(A) the types or categories of drugs or devices that may be prescribed; or

(B) the types of categories of drugs or devices that may not be prescribed;

(5) provide a general plan for addressing consultation and referral;

(6) provide a plan for addressing patient emergencies;

(7) state the general process for communication and the sharing of information between the APRN and the physician related to the care and treatment of patients;

(8) designate one or more alternate physicians who may participate in the execution of the prescriptive authority agreement in accordance with the rules of the Texas Medical Board if an alternate physician arrangement is to be utilized; and

(9) describe a prescriptive authority quality assurance and improvement plan and specify methods for documenting the implementation of the plan that includes the following:

(A) chart review, with the number of charts to be reviewed determined by the APRN and physician; and

(B) periodic face to face meetings between the APRN and the physician at a location agreed upon by both providers.

(d) The periodic face to face meetings described by subsection (c)(9)(B) of this section must:

(1) include:

(A) the sharing of information relating to patient treatment and care, needed changes in patient care plans, and issues relating to referrals; and

(B) discussion of patient care improvement; and

(2) be documented and occur:

(A) except as provided by subparagraph (B) of this paragraph:

(i) at least monthly until the third anniversary of the date the agreement is executed; and

(ii) at least quarterly after the third anniversary of the date the agreement is executed, with monthly meetings held between the quarterly meetings by means of a remote electronic communications system, including video conferencing technology or the internet; or

(B) if during the seven years preceding the date the agreement is executed, the APRN was in a practice for at least five years that included the exercise of prescriptive authority with required physician supervision:

(i) at least monthly until the first anniversary of the date the agreement was executed; and

(ii) at least quarterly after the first anniversary of the date the agreement is executed, with monthly meetings held between the quarterly meetings by means of a remote electronic communications system, including video conferencing technology or the internet.

(e) Although a prescriptive authority agreement must include the information specified by this section, the agreement may include other provisions agreed to by the APRN and physician, including provisions that were previously contained in protocols or other written authorization.

(f) The APRN shall participate in quality assurance meetings with an alternate physician in a physician group practice if the alternate physician has been designated to conduct and document the meeting.

(g) The prescriptive authority agreement is not required to describe the exact steps that an APRN must take with respect to each specific condition, disease, or symptom.

(h) An APRN who is a party to a prescriptive authority agreement must retain a copy of the agreement until the second anniversary of the date the agreement is terminated.

(i) A party to the prescriptive authority agreement may not by contract waive, void, or nullify any provision of this rule.

(j) In the event that a party to a prescriptive authority agreement is notified that the individual has become the subject of an investigation by the respective licensing board, the individual shall immediately notify the other party to the prescriptive authority agreement.

(k) The prescriptive authority agreement and any amendments must be reviewed at least annually, dated, and signed by the parties to the agreement. The prescriptive authority agreement shall be made available to the Board, the Texas Medical Board, or the Texas Physician Assistant Board not later than the third business day after the date of receipt of the request from the respective licensing board.

(l) The prescriptive authority agreement should promote the exercise of professional judgment by the APRN commensurate with the APRN's education and experience and the relationship between the APRN and the physician.

§222.6. Prescribing at Facility-Based Practice Sites.

(a) When ordering or prescribing a drug or device at a facility-based practice site, the APRN with prescriptive authority shall:

(1) maintain either a prescriptive authority agreement that meets the requirements of this section or protocols or other written authorization developed in accordance with facility medical staff policies and review the authorizing documents with the appropriate medical staff at least annually;

(2) order or prescribe drugs and devices in a hospital-based facility in which the delegating physician is the medical director, the chief of medical staff, the chair of the credentialing committee, or a department chair, or a physician who consents to the request of the medical director or chief of the medical staff to delegate;

(3) order or prescribe drugs and devices in a long-term care facility in which the delegating physician is the medical director; and

(4) order or prescribe drugs and devices for the care or treatment of only those patients for whom physicians have given their prior consent.

(b) Protocols or other written authorization is authorization to provide medical aspects of patient care that are agreed upon and signed by the APRN and the physician, reviewed and signed at least annually, and maintained in the practice setting of the APRN. Protocols or other written authorization shall be defined to promote the exercise of professional judgment by the APRN commensurate with his/her education and experience. Protocols or other written authorization need not describe the exact steps that the APRN must take with respect to each specific condition, disease, or symptom and may state types or categories of drugs that may be ordered or prescribed.

§222.7. Orders and Prescriptions for Non-prescription Drugs, Dangerous Drugs, and Devices.

APRNs with full licensure and valid prescription authorization numbers are eligible to order or prescribe non-prescription drugs, dangerous drugs, and devices, including durable medical equipment, in accordance with the standards and requirements set forth in this chapter. APRNs with full licensure and valid prescription authorization numbers are not eligible to order or prescribe controlled substances unless they meet the applicable requirements of this rule.

§222.8. Orders and Prescriptions for Controlled Substances.

(a) APRNs with full licensure and valid prescription authorization numbers are eligible to obtain authority to order and prescribe certain categories of controlled substances. The APRN must comply with all federal and state laws and regulations relating to the ordering and prescribing of controlled substances in Texas, including but not limited to, requirements set forth by the Texas Department of Public Safety and the United States Drug Enforcement Administration.

(b) Orders and prescriptions for controlled substances in Schedules III through V may be authorized, provided the following criteria are met:

(1) Prescriptions for a controlled substance in Schedules III through V, including a refill of the prescription, shall not exceed a 90 day supply. This requirement includes a prescription, either in the form of a new prescription or in the form of a refill, for the same controlled substance that a patient has been previously issued within the time period described by this subsection.

(2) Beyond the initial 90 days, the refill of a prescription for a controlled substance in Schedules III through V shall not be authorized prior to consultation with the delegating physician and notation of the consultation in the patient's chart.

(3) A prescription of a controlled substance in Schedules III through V shall not be authorized for a child less than two years of age prior to consultation with the delegating physician and notation of the consultation in the patient's chart.

(c) Orders and prescriptions for controlled substances in Schedule II may be authorized only:

(1) in a hospital facility-based practice, in accordance with policies approved by the hospital's medical staff or a committee of the hospital's medical staff as provided by the hospital's bylaws to ensure patient safety and as part of care provided to a patient who:

(A) has been admitted to the hospital for an intended length of stay of 24 hours or greater; or

(B) is receiving services in the emergency department of the hospital; or

(2) as part of the plan of care for the treatment of a person who has executed a written certification of a terminal illness, has elected to receive hospice care, and is receiving hospice treatment from a qualified hospice provider.

(d) APRNs with full licensure and valid prescription authorization must comply with all federal and state laws and regulations relating to the prescribing of controlled substances in Texas, including but not limited to, requirements set forth by the Texas Department of Public Safety and the United States Drug Enforcement Administration.

§222.9. Conditions for Obtaining and Distributing Drug Samples.

The APRN with full licensure and a valid prescription authorization number may request, receive, possess, and distribute prescription drug samples provided:

(1) all requirements for the APRN to order and prescribe medications and devices are met;

(2) a prescriptive authority agreement or facility-based protocols or other written authorization authorizes the APRN to order and prescribe the medications and devices;

(3) the samples are for only those drugs or devices that the APRN is eligible to order or prescribe in accordance with the standards and requirements set forth in this chapter; and

(4) a record of the sample is maintained and samples are labeled as specified in the Dangerous Drug Act (Chapter 483, Health and Safety Code) or the Texas Controlled Substances Act (Chapter 481, Health and Safety Code) and 37 Texas Administrative Code Chapter 13.

§222.10. Enforcement.

(a) Any APRN who violates the sections of this rule or orders or prescribes in a manner that is not consistent with the standard of care shall be subject to removal of the authority to prescribe under this section and disciplinary action by the Board. Behaviors associated with ordering and prescribing medications for which the Board may impose disciplinary action include, but are not limited to:

(1) ordering, prescribing, dispensing, or administering medications or devices for other than evidenced based therapeutic or prophylactic purposes that meet the minimum standards of care;

(2) ordering, prescribing, or dispensing medications or devices for personal use;

(3) failing to properly assess and document the assessment prior to ordering, prescribing, dispensing, or administering a medication or device;

(4) selling, purchasing, trading, or offering to sell, purchase, or trade a prescription drug sample; and

(5) delegation of authority to any other person to order, prescribe, or dispense of an order or prescription for a drug or device.

(b) Failure to cooperate with a representative of the Board who conducts an onsite investigation may result in disciplinary action. Failure to cooperate with a representative of the Board or the Texas Medical Board who inspects and audits the practice relating to the implementation and operation of the prescriptive authority agreement may result in disciplinary action.

(c) The Board shall immediately notify the Texas Medical Board and the Texas Physician Assistant Board:

(1) when an APRN licensed by the Board becomes the subject of an investigation involving the delegation and supervision of prescriptive authority; and

(2) upon the final disposition of an investigation involving an APRN licensed by the Board and the delegation and supervision of prescriptive authority.

(d) Upon receipt of notice from the Texas Medical Board and/or the Texas Physician Assistant Board that a licensee of one of those boards is under investigation involving the delegation and supervision of prescriptive authority, the Board may open an investigation against an APRN who is a party to the prescriptive authority agreement with the licensee who is under investigation by the board that provided the notice.

(e) The Board shall report to the Texas Department of Public Safety and the United States Drug Enforcement Administration any of the following:

(1) any significant changes in the status of the RN license or advanced practice license; or

(2) disciplinary action impacting an APRN's ability to authorize or issue prescription drug orders.

(f) The practice of the APRN approved by the Board to sign prescription drug orders is subject to monitoring by the Board on a periodic basis.

(g) The Board shall maintain a list of APRNs who have been subject to a final adverse disciplinary action for an act involving the delegation and supervision of prescriptive authority.

(h) The Board shall provide information to the public regarding APRNs who are prohibited from entering into or practicing under a prescriptive authority agreement.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 29, 2013.

TRD-201303089
Jena Abel
Assistant General Counsel
Texas Board of Nursing
Earliest possible date of adoption: September 8, 2013
For further information, please call: (512) 305-6822

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CHAPTER 223. FEES

22 TAC §223.1

Introduction. The Texas Board of Nursing (Board) proposes amendments to §223.1, relating to Fees. The amendments are proposed under the Occupations Code §§301.155, 301.157, and 301.151 and are necessary to: (i) establish, in rule, a $500 filing fee for an out-of-state nursing education program seeking to conduct clinical learning experiences in Texas; and (ii) reduce the licensure renewal fee for registered nurses (RN) from $73 to $70.

Background

Under current Board rules §214.3 and §215.3, an out-of-state nursing education program may seek Board approval to conduct clinical learning experiences in Texas. The requirements that an out-of-state nursing education program must meet in order to receive such approval are currently set out in Board rules §214.3 and §215.3 and Board Education Guideline 3.1.1.f.

The Board is authorized by the Occupations Code §301.155 to establish fees in amounts reasonable and necessary to cover the costs of administering the Nursing Practice Act, including costs associated with reviewing and approving nursing education programs in Texas. Since January 2008, the Board has approved 11 out-of-state nursing education programs to conduct clinical learning experiences in Texas. It has been the Board's historical practice to require these programs to submit a $500 filing fee with their approval requests in lieu of the $2,500 filing fee normally required for the approval of an in-state nursing education program proposal.

The Board has determined that a filing fee of $500 for the review and approval of an out-of-state nursing education program to conduct clinical learning experiences in Texas is appropriate and reasonable. First, the Board anticipates that this proposed filing fee will better assist the Board in offsetting a portion of the costs associated with the review of these requests. When an out-of-state nursing education program submits an approval request to the Board, the proposal must be carefully reviewed by Board Staff to determine if the program meets the requirements of the Board's rules and education guideline. If the program is found to be deficient in any area, Board Staff may need to consult with the program to clarify and/or resolve such deficiencies. This review process can consume Staff time and Board resources. Second, out-of-state nursing education programs must be fully approved/accredited by their own state boards of nursing and approved/accredited/licensed by the appropriate Texas agency (i.e., Texas Higher Education Coordinating Board (THECB), Texas Workforce Commission (TWC)) to conduct business/educational activities in Texas or be deemed exempt from such approval/accreditation/or licensure requirements prior to receiving the Board's approval to operate in Texas. Therefore, while Board Staff must review the program's request carefully, the amount of time that Board Staff must spend reviewing the program's request is typically less than the amount of time Board Staff must spend when reviewing the proposal of an in-state nursing education program seeking initial approval from the Board. Because out-of-state nursing education programs have already been reviewed by at least one other nursing licensing authority and other state licensing entities, such as the THECB or TWC, prior to being approved by the Board, the Board has typically only required a $500 filing fee for these out-of-state nursing education programs, which more accurately reflects the amount of Staff time and Board resources that must be spent in reviewing these types of requests. The proposed amendments formalize the Board's historical practice in this regard in rule.

The Board is simultaneously proposing amendments to §214.3 and §215.3 of this title (relating to Program Development, Expansion, and Closure) to incorporate the proposed $500 filing fee for the approval of an out-of-state nursing education program to conduct clinical learning experiences in Texas into the current requirements that must be met by a program seeking such approval. These proposals are being published elsewhere in this issue of the *Texas Register.*

Further, in its budget request for the 2014 - 2015 biennium, the Board requested two new full time employee positions, an increase in funds to the Texas Peer Assistance Program for Nurses (TPAPN), and to cease the collection of pass-through fees to the Texas Department of Public Safety for criminal background checks. The 83rd Texas Legislature approved the appropriation of monies for the new staff positions in a contingency revenue rider, which requires the Board to assess or increase fees in an amount sufficient to generate $370,204 during the 2014 - 2015 biennium. However, the 83rd Texas Legislature approved an additional $417,116 for TPAPN without a fee increase and allowed the Board to cease collecting the fee for criminal background checks. As a result, the Board is proposing a reduction in the RN renewal fee from $73 to $70.

Section-by-Section Overview. Proposed amended §223.1(a)(3)(A) provides that the fee for the renewal of an RN license is $70 each biennium. Proposed amended §223.1(a)(27) provides that the fee for the approval of a nursing education program outside Texas' jurisdiction to conduct clinical learning experiences in Texas is $500.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendment to §223.1(a)(3)(A) will be in effect, there will be an approximate $1,606,355 decrease in annual revenue to state government as a result of ceasing collecting fees for the Texas Department of Public Safety and decreasing the RN renewal fee from $73 to $70. This estimate is based upon the following factors. First, the proposed amendment to §223.1(a)(3)(A) is based upon the fact the Board will no longer collect a fee upon renewal, endorsement, and examination for criminal background checks. The Board had been collecting up to $2,000,000 per year for this purpose but will now require all nursing applicants to pay the Texas Department of Public Safety directly for this service. Second, the 83rd Texas Legislature approved an increase of $208,558 per year for TPAPN, but did not require the Board to raise additional revenue to cover these costs, thus allowing the Board to utilize current revenue for this purpose. Finally, the 83rd Texas Legislature approved two additional Board staff positions, with the requirement that the Board raise fees to cover $185,102 per year for this associated cost.

Ms. Thomas has also determined that for each year of the first five years proposed amended §223.1(a)(27) will be in effect,

there may be an approximate $1,100 total annual increase in revenue to state government as a result of the enforcement or administration of the proposal due to estimated filing fees associated with out-of-state nursing education program approval requests. These estimates are based on the following factors.

Over the last five years, the Board has approved 11 out-of-state nursing education programs to conduct clinical learning experiences in Texas. The Board anticipates that it may approve a similar number of out-of-state nursing education programs to conduct clinical learning experiences in Texas over the next five years. If the Board approves at least 11 out-of-state nursing education programs to conduct clinical learning experiences in Texas over the next five years, there will be an approximate $1,100 total annual increase in revenue to state government as a result. If the Board approves more than 11 out-of-state nursing education programs to conduct clinical learning experiences in Texas over the next five years, there will be an additional $500 increase in revenue to state government for each additional nursing education program request that is approved. There are no anticipated effects on local employment or the local economy as a result of the proposal.

Public Benefit/cost Note. Ms. Thomas has further determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefits will be a reduction in the RN renewal fee and the availability of resources that will better enable the Board to ensure quality nursing education in Texas and safe direct patient care interaction in clinical learning experiences.

The proposed amendment to §223.1(a)(3)(A) slightly reduces the RN renewal fee, which will result in savings to registered nurses renewing their nursing licenses.

The proposed amendment to §223.1(a)(27) requires a filing fee of $500 for each out-of-state nursing education program that submits an approval request to the Board to conduct clinical learning experiences in Texas. The Board anticipates that this proposed filing fee will assist it in offsetting a portion of the costs associated with the review of these requests. Offsetting a portion of these costs will assist the Board in appropriately managing its resources so that Board Staff is able to adequately review each request from an out-of-state nursing education program seeking approval to conduct clinical learning experiences in Texas to ensure that it meets the Board's minimum standards.

Potential Costs for Persons Required to Comply with the Proposal

The Board does not anticipate any associated costs of compliance with the proposed amendment to §223.1(a)(3)(A). However, there may be associated costs of compliance with the proposed amendment to §223.1(a)(27).

Under the Occupations Code Chapter 301 and Board rules, an out-of-state nursing education program may submit a request to the Board to conduct clinical learning experiences in Texas. No person is required by law, however, to do so. For those programs who choose to enter the Texas nursing education market and request such approval from the Board, there will be associated costs of compliance with proposed amended §223.1(a)(27). The Board estimates that the total probable cost of compliance with proposed amended §223.1(a)(27) will be approximately $500 for each out-of-state nursing education program that requests approval to conduct clinical learning experiences in Texas. This estimate is based upon the following factors.

First, the proposed filing fee of $500 applies to every nursing education program outside Texas' jurisdiction that seeks the Board's approval to conduct clinical learning experiences in Texas. Thus, each out-of-state nursing education program seeking such approval will be required to submit a $500 filing fee. Second, the proposed filing fee of $500 is a flat fee. The amount of the fee will not change based upon a program's individual factors, such as the size of the program, the number of students enrolled in the program, or the amount of time that Board Staff may spend reviewing the program's request. Third, the Board estimates that a program should only incur the proposed filing fee one time. There are no renewal or maintenance fees associated with the Board's approval; therefore, once an out-of-state program has been approved by the Board to conduct clinical learning experiences in Texas, the program should not be subject to another filing fee or any other maintenance or renewal fees, unless the program's approval is withdrawn by the Board pursuant to Board rules §214.3 or §215.3. In the event that an out-of-state nursing education program's approval is withdrawn pursuant to Board rules §214.3 or §215.3, the program may be subject to a second $500 filing fee if the program chooses to re-apply for approval to conduct clinical learning experiences in Texas. Any other costs to comply with the proposed amendments result from the legislative enactment of Chapter 301 and are not a result of the adoption, enforcement, or administration of the proposal.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. The Government Code §2006.002(c) and (f) require, that if a proposed rule may have an economic impact on small businesses or micro businesses, state agencies must prepare, as part of the rulemaking process, an economic impact statement that assesses the potential impact of the proposed rule on these businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule.

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

There are no anticipated costs of compliance with proposed amended §223.1(a)(3)(A). However, there may be associated costs of compliance with proposed amended §223.1(a)(27). The Board has determined, however, that it highly likely that no out-of-state nursing education program that chooses to submit a request to conduct clinical learning experiences in Texas will qualify as a small or micro business under the Government Code §2006.001(a). This estimate is based upon the following factors.

The Board reviewed each of the 11 out-of-state nursing education programs that were approved by the Board to conduct clinical learning experiences in Texas since 2008. In examining the entities that sponsored/submitted the requests to conduct clinical learning experiences in Texas, the Board determined the following: (i) only 1 of the 11 submitting entities was formed for the purpose of making a profit; (ii) none of the submitting entities employed less than 100 employees or had less than $6 million

in annual gross receipts; and (iii) only 1 of the 11 submitting entities was independently owned or operated. Based upon this review, the Board has determined that none of the 11 submitting entities qualify to meet the definition of a small or micro business under the Government Code §2006.001(a). Further, 10% of the submitting entities were large career schools with multiple settings in several states. The Board anticipates that this is generally representative of the types of entities that would apply for approval to conduct clinical learning experiences in Texas. It would be generally inconsistent with the Board's experience for smaller, privately operated career schools that may fall within the definition of a small or micro business under the Government Code §2006.001(a) to pursue out-of-state clinical experiences. Therefore, the Board does not anticipate that the proposal will have an adverse effect on any small or micro business under the Government Code §2006.001(a).

Although the Board does not anticipate that the proposal will have an adverse effect on any small or micro business under the Government Code §2006.001(a), in the event that the proposal does have an adverse economic effect on a small or micro business that elects to enter the Texas nursing education market and, is therefore required to comply with the proposed amendments, the Board has determined that it is still not required to prepare a regulatory flexibility analysis as required in §2006.002(c)(2) of the Government Code for the following two reasons. First, small or micro businesses are not required by statute or by the proposed amendments to enter the Texas nursing education market to conduct clinical learning experiences. Therefore, those out-of-state nursing education programs that may qualify as small and micro businesses that submit a request to conduct clinical learning experiences in Texas do so at their own choice, and as a result, agree to bear any additional costs required for compliance with this proposal. The costs outlined in the Public Benefit/Cost Note part of this proposal provide sufficient cost information for a small or micro business to make an informed business decision regarding whether to enter the Texas nursing education market and submit a request for Board approval to conduct clinical learning experiences in Texas.

Second, the Government Code §2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Section 2006.002(c-1) requires that the regulatory analysis "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." Therefore, an agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small and micro businesses, would not be protective of the health, safety, and environmental and economic welfare of the state.

The Occupations Code §301.157(b) authorizes the Board to approve schools of nursing and educational programs that meet the Board's requirements. Section 301.157 authorizes the Board to establish fees that are necessary to cover the costs of administering Chapter 301. The purpose of these statutes is to provide the Board with sufficient resources to ensure quality nursing education and safe and effective clinical learning experiences in Texas. Proposed amended §223.1(a)(27) supports this goal by ensuring that the Board has adequate resources to adequately review every request from an out-of-state nursing education program that is submitted to the Board for approval. Small and micro businesses entering the Texas nursing education market must provide quality nursing education and ensure the safety of their clinical learning experiences. As a result, every out-of-state nursing education program request must be thoroughly reviewed to ensure compliance with this standard of excellence. The purpose of proposed amended §223.1(a)(27) and its authorizing statutes are to protect the health, safety, and economic welfare of Texas consumers and the state of Texas. The Board cannot ensure quality nursing education and safe clinical learning experiences, which is necessary for quality nursing care for all Texas consumers, without properly managing its resources to offset the costs associated with the review of out-of-state nursing education program requests. The appropriate management of the Board's existing resources is important to and protective of the health of Texas consumers. Further, the Board has already determined that lowering the filing fee for an out-of-state nursing education program to $500 (as compared to the filing fee of $2,500 for an in-state nursing education program seeking initial approval) is appropriate. However, eliminating or lowering this already nominal filing fee further would not appropriately offset the amount of Board resources that must be spent in reviewing these requests. As such, the Board has determined that there are no additional regulatory alternatives to the proposed amendments that will sufficiently protect the health, safety, and economic interests of Texas consumers and the welfare of the state.

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

Request for Public Comment. To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on September 9, 2013, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.texas.gov, or faxed to (512) 305-8101. An additional copy of the comments on the proposal or any request for a public hearing must be simultaneously submitted to Mark Majek, Director of Operations, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to mark.majek@bon.texas.gov, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The amendments are proposed under the Occupations Code §§301.155, 301.157, and 301.151.

Section 301.155(a) provides that the Board by rule shall establish fees in amounts reasonable and necessary to cover the costs of administering Chapter 301. Further, §301.155(a) provides that the Board may not set a fee that existed on September 1, 1993, in an amount less than the amount of that fee on that date.

Section 301.155(c) states that the Board shall assess a surcharge of not less than $3 or more than $5 for a registered nurse and a surcharge of not less than $2 or more than $3 for a vocational nurse to the fee established by the Board under §301.155(a) for a license holder to renew a license under Chapter 301. The Board may use nine cents of the registered nurse surcharge and six cents of the vocational nurse surcharge to cover the administrative costs of collecting and depositing the

surcharge. The Board quarterly shall transmit the remainder of each surcharge to the Department of State Health Services to be used only to implement the nursing resource section under the Health and Safety Code §105.002. The Board is not required to collect the surcharge if the Board determines the funds collected are not appropriated for the purpose of funding the nursing resource section.

Section 301.157(a) states that Board shall prescribe three programs of study to prepare a person to receive an initial license as a registered nurse under Chapter 301 as follows: (i) a baccalaureate degree program that is conducted by an educational unit in nursing that is a part of a senior college or university and that leads to a baccalaureate degree in nursing; (ii) an associate degree program that is conducted by an educational unit in nursing within the structure of a college or a university and that leads to an associate degree in nursing; and (iii) a diploma program that is conducted by a single-purpose school, usually under the control of a hospital, and that leads to a diploma in nursing.

Section 301.157(a-1) states that a diploma program of study in this state that leads to an initial license as a registered nurse under Chapter 301 and that is completed on or after December 31, 2014, must entitle a student to receive a degree on the student's successful completion of a degree program of a public or private institution of higher education accredited by an agency recognized by the Texas Higher Education Coordinating Board.

Section 301.157(b) states that the Board shall: (i) prescribe two programs of study to prepare a person to receive an initial professional nurse license under Chapter 301 as follows: a program conducted by an educational unit in nursing within the structure of a school, including a college, university, or proprietary school and a program conducted by a hospital; (ii) prescribe and publish the minimum requirements and standards for a course of study in each program that prepares registered nurses or professional nurses; (iii) prescribe other rules as necessary to conduct approved schools of nursing and educational programs for the preparation of registered nurses or professional nurses; (iv) approve schools of nursing and educational programs that meet the Board's requirements; (v) select one or more national nursing accrediting agencies, recognized by the United States Department of Education and determined by the Board to have acceptable standards, to accredit schools of nursing and educational programs; and (vi) deny or withdraw approval from a school of nursing or educational program that fails to meet the prescribed course of study or other standard under which it sought approval by the Board; fails to meet or maintain accreditation with the national nursing accrediting agency selected by the Board under §301.157(b)(5) under which it was approved or sought approval by the Board; or fails to maintain the approval of the state board of nursing of another state and the board under which it was approved.

Section 301.157(b-1) states that the Board may not require accreditation of the governing institution of a school of nursing. The Board shall accept the requirements established by the Texas Higher Education Coordinating Board for accrediting the governing institution of a school of nursing. The governing institution of a professional nursing school, not including a diploma program, must be accredited by an agency recognized by the Texas Higher Education Coordinating Board or hold a certificate of authority from the Texas Higher Education Coordinating Board under provisions leading to accreditation of the institution in due course.

Section 301.157(c) provides that a program approved to prepare registered nurses may not be less than two academic years or more than four calendar years.

Section 301.157(d) states that a person may not be certified as a graduate of any school of nursing or educational program unless the person has completed the requirements of the prescribed course of study, including clinical practice, of a school of nursing or educational program that: (i) is approved by the Board; (ii) is accredited by a national nursing accreditation agency determined by the Board to have acceptable standards; or (iii) is approved by a state board of nursing of another state and the Board, subject to §301.157(d-4).

Section 301.157(d-1) states that a school of nursing or educational program is considered approved by the Board and, except as provided by §301.157(d-7), is exempt from Board rules that require ongoing approval if the school or program: (i) is accredited and maintains accreditation through a national nursing accrediting agency selected by the Board under §301.157(b)(5); and (ii) maintains an acceptable pass rate as determined by the Board on the applicable licensing examination under Chapter 301.

Section 301.157(d-2) states that a school of nursing or educational program that fails to meet or maintain an acceptable pass rate on applicable licensing examinations under Chapter 301 is subject to review by the Board. The Board may assist the school or program in its effort to achieve compliance with the Board's standards.

Section 301.157(d-3) states that a school or program from which approval has been withdrawn under §301.157 may reapply for approval.

Section 301.157(d-4) states that the Board may recognize and accept as approved under §301.157 a school of nursing or educational program operated in another state and approved by a state board of nursing or other regulatory body of that state. The Board shall develop policies to ensure that the other state's standards are substantially equivalent to the Board's standards.

Section 301.157(d-5) provides that the Board shall streamline the process for initially approving a school of nursing or educational program under §301.157 by identifying and eliminating tasks performed by the Board that duplicate or overlap tasks performed by the Texas Higher Education Coordinating Board or the Texas Workforce Commission.

Section 301.157(d-6) states that the Board, in cooperation with the Texas Higher Education Coordinating Board and the Texas Workforce Commission, shall establish guidelines for the initial approval of schools of nursing or educational programs. The guidelines must: (i) identify the approval processes to be conducted by the Texas Higher Education Coordinating Board or the Texas Workforce Commission; (ii) require the approval process identified under §301.157(d-1) to precede the approval process conducted by the Board; and (iii) be made available on the Board's Internet website and in a written form.

Section 301.157(d-7) states that a school of nursing or educational program approved under §301.157(d-1) shall: (i) provide the Board with copies of any reports submitted to or received from the national nursing accrediting agency selected by the Board; (ii) notify the Board of any change in accreditation status; and (iii) provide other information required by the Board as necessary to evaluate and establish nursing education and workforce policy in this state.

Section 301.157(d-8) states that, for purposes of §301.157(d-4), a nursing program is considered to meet standards substantially equivalent to the Board's standards if the program: (i) is part of an institution of higher education located outside this state that is approved by the appropriate regulatory authorities of that state; (ii) holds regional accreditation by an accrediting body recognized by the United States secretary of education and the Council for Higher Education Accreditation; (iii) holds specialty accreditation by an accrediting body recognized by the United States secretary of education and the Council for Higher Education Accreditation, including the National League for Nursing Accrediting Commission; (iv) requires program applicants to be a licensed practical or professional nurse, a military service corpsman, or a paramedic, or to hold a college degree in a clinically oriented health care field with demonstrated experience providing direct patient care; and (v) graduates students who: (A) achieve faculty-determined program outcomes, including passing criterion-referenced examinations of nursing knowledge essential to beginning a registered nursing practice and transitioning to the role of registered nurse; (B) pass a criterion-referenced summative performance examination developed by faculty subject matter experts that measures clinical competencies essential to beginning a registered nursing practice and that meets nationally recognized standards for educational testing, including the educational testing standards of the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education; and (C) pass the National Council Licensure Examination for Registered Nurses at a rate equivalent to the passage rate for students of approved in-state programs.

Section 301.157(d-9) states that a graduate of a clinical competency assessment program operated in another state and approved by a state board of nursing or other regulatory body of another state is eligible to apply for an initial license under Chapter 301 if: (i) the Board allowed graduates of the program to apply for an initial license under Chapter 301 continuously during the 10-year period preceding January 1, 2007; (ii) the program does not make any substantial changes in the length or content of its clinical competency assessment without the Board's approval; (iii) the program remains in good standing with the state board of nursing or other regulatory body in the other state; and (iv) the program participates in the research study under Section 105.008, Health and Safety Code.

Section 301.157(d-9) states, that in this section, the terms "clinical competency assessment program" and "supervised clinical learning experiences program" have the meanings assigned by Section 105.008, Health and Safety Code.

Section 301.157(d-10) states that §301.157(d-8), (d-9), (d-10), and (d-11) expire December 31, 2017. As part of the first review conducted under §301.003 after September 1, 2009, the Sunset Advisory Commission shall: (i) recommend whether §301.157(d-8) and (d-9) should be extended; and (ii) recommend any changes to §301.157(d-8) and (d-9) relating to the eligibility for a license of graduates of a clinical competency assessment program operated in another state.

Section 301.157(e) states that the Board shall give each person, including an organization, affected by an order or decision of the Board under §301.157 reasonable notice of not less than 20 days and an opportunity to appear and be heard regarding the order or decision. The Board shall hear each protest or complaint from a person affected by a rule or decision regarding: (i) the inadequacy or unreasonableness of any rule or order the Board adopts; or (ii) the injustice of any order or decision of the Board.

Section 301.157(f) states that, not later than the 30th day after the date an order is entered and approved by the Board, a person is entitled to bring an action against the Board in a district court of Travis County to have the rule or order vacated or modified, if that person: (i) is affected by the order or decision; (ii) is dissatisfied with any rule or order of the Board; and (iii) sets forth in a petition the principal grounds of objection to the rule or order.

Section 301.151(g) states that an appeal under §301.157 shall be tried de novo as if it were an appeal from a justice court to a county court.

Section 301.151(h) states that the Board, in collaboration with the nursing educators, the Texas Higher Education Coordinating Board, and the Texas Health Care Policy Council, shall implement, monitor, and evaluate a plan for the creation of innovative nursing education models that promote increased enrollment in this state's nursing programs.

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

Cross Reference to Statute. The following statutes are affected by this proposal: Occupations Code: §§301.155, 301.157, and 301.151.

§223.1. Fees.

(a) The Texas Board of Nursing has established reasonable and necessary fees for the administration of its functions.

(1) - (2) (No change.)

(3) Licensure renewal (each biennium):

(A) Registered Nurse (RN): $70 [~~$73~~]; and

(B) (No change.)

(4) - (24) (No change.)

(25) approval of remedial education course: $300 per course; [~~and~~]

(26) renewal of remedial education course: $100 per course; and[~~.~~]

(27) approval of a nursing education program outside Texas' jurisdiction to conduct clinical learning experiences in Texas: $500.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 29, 2013.

TRD-201303079
Jena Abel
Assistant General Counsel
Texas Board of Nursing
Earliest possible date of adoption: September 8, 2013
For further information, please call: (512) 305-6822

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 354. MEMORANDA OF UNDERSTANDING

31 TAC §354.4

The Texas Water Development Board (TWDB) proposes amendments to §354.4, a memorandum of understanding (MOU) between the TWDB and the Texas Department of Agriculture, Office of Rural Affairs (TDA). The existing MOU between the TWDB and the TDA expires on August 31, 2013. The TDA, Office of Rural Affairs has assumed the powers and duties of the abolished Texas Department of Rural Affairs.

BACKGROUND AND SUMMARY OF THE FACTUAL ISSUES FOR THE PROPOSED AMENDMENT.

These proposed amendments describe the new MOU for the period from September 1, 2013 to August 31, 2015. The amendments are required by riders to the appropriations to the TWDB and the TDA in the General Appropriations Act (GAA). (Senate Bill (SB) 1, 83rd Leg. R.S., page VI-56.) Rider 8 requires the TWDB to coordinate funds out of the Economically Distressed Areas Program (EDAP) administered by the TWDB and the Colonia Fund administered by the TDA as outlined in an MOU to maximize delivery of the funds and minimize administrative delay in their expenditure. The TDA appropriations contain the same requirement at SB 1, 83rd Leg. R.S., page VI-10, Rider 27.

This rule proposes an amended MOU to replace existing §354.4. The proposed MOU governs the working relationship between the TWDB and TDA for the period from September 1, 2013 through August 31, 2015.

DISCUSSION OF THE AMENDMENTS.

The MOU is essentially the same as the current MOU; the proposed amendments are discussed as follows.

RECITALS. The name of the parties to this MOU have changed because the TDA has taken over the functions of the defunct Department of Rural Affairs. Additionally, the citations to the General Appropriations Act have been updated to reflect the latest budget.

PERFORMANCE. Existing subsection (e)(1)(B) is deleted to reflect that the TDA does not assist applicants with their applications. The word "applicable" is added to existing subsection (e)(1)(C) to provide clarification. Existing subsection (e)(1)(E) is amended to show the proper name of the TDA program, which is the Colonia Economically Distressed Areas Program (CEDAP) instead of the existing Colonia Fund. Existing subsection (e)(1)(H) is deleted because TDA does not provide on-site technical assistance; however, as noted in subsection (e)(2)(C), the TWDB does provide technical assistance. Existing subsection (e)(1)(L) is deleted because TDA provides information regarding CEDAP on its web site and does not notify communities individually about the availability of funds. Subparagraphs under subsection (e)(1) have been renumbered to reflect the additions and deletions.

Amendments to subsection (e)(2)(B) relating to TWDB responsibilities under the MOU change the language relating to reports and schedules for EDAP projects to increase efficiency.

LIMITATIONS. A proposed amendment to subsection (f) changes the name of the TDA program to CEDAP which reflects the name of the program administered by TDA. The amendment also adds the word "plan" when discussing funds from a federal Community Development Block Grant to clarify that the program plan controls the use of funds.

REPORTING REQUIREMENTS. Subsection (g) is amended to reflect the language in the TDA and TWDB Riders to the GAA. Additionally, the name of the TDA program is updated to CEDAP.

Other nonsubstantive amendments to §354.4 have been proposed, such as updating the agency name from Texas Department of Rural Affairs to Texas Department of Agriculture and updating citations.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS.

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the two years this rule will be in effect, there is no expected additional cost to state or local governments resulting from its administration. This rule directly affects only the TWDB and the TDA and will have no additional cost for either agency since the coordination addressed by this rule has been in place for years and no extra costs will be incurred due to continuing the agreement to coordinate.

This rule is not expected to result in reductions in costs to either state or local governments. This rulemaking will not result in any reductions in costs; the state agencies involved already have and have had personnel assigned to implementation of the rule and the rule does not require any local government resources. This rule is not expected to have any impact on state or local revenues. The rule does not require any increase in expenditures for state or local governments as a result of administering the rule. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from this rule.

PUBLIC BENEFITS AND COSTS.

Ms. Trevino also has determined that for each year of the two years the proposed rulemaking is in effect, the public will benefit from the rulemaking due to coordination between the TWDB and the TDA that will result in increased efficiencies in financing projects because the agencies will avoid duplication and maximize the use of appropriated funds for water and sewer projects. There will be no economic costs to persons required to comply with this rule because the rule does not impose any requirements on private individuals or local governments.

LOCAL EMPLOYMENT IMPACT STATEMENT.

The TWDB has determined that a local employment impact statement is not required because the rule does not adversely affect a local economy in a material way during the two years it will be in effect as this rule does not impose any requirements on local economies. The TWDB has also determined that there will be no adverse effect on small businesses or micro-businesses as a result of enforcing this rulemaking because the rules are not regulatory and not directed at small or micro-businesses. The TWDB has also determined that there is no anticipated

economic cost to persons who are required to comply with this rule as proposed. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY ANALYSIS.

The TWDB has determined that the proposed rulemaking is not subject to Texas Government Code §2001.0225 because the rule is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT.

This rule affects only two state agencies and does not affect or apply to private individuals. The TWDB has determined that the promulgation and enforcement of this proposed rule will not result in either a constitutional or a statutory taking of private real property. The proposed rule does not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because the proposed rule does not burden or restrict or limit the owner's right or use of the property. Therefore, the proposed rule does not constitute a taking under the Texas Government Code Chapter 2007 or the Texas Constitution.

SUBMITTAL OF COMMENTS.

Comments on the proposed rulemaking will be accepted for 30 days following publication in the *Texas Register* and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231 or rulescomments@twdb.texas.gov or by fax to (512) 475-2053.

STATUTORY AUTHORITY.

These amendments are adopted under Texas Water Code §6.104, which requires the TWDB to adopt by rule any memorandum of understanding between the TWDB and any other state agency and General Appropriations Act, SB 1, 83rd Leg., R.S., Rider 8, page VI-56 of the TWDB budget.

Cross reference to statute: Texas Water Code §6.104.

§354.4. Memorandum of Understanding Between the Texas Department of Agriculture, Office of Rural Affairs and the Texas Water Development Board.

(a) SECTION I. RECITALS.

(1) WHEREAS, pursuant to General Appropriations Act, SB [~~HB~~] 1, 83 [~~82~~] L.S., Rider 8, page VI-56 [~~VI-54~~], the Texas Water Development Board's (TWDB) appropriation, and Rider 26, page VI-10 of the Texas Department of Agriculture's (TDA) appropriation, TWDB [~~Board (TWDB)~~] is required to enter into this Memorandum of Understanding (MOU) with TDA [~~the Texas Department of Rural Affairs (TDRA)~~];

(2) WHEREAS, the TDA [~~TDRA~~] administers the Colonia Set-Aside Program described in General Appropriations Act, SB [~~HB~~] 1, 83 [~~82~~] L.S., Rider 27 [~~6~~], page VI-10 [~~VII-18~~] of the TDA [~~TDRA~~] budget;

(3) WHEREAS, the TDA [~~TDRA~~] and TWDB are required to continue to coordinate funds as outlined in this MOU to ensure that none of the funds appropriated therein are expended in a manner that aids the proliferation of colonias or are otherwise used in a manner inconsistent with the intent of the Economically Distressed Areas Program (EDAP) administered by the TWDB, and maximize delivery of the funds and minimize administrative delay in their expenditure.

(4) NOW THEREFORE, the TDA [~~TDRA~~] and the TWDB hereby enter into this MOU for the purposes set forth herein.

(b) SECTION II. PARTIES. This MOU [~~Memorandum~~] is made and entered into between the TDA [~~TDRA~~], an agency of the State of Texas, and the TWDB, also an agency of the State of Texas.

(c) SECTION III. PURPOSE. The purpose of this MOU [~~Memorandum~~] is to ensure that none of the funds appropriated under the Colonia Fund are expended in a manner that aids the proliferation of colonias or are otherwise used in a manner inconsistent with the intent of the EDAP operated by the TWDB and to use the Colonia Set Aside program for residential service lines, hookups and plumbing improvements, so as to maximize delivery of the funds and minimize administrative delay in their expenditure.

(d) SECTION IV. PERIOD OF PERFORMANCE. The obligations under this MOU shall be in force beginning on September 1, 2013 [~~2011~~], and terminating on August 31, 2015 [~~2013~~].

(e) SECTION V. PERFORMANCE. Each party to this MOU shall coordinate with the other in delivering water and sewer service lines, hook-ups, and plumbing improvements to residents of selected colonias in order to connect those residents' housing units to EDAP-funded water and sewer systems.

(1) TDA RESPONSIBILITIES [~~TDRA responsibilities~~]. The TDA [~~TDRA~~] shall be responsible for the following functions:

(A) develop an application process for projects submitted by eligible units of local government;

[~~(B) assist units of general local government in preparing an application to the Colonia Fund;~~]

(B) [~~(C)~~] determine whether projects meet applicable federal requirements;

(C) [~~(D)~~] select projects to receive funding and [~~in conjunction with the TWDB;~~]

[~~(E)~~] make Colonia Economically Distressed Areas Program (CEDAP) [~~Fund~~] grant awards from the Colonia Fund for selected projects on an as-needed basis;

(D) [~~(F)~~] prepare and execute contracts with units of general local government (Contractor localities);

(E) [~~(G)~~] provide oversight and guidance to Contractor localities regarding applicable federal and state laws and program regulations (environmental, labor, acquisition of real property, relocation, procurement, financial management, fair housing, equal employment opportunity, etc.);

[~~(H) provide on-site technical assistance if necessary to ensure that funds are efficiently and effectively used to accomplish the activities for which they were intended;~~]

(F) [~~(I)~~] review, approve, process, and honor valid reimbursement requests from Contractor localities;

(G) [~~(J)~~] monitor each project prior to contract completion to ensure compliance with applicable federal and state laws and program regulations; and

(H) [~~(K)~~] consult with the TWDB regarding specific projects on an as-needed basis.[~~; and~~]

[~~(L)~~ notify communities on list provided by the TWDB of the availability of funds.]

(2) TWDB RESPONSIBILITIES [~~responsibilities~~]. The TWDB shall be responsible for the following functions:

(A) at the beginning of each fiscal year, or quarterly upon request, provide the TDA [~~TDRA~~] with descriptions of and

schedules for EDAP-funded projects that need Colonia Fund assistance to provide connections and plumbing improvements [~~at least six (6) weeks before such assistance would be required~~];

(B) provide a list of projects for the TDA's [~~TDRA's~~] eligibility review for joint funding; and

(C) provide assistance with technical project-related concerns brought forward by Contractor localities or the TDA [~~TDRA~~] during the course of the project.

(f) SECTION VI. LIMITATIONS. Eligible applicants shall be those counties eligible under both the TDA's CEDAP [~~TDRA's Colonia Fund~~] and TWDB's EDAP. Non-entitlement cities located within eligible counties are also eligible applicants. Eligible projects shall be located in unincorporated colonias identified by the TWDB and ineligible [~~in eligible~~] cities that annexed the colonia where improvements are to be made within five years after the effective date of the annexation, or are in the process of annexing the colonia where improvements are to be made. Eligibility shall be denied to any project in a county that has not adopted or is not enforcing the Model Subdivision Rules established pursuant to §16.343 of the Texas Water Code. If there are an insufficient number of TWDB EDAP projects ready for CEDAP [~~Colonia Economically Distressed Areas Program (CEDAP)~~] funding, the CEDAP funds may be transferred at the TDA's [~~TDRA's~~] discretion as stated within the current Community Development Block Grant action plan.

(g) SECTION VII. REPORTING REQUIREMENTS. No later than September 15, 2014, parties to this MOU agree to [~~Each party to this Memorandum shall submit, on or before the fifteenth day of the month following the end of the calendar quarter, to the other party a report of its activities and expenditures during the previous calendar quarter. No later than September 15, 2012, the TDRA and the TWDB shall~~] submit a joint report to the Legislative Budget Board describing [~~that describes~~] and analyzing [~~analyzes~~] the effectiveness of projects funded as a result of coordinated CEDAP [~~Colonia Fund~~]/EDAP efforts, including an estimate of savings gained from reducing duplicative efforts for each party.

(h) SECTION VIII. TERMINATION. This MOU [~~Memorandum~~] shall terminate upon ten (10) days written notice by either party to the other party in this MOU [~~contract~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 26, 2013.

TRD-201303071
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: September 8, 2013
For further information, please call: (512) 463-8061

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TITLE 34. PUBLIC FINANCE

PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 103. CALCULATIONS OR TYPES OF BENEFITS

34 TAC §103.4

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas County and District Retirement System or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas County and District Retirement System proposes the repeal of §103.4, which concerns the process to certify prior service and average prior service compensation, and proposes new §103.4, which provides for a more efficient and streamlined process to certify prior service and average prior service compensation. Currently, §103.4 provides generally that a subdivision must certify a member's average prior service compensation based on the monthly compensation paid to the member for those full months of employment performed for the subdivision prior to the subdivision's participation in the system. Calculating an average of all past months of a member's employment can be very time consuming and challenging for employers and sometimes is impossible when the relevant records no longer exist.

The proposed new §103.4 streamlines the process of certifying average prior service compensation and allows a subdivision to report the member's most recent annual rate of pay to the system. The system will then calculate average rate of pay by applying the formula. The proposed new rule applies only to certifications of average prior service compensation which occur after the effective date of the adoption of this rule.

Tom Harrison, General Counsel of the Texas County and District Retirement System, has determined that for the first five-year period the proposed repeal is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Harrison has also determined that for each year of the first five years the proposed repeal and new rule are in effect, the public benefit anticipated as a result of administering the new rule will be to streamline the process of certifying average prior service compensation and to eliminate an administrative burden that provides no measurable benefit. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed repeal may be submitted to Tom Harrison, General Counsel, Texas County and District Retirement System, P.O. Box 2034, Austin, Texas 78768-2034.

The repeal is proposed under the Texas Government Code, §843.104, which authorizes the board of trustees of the Texas County and District Retirement System to adopt rules concerning the definition and computation of average prior service compensation.

Texas Government Code, §843.104, is affected by this proposed repeal.

§103.4. Certification of Prior Service and Average Prior Service Compensation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 26, 2013.

TRD-201303068

Tom Harrison
General Counsel
Texas County and District Retirement System
Earliest possible date of adoption: September 8, 2013
For further information, please call: (512) 637-3247

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34 TAC §103.4

The Texas County and District Retirement System proposes new §103.4, concerning the certification of prior service and average prior service compensation. Currently, §103.4 provides generally that a subdivision must certify a member's average prior service compensation based on the monthly compensation paid to the member for those full months of employment performed for the subdivision prior to the subdivision's participation in the system. Calculating an average of all past months of a member's employment can be very time consuming and challenging for employers and sometimes is impossible when the relevant records no longer exist.

The proposed new rule streamlines the process of certifying average prior service compensation and allows a subdivision to report the member's most recent annual rate of pay to the system. The system will then calculate average rate of pay by applying the formula described below. The new rule does not impact a subdivision's ability to adopt another calculation method as long as the method is reasonable and equitable and does not undervalue the member's average prior service compensation. The proposed new rule applies only to certifications of average prior service compensation which occur after the effective date of the adoption of this rule.

Tom Harrison, General Counsel of the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Harrison has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be to streamline the process of certifying average prior service compensation and to eliminate an administrative burden that provides no measurable benefit. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed new rule may be submitted to Tom Harrison, General Counsel, Texas County and District Retirement System, P.O. Box 2034, Austin, Texas 78768-2034.

The new rule is proposed under the Texas Government Code, §843.104, which authorizes the board of trustees of the Texas County and District Retirement System to adopt rules concerning the definition and computation of average prior service compensation.

Texas Government Code, §843.104, is affected by this proposed new rule.

§103.4. Certification of Prior Service and Average Prior Service Compensation.

(a) Pursuant to §§843.101 - 843.104 of the Texas Government Code, a subdivision must certify to the system the service performed by employees of the subdivision before the subdivision's participation in the retirement system became effective and must also certify the average prior service compensation of those members.

(b) The subdivision must certify each member's prior service by calculating one month of credited service for each calendar month during which the member performed at least one day of service for the subdivision, other than as a temporary employee, prior to the month that includes the subdivision's effective participation date.

(c) The subdivision must certify each member's average prior service compensation by multiplying the member's most recent annual rate of compensation as determined in subsection (d) of this section by .97, and dividing this product by twelve.

(d) The most recent annual rate of compensation is determined based on the definition prescribed in §844.503 of the Texas Government Code concerning computation of current annual compensation for purposes of group term life insurance. The subdivision shall compute the most recent annual rate of compensation for a member by converting to an annual basis the regular rate of pay of the member for the most recent regular hour worked and proportionally reducing that annual basis figure if the member is not employed in a full time position. The most recent annual rate of compensation of a member who is exempt from the minimum wage and maximum hour requirements of the federal Fair Labor Standards Act (29 U.S.C. Section 201 et seq.) and who is paid on a salary basis is computed by converting to an annual basis the regular salary paid to the member for the most recent pay period of active employment.

(e) The system shall provide the subdivision a worksheet for the subdivision to enter the data concerning the months of prior service worked as defined in subsection (b) of this section, to enter the data concerning the most recent rate of annual compensation as defined in subsection (d) of this section, and to calculate the average prior service compensation as described in subsection (c) of this section. The subdivision shall be responsible for entering the data, making the calculations, and then certifying the results to the system.

(f) Upon receipt of the prior service certification and the average prior service compensation certification, the system will review the data, validate the calculations, and make any necessary corrections in the event of a discrepancy between the subdivision's certifications and the system's validation. If the calculation of average prior service compensation as mandated by this section is infeasible for any reason, the system may approve an alternate method to determine average prior service compensation as long as the calculation is reasonable and consistently applied.

(g) A subdivision must certify the prior service and average prior service compensation of all eligible members no later than 30 days after the subdivision's effective date of participation. In the case of a member eligible for prior service credit under §843.102(a)(2) of the Texas Government Code, the subdivision must make the certification no later than 30 days after the six month period of re-employment. Calculations of prior service credit are governed by the law in effect at the time of the calculation. The system may extend the time periods set forth in this subsection.

(h) If, under §843.201 of the Texas Government Code, a subdivision has acquired a public facility or assumed a governmental function, the date of acquisition or assumption shall be the effective date of participation for purposes of calculating the prior service and average prior service compensation of those members eligible under that section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 26, 2013.

TRD-201303069
Tom Harrison
General Counsel
Texas County and District Retirement System
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For further information, please call: (512) 637-3247

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CHAPTER 105. CREDITABLE SERVICE

34 TAC §105.3

The Texas County and District Retirement System proposes to amend §105.3, concerning the credited service for active duty qualified military service. Section 105.3 tracks §843.502 of the Texas Government Code, which provides generally that an eligible member may receive one month of credited service in the retirement system for each month of qualified military service performed while on active duty. Section 105.3 implements the state law, but needs to be updated to reflect legislative changes enacted in 2009.

In 2009, the Legislature amended Texas Government Code §844.502 and repealed the requirement of authorization by the subdivision. Accordingly, the proposed amendment deletes subsection (a)(3), which requires the approval of the subdivision before credited service may be granted by the retirement system.

Tom Harrison, General Counsel of the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Harrison has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will to clarify the process of crediting service to members based on qualified military service in compliance with state law. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Tom Harrison, General Counsel, Texas County and District Retirement System, P.O. Box 2034, Austin, Texas 78768-2034.

The amendment is proposed under the Government Code, §843.502(b), which authorizes the board of trustees of the Texas County and District Retirement System to adopt rules concerning credited service for qualified military service.

No other statutes are affected by the proposed amendment.

§105.3. Optional Credited Service for Active Duty Qualified Military Service.

(a) In this section:

(1) The term "credited service" means membership service for determining retirement eligibility only. Member contributions and monetary credits are not required or permitted with respect to credited service for qualified military service established after December 31, 1999.

(2) The term "eligible member" means a member of an eligible subdivision who has established credited service in the retirement system for at least the minimum period required to receive a service retirement annuity from the subdivision at age 60, who has performed active duty qualified military service, and who has been released from military duty under honorable conditions.

[~~(3) The term "eligible subdivision" means a subdivision whose governing board has adopted the optional authorization for the establishment of credited service in the retirement system for qualified military service.~~]

(3) [~~(4)~~] The term "qualified military service" means active duty service in the uniformed services as defined in 38 U.S.C. §4303(13). It excludes that service which was performed in a month for which the member has received credited service in this retirement system under any other provision of the TCDRS Act or the Uniformed Services Employment and Reemployments Rights Act of 1994, and that service, credited by another retirement system, that is recognized by this system under the proportionate retirement program. A member may not be credited with more than one month of service for any calendar month.

(b) Subject to the limitations in subsection (a) of this section, an eligible member may receive one month of credited service in the retirement system for each month of qualified military service performed while on active duty. An eligible member may not establish more than 60 months of credited service in the retirement system for qualified military service under this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Tom Harrison
General Counsel
Texas County and District Retirement System
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For further information, please call: (512) 637-3247

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 9. CONTRACT AND GRANT MANAGEMENT

SUBCHAPTER C. CONTRACTING FOR ARCHITECTURAL, ENGINEERING, AND SURVEYING SERVICES

The Texas Department of Transportation (department) proposes amendments to §§9.31 - 9.34, the repeal of §§9.36 - 9.40, and new §§9.36 - 9.42, all concerning Subchapter C, Contracting for Architectural, Engineering, and Surveying Services.

EXPLANATION OF PROPOSED AMENDMENTS, REPEALS, AND NEW SECTIONS

Architectural, engineering, and surveying services are procured by the department in accordance with Government Code, Chapter 2254, Subchapter A (Professional Services Procurement Act). The proposed revisions amend the department's provider selection processes while maintaining a logical numbering sequence for the sections. The substantive changes, then, relate

to provider selection. Two of the current selection processes are amended, the standard process and the small contract process; these processes are renamed and reconfigured as the comprehensive process and the accelerated process, respectively. Also, two entirely new selection processes are established, the streamlined process and the urgent and critical process.

Under these new rules, the comprehensive, streamlined, and accelerated processes will constitute the department's core provider selection processes. Under these processes, the department will advertise contracts using a Request for Qualifications (RFQ), currently known as a Notice of Intent (NOI). Providers will respond to an RFQ by submitting Statements of Qualification (SOQ), currently known as Letters of Interest (LOI). For a given solicitation, the department will evaluates and score all responsive SOQs.

Under the comprehensive process, the department will short-list the most qualified providers, as indicated by the SOQ scores. The short-listed providers will then participate in interviews and providers will be selected based on the interview scores. Under the streamlined process, interviews are optional. If the department elects to use interviews, providers will be selected based on the interview scores, as with the comprehensive process. Otherwise, selection is based on the SOQ scores. Under the accelerated process, there will not be a short list stage; selection will always be based on the SOQ scores.

The urgent and critical process will be available only for very specific circumstances and the department anticipates rarely using it. However, there are some situations in which the department believes that an urgent process will be needed. The applicability and methodology for this process is explained under §9.39 of this preamble.

Amendments to §9.31 remove three terms that are no longer needed due to the changes in the subchapter: "design division," "letter of interest," and "long list." The term "interview and contract guide" is added for clarification. The terms "notice of intent," "relative importance factor," "request for qualification," "short list," and "solicitation" are revised to better reflect the use of the terms in the subchapter as amended.

Throughout the document the department has made changes to the terminology to reflect the new definitions. For example "Request for qualifications (RFQ)" is replaced by "notice of intent (NOI)", and "statement of qualification (SOQ)" replaces "letter of interest (LOI)".

Amendments to §9.32(a) introduce the six provider selection processes that the department will use to issue solicitations and select providers: comprehensive process, federal process, streamlined process, accelerated process, emergency process, and urgent and critical process. The current standard process takes a "one size fits all" approach to provider selection and has proven to be overly rigid. The comprehensive, streamlined, and accelerated processes provide flexibility, promote efficiency, and accommodate specificity by factoring contract type and dollar value, service type, and project complexity into the selection process. Note, the federal process is not addressed in these amendments, and the emergency process is substantively unchanged from the current rule. The basis for the urgent and critical process is explained under §9.39 of this preamble.

Amendments to §9.32(b) and (c) replace the term "notice of intent" with "solicitation" to align the terminology with the new language in §9.32(a). Amendments to §9.32(c) remove the description of the procedure for awarding multiple contracts under one solicitation, as this text is unnecessary with the new revisions.

Amendments to §9.33(b)(1) clarify that a firm providing a task leader for a standard work category must have an active precertification status in that work category by the closing date of the solicitation. This change better reflects the current process used by the department.

Amendments to §9.33(f) replace "Design Division" with "department" to reflect current policy and procedure. This provides the department's administration flexibility to make organizational changes as needed.

Amendments to §9.34, Comprehensive Process, change the title from Standard Process to Comprehensive Process. The comprehensive process provides the department with a selection process that is specifically designed for high-dollar value, high-profile contracts. These higher-risk contracts call for a selection process that provides a greater degree of evaluation. To ensure rigor, interviews are mandatory. The comprehensive process requires a short list stage, unlike the other selection processes. Under §9.34(a), the comprehensive process must be used with any specific deliverable contract of $1 million or more in value that is not subject to the federal process. This dollar value aligns with the definition of a major contract in Government Code, Chapter 2262.

Amendments to §9.34(b)(2)(A) and (b)(4) allow a firm to administratively qualify a division within the corporation, subject to certain conditions. This change is made in response to industry partners who questioned the applicability of cost data generated from non-transportation services activities in developing an indirect cost rate to be used on a transportation services contract.

Amendments to §9.34(c) remove the specific role requirements for the consultant selection team (CST) members to provide greater flexibility in determining CST makeup. To promote efficiency, amended §9.34(d) establishes the minimum solicitation posting period as 14 days. The department has determined that not all solicitations require a posting period of 21 days, as required currently.

Amendments to §9.34(f) restrict the time frame for replacing project managers and task leaders. Firms must replace such personnel, as needed, prior to being short-listed. This serves to limit delays to the subsequent stages of the selection process.

To provide flexibility and accommodate specificity in evaluating and scoring SOQs, the prescribed evaluation criteria in current §9.34(h)(1)(A) - (D) are removed. SOQ evaluation criteria will be developed on a solicitation-by-solicitation basis and tailored to serve the specific requirements of a given contract. Under §9.34(g)(3), SOQ evaluation criteria will be listed in the RFQ.

Amendments to §9.34(i) - (j) remove proposals as an option for short list evaluation. Providers will no longer submit proposals; the short list stage will only consist of interviews. The department has determined that a proposal in lieu of or in conjunction with an interview provides no appreciable value to the selection process. The text regarding interview attendance requirements has also been removed, as being unnecessary for the evaluation process. To provide flexibility and accommodate specificity in evaluating and scoring interviews, the prescribed evaluation criteria in current §9.34(i)(2)(A) - (F) has been removed. The interview evaluation criteria will be developed on a solicitation-by-solicitation basis and tailored to serve the specific requirements of a given contract. Under §9.34(i)(2), the evaluation criteria will be listed in

the interview and contract guide. Also, past performance scores in the Consultant Certification Information System (CCIS) database reflecting less than satisfactory performance is preserved as a mandatory interview evaluation criterion. Finally, current §9.34(j)(3) is removed, as this review step is no longer necessary in the selection process.

New §9.36, Streamlined Process, provides the department with a selection process that is specifically designed to expedite indefinite deliverable contracts involving the more complex, higher-risk engineering disciplines, while ensuring a sufficient degree of evaluation. The administrative qualifications and the selection process from §9.34 will also be used for this streamlined process and the specific subsections have been referenced in §9.36 as needed. To provide flexibility for this process, interviews are optional. The streamlined process, as applied, may or may not involve a short list stage. New §9.36(d) provides the basis of selection for this section by referencing the selection processes in §9.34(j) and new §9.37(d).

New §9.37, Accelerated Process, is based on the language of current §9.36, Small Contract Process. The accelerated process provides the department with a selection process that is specifically designed for indefinite deliverable contracts involving less complex, lower-risk engineering disciplines and specific deliverable contracts valued at less than $1 million. New §9.37(b) establishes the administrative qualification requirements by referencing the basic administrative qualification procedures set out in amended §9.34(b). New §9.37(c) establishes the selection process by referencing amended §9.34(c) - (e) and (g). New §9.37(d)(1) provides the basis of selection. To promote efficiency, interviews are not used. The accelerated process does not involve a short list stage. Selection is based on SOQ score and the prime provider's past performance score in the CCIS database reflecting less than satisfactory performance. New §9.37(d)(2) - (3) preserve the tie-breaking and notification methods language from current §9.36.

New §9.38, Emergency Contracts Process, is based on language from current §9.37 with no substantive changes.

New §9.39, Urgent and Critical Process, gives the department a selection process specifically designed to address an urgent and critical situation that may result in an emergency if not addressed promptly. This process is intended for those relatively few instances in which the department has sufficient warning of a developing emergency, but does not have the time to conduct a separate procurement under the other sections of this subchapter.

New §9.39(a) establishes the specific steps that the executive director must take to engage the urgent and critical process. The executive director must certify in writing that: (1) an urgent and critical need exists that cannot be met through other sections of the subchapter; (2) there is sufficient, objective reason to believe a specific provider is the most qualified to perform the work; and (3) federal funds will not be involved in the contract. This certification will ensure that this process is only used when necessary.

New §9.39(c) provides the basis of selection. The department will review precertification data, project experience, past performance, and other information relevant to identifying the most qualified provider. If the executive director finds sufficient, objective reason to believe that a specific provider is the most qualified to perform the work, he will certify so in writing. Otherwise, the department may follow the process described in new §9.38(c).

New §9.40, Negotiations, is based on the language of current §9.38. New §9.40(c) establishes a negotiations procedure for the urgent and critical process that is compliant with the Professional Services Procurement Act. Subsection (c) also limits signature authority for these agreements to the executive director.

New §9.41, Contract Administration, is based on the language of current §9.39 with no substantive changes.

New §9.42, Contract Under a Pilot Program, is based on the language of current §9.40 with no substantive changes.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years in which the amendment, repeals, 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 amendments, repeals, and new sections.

Mark Marek, Director, Design 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, repeals, and new sections.

PUBLIC BENEFIT AND COST

Mr. Marek has also determined that for each year of the first five years in which the sections as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the amendments, repeals, and new sections will be improvements to the department's provider selection processes for architectural, engineering, and surveying services. 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 §§9.31 - 9.34, the repeal of §§9.36 - 9.40, and new §§9.36 - 9.42 may be submitted to Robin Carter, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "Ch. 9." The deadline for receipt of comments is 5:00 p.m. on September 9, 2013. 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, repeals, or new sections or is an employee of the department.

43 TAC §§9.31 - 9.34, 9.36 - 9.42

STATUTORY AUTHORITY

The amendments and new sections 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, Transportation Code, §223.041, regarding the use by the department of private sector professional services for transportation projects, and Government Code, Chapter 2254, Subchapter A (Professional Services Procurement Act), which sets forth requirements for selection and contracting of architectural and engineering services.

CROSS REFERENCE TO STATUTE

Government Code, Chapter 2254, Subchapter A (Professional Services Procurement Act) and Transportation Code, §223.041.

§9.31. Definitions.

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

(1) Audit Office--An office of the department whose internal function is to conduct independent reviews of departmental operations and procedures to ensure that they are functioning as intended and whose external function is to audit negotiated contracts including the review of cost reimbursement and indirect cost rate data.

(2) Consultant Certification Information System (CCIS)--A computer system used to collect and store information related to the department's certification of providers.

(3) Consultant selection team (CST)--The department's team that evaluates statements of qualification and interviews [~~letters of interest, statements of qualification, interviews, and proposals~~] and selects the provider based on demonstrated qualifications.

(4) Department--The Texas Department of Transportation.

[~~(5) Design Division--A division of the department whose functions include providing guidance and oversight for the department's contracting processes and procedures for architectural, engineering, or surveying services.~~]

(5) [~~(6)~~] Executive director--The executive director of the department.

(6) Interview and Contract Guide (ICG)--A document provided by the department to short-listed providers that includes instructions to prepare for the interview.

[~~(7) Letter of interest--A document submitted by a prime provider in response to a notice of intent and evaluated by the consultant selection team, used as part of the long list stage in the standard and federal processes.~~]

[~~(8) Long list--The list of prime providers submitting responsive letters of interest, used as part of the standard and federal processes.~~]

(7) [~~(9)~~] Managing office--The department's organizational sub-unit responsible for overseeing the provider selection, leading the contract negotiations, administering the contract, and processing invoices.

(8) [~~(10)~~] Managing officer--The head of a managing office.

(9) [~~(11)~~] Non-listed category (NLC)--A formal classification, developed by a managing office, used to define a specific sub-discipline of work and provide the minimum technical qualifications for performing the work. NLCs address project-specific work categories not covered by the standard work categories.

(10) [~~(12)~~] Notice of intent (NOI)--A public announcement that advertises the department's intent to enter into an [~~one or more~~] architectural, engineering, or surveying contract [~~contracts~~] and provides instructions for preparation and submittal of a statement of qualification generally referred to as a solicitation [~~letter of interest, used as part of the standard and federal processes~~].

(11) [~~(13)~~] Precertification--A department process conducted to verify that a provider meets the minimum technical requirements to perform work under a standard work category.

(12) [~~(14)~~] Prime provider--A firm that provides or proposes to provide architectural, engineering, or surveying services under contract with the state.

(13) [~~(15)~~] Provider--A prime provider or subprovider.

(14) [~~(16)~~] Relative importance factor (RIF)--The numerical weight assigned to an evaluation criterion, used by the consultant selection team to score statements of qualification and interviews [~~letters of interest, statements of qualification, interviews, and proposals~~].

(15) [~~(17)~~] Request for qualification (RFQ)--A public announcement that advertises the department's intent to enter into an architectural, engineering, or surveying contract and provides instructions for the preparation and submittal of a statement of qualification generally referred to as a solicitation[~~, used as part of the small contract process~~].

(16) [~~(18)~~] Short list--The list of prime providers most qualified to perform the services specified in an RFQ [~~a notice of intent~~], as demonstrated by the statement of qualification [~~letter of interest~~] scores.

(17) [~~(19)~~] Solicitation--A [~~notice of intent or~~] request for qualification.

(18) [~~(20)~~] Standard work category--A formal classification, developed by the department, used to define a specific sub-group of work and provide the minimum technical qualifications for performing the work.

(19) [~~(21)~~] Statement of qualification (SOQ)--A document prepared by a prime provider, submitted in response to a request for qualification.

(20) [~~(22)~~] Subprovider--A firm that provides or supports, or proposes to provide or support, architectural, engineering, or surveying services under contract with a prime provider.

§9.32. Selection Processes, Contract Types, Selection Types, and Projected Contracts.

(a) Selection processes. The department will issue solicitations and select providers under the following selection processes: comprehensive, federal, streamlined, accelerated, emergency, and urgent and critical. [~~The department will use four selection processes: federal, standard, small contract, and emergency.~~]

(b) Contract types. The department will offer two types of contracts: indefinite deliverable and specific deliverable.

(1) An indefinite deliverable contract may be used for a single project or for multiple projects. The solicitation [~~notice of intent~~] will describe the typical work types to be performed under the contract.

(A) Categorical limitations on contract dollar value may be established by the executive director or the executive director's designee.

(B) The contract period in which initial work authorizations may be issued may not be longer than two years after the date of contract execution, unless approved by the Texas Transportation Commission before the solicitation [~~notice of intent~~] posting date.

(C) Supplemental agreements may be issued to extend the contract period beyond two years, but only as necessary to complete work on an initial work authorization.

(2) A specific deliverable contract may be used for a single project or for multiple projects. The solicitation will specify the specific deliverables to be provided under the contract.

(c) Selection types.

(1) Single contract selection. One contract will result from the solicitation.

(2) Multiple contract selection. More than one contract of similar work types will result from the solicitation [~~notice of intent~~]. The solicitation [~~notice of intent~~] will indicate the number and type of contracts [~~and specify a range of scores for prime providers that will be considered qualified to perform the work~~].

~~[(A) If more prime providers fall within the specified range than the anticipated number of contracts, the prime providers will be selected in order of ranking in the evaluation process.]~~

~~[(B) If the anticipated number of contracts is greater than the number of prime providers that fall within the specified range, each prime provider will be selected for one contract. The remaining contracts will be awarded to the prime providers in order of ranking in the evaluation process, until each prime provider has two contracts or all of the contracts have been awarded. If there is still an excess of contracts, the process for awarding the second round of contracts will be repeated until all contracts are awarded.]~~

(d) Projected contracts list. Quarterly, the department will publish on the department's website a list of projected contracts for architectural, engineering, and surveying services.

§9.33. Precertification.

(a) Standard work categories. Precertification establishes the minimum technical qualifications to perform work under a standard work category. The Texas Transportation Commission, by minute order, may add, revise, or delete a standard work category.

(b) Contract eligibility.

(1) To be eligible to perform work under a standard work category, a firm providing a task leader [~~provider~~] must have active precertification status in that work category by the closing date of the solicitation.

(2) The department will not delay the selection process or the contract execution to accommodate a provider that is not in active precertification status.

(c) Precertification status of firms and employees.

(1) A firm is precertified in a standard work category only if it employs an individual precertified in that category.

(2) A firm that employs an individual who is precertified in multiple standard work categories is, by extension, precertified in each of those categories.

(3) A firm's precertification status is only applicable to the incorporated business entity that employs the individual upon whom the firm's precertification status is based and does not extend to a subsidiary, affiliate, or parent of the incorporated entity.

(4) An employee's precertification status is based solely on the individual's qualifications. A firm's qualifications may not serve as a basis for precertifying an employee.

(5) Precertification status shall transfer with the employee, should the employee leave the firm.

(d) Precertification website. The department will maintain a precertification website that will include:

(1) the definitions of the standard work categories;

(2) the minimum technical qualifications to perform work under the standard work categories; and

(3) the precertification application form, with instructions.

(e) Application and review process.

(1) To apply for precertification in a standard work category, a firm must employ an individual qualified to become precertified in that category and present the individual's qualifications in a precertification application.

(2) The department will consider the following factors in reviewing an application:

(A) the minimum technical qualifications as applicable;

(B) the individual's professional license or registration;

(C) the individual's experience and training; and

(D) any record that shows that the individual or the firm is the subject of a final administrative or judicial determination that the employee or firm has violated a statute or rule of a state licensing entity related to occupational or professional conduct.

(3) If a submitted application is incomplete or inaccurate, the firm will be given an opportunity to correct the application and provide additional information. The firm must provide the information within 30 days after the day that it receives the department's notice that the application is incomplete or inaccurate.

(4) If the information is not provided under paragraph (3) of this subsection within the 30-day period prescribed by that paragraph, the application will be processed at the end of that 30-day period with the information available.

(5) The department will make a good faith effort to make a precertification determination within 60 days after the day that the department receives a complete and accurate application or if paragraph (4) of this subsection applies, within 60 days after the day that the 30-day period prescribed by that paragraph ends.

(f) Appeal. A firm may appeal a precertification denial to the department [~~Design Division~~] by submitting additional information within 30 days after the day that it receives written notification of the denial. The information must justify why precertification should be granted. The department will review the information and make a second precertification determination. A firm may file a written complaint regarding a second precertification denial to the executive director or the executive director's designee.

(g) Updates. A firm must report any change in its application information no later than 45 days after the day that the change occurs.

(h) Data management. A firm's application information will be maintained in the Consultant Certification Information System (CCIS) [~~CCIS~~].

(i) Annual renewal. To maintain contract eligibility, a firm must renew its precertification status no later than March 31 of each year. The firm must submit its annual renewal through the CCIS.

(1) A firm that has renewed its precertification status by the annual deadline will maintain an active precertification status in the standard work categories in which it is precertified.

(2) A firm that has not renewed its precertification by the annual deadline will be placed in inactive status.

§9.34. Comprehensive [~~Standard~~] Process.

(a) Applicability. The comprehensive [~~standard~~] process[~~,~~] described under this section must[~~, may~~] be used for any specific deliverable contract that is $1 million or more in value and is [~~architectural, engineering, or surveying services contract~~] not subject to §9.35 of this subchapter (relating to Federal Process).

(b) Administrative qualification.

(1) Administrative qualification is a process used by the department to verify that a provider has an indirect cost rate that meets department requirements. Except as provided by paragraph (8) of this subsection, to compete for a contract under this section a provider either must be administratively qualified or must accept an indirect cost rate under paragraph (7) of this subsection.

(2) Factors in determining administrative qualification.

(A) A provider may demonstrate administrative qualification by an audit or by self-certification [~~of its incorporated entity. Indirect cost rates must be based on the entire incorporated entity and may not be based on the entity's units or divisions~~].

(i) An audit may be performed by an independent certified public accountant (CPA), an agency of the federal government, another state transportation agency, or a local transit agency. An audit performed by an independent CPA must be conducted in accordance with the current versions of 48 C.F.R. Part 31, the Generally Accepted Government Auditing Standards (GAGAS), and the American Association of State Highway Transportation Officials (AASHTO) Uniform Audit and Accounting Guide. The provider must provide the department with unrestricted access to the audit work papers, records, and other information as requested by the Audit Office.

(ii) Self-certification may be conducted by the provider and must include a cost report and an internal controls report. The self-certified cost report must comply with the current versions of 48 C.F.R. Part 31, the GAGAS, and the AASHTO Uniform Audit and Accounting Guide. The self-certified internal control report must certify the provider has internal controls in place within its organization. Both the cost report and the internal control report must be signed by a company officer and notarized.

(B) The audit or self-certification shall be based on the provider's fiscal year. The indirect cost rate, as approved by the Audit Office, shall become effective six months after the end of the provider's fiscal year, or immediately if filed more than six months after the end of the provider's fiscal year. It shall be effective no more than twelve months and shall expire eighteen months after the end of the fiscal year upon which it is based.

(C) A provider must submit on an annual basis a compensation analysis for all executives in accordance with the AASHTO Uniform Audit and Accounting Guide.

(D) The department may audit the indirect cost rate of a provider under contract with, or seeking to do business with, the department. These audits will be conducted in accordance with the criteria outlined in this subsection.

(E) A provider must submit a signed Certification of Final Indirect Costs with the audit report or self-certification. The certification must follow the requirements of the Federal Highway Administration.

(3) Submittal and review process for administrative qualification.

(A) A provider must submit its administrative qualification information to the Audit Office in accordance with the instructions on the department's website. [~~Administrative qualification submittals will not be received by the Design Division.~~]

(B) Upon review of an audit report or self-certification received from a provider, the Audit Office may request additional information from the provider. If the submittal is not complete and accurate, the Audit Office will return it to the provider for correction. Upon request for additional information by the Audit Office, the provider shall submit the information within 15 days after the day that it receives the Audit Office's request. If the information is not provided within the 15-day period, the submittal will be placed on pending status for an additional 15 days. If the information is not received within the additional 15-day period, the submittal will not be processed for administrative qualification.

(4) Administrative qualification is applicable only to the incorporated business entity upon which the indirect cost rate is based and does not extend to a subsidiary, affiliate, or parent of the incorporated entity, except as provided by this paragraph. A corporation may administratively qualify a division of the corporation if the division is not limited to a geographical area that is less than the entire state of Texas and if the corporation is able to demonstrate and justify the allocation of costs between the division and other corporate operations. If a corporate division is administratively qualified, all employees working under a resulting contract must be employees of the division.

(5) The Audit Office will provide a selected firm's indirect cost rate information to the managing office [~~on notification from the Design Division,~~] for use in negotiations under §9.40 [~~§9.38~~] of this subchapter (relating to Negotiations).

(6) The Audit Office will not provide a firm's administrative qualification information to the managing office or the consultant selection team before the selection of that firm.

(7) Providers not administratively qualified. The department may contract with a prime provider or allow the use of a subprovider that is not administratively qualified if:

(A) the provider has been in operation, as currently organized, for less than one fiscal year and the provider accepts an indirect cost rate developed by the Audit Office; or

(B) on request by the department during the selection process, the prime provider provides written certification that the prime provider or subprovider, as applicable, does not have an indirect cost rate audit and will accept an indirect cost rate developed by the Audit Office.

(8) Exemptions to administrative qualification.

(A) A non-engineering firm is exempt from the administrative qualification requirement of this section.

(B) A provider performing a service under standard work category 18.2.1, subsurface utilities engineering, or any of the following work groups, as listed on the department's precertification website, is exempted from administrative qualification, to the extent of the service being performed:

(i) Group 6, bridge inspection;

(ii) Group 12, materials inspection and testing;

(iii) Group 14, geotechnical services;

(iv) Group 15, surveying and mapping; and

(v) Group 16, architecture.

(C) The Audit Office [~~and Design Division~~] may exempt services other than those indicated in subparagraph (B) of this paragraph on a case-by-case basis. Any request for an exemption must be received by the Audit Office by the closing date of the solicitation.

(c) Consultant selection team (CST).

(1) The department shall use a CST in selecting providers under this section.

(2) The CST shall be composed of at least three department employees [~~the department employee designated as the CST chair, the~~

~~department employee designated as the project manager, and at least one other department employee~~].

(3) At least one CST member must be a professional engineer, for engineering contracts; a registered architect, for architectural contracts; and either a professional engineer or registered professional land surveyor, for surveying contracts.

(4) If a CST member leaves the CST during the selection process, the process may continue with the remaining members, subject to paragraph (3) of this subsection.

(d) Request for qualifications (RFQ) [~~Notice of intent (NOI)~~]. Not fewer than 14 [~~21~~] calendar days before the solicitation closing date, the department will post on a web-based bulletin board an RFQ [~~NOI~~] providing the contract information and specifying the requirements for preparing and submitting a statement of qualification [~~letter of interest~~].

(e) Statement of qualification (SOQ) [~~Letter of interest (LOI)~~]. To be considered, an SOQ [~~an LOI~~] must comply with the requirements specified in the RFQ [~~NOI~~].

(f) Replacements. An individual may be proposed as a replacement for the prime provider project manager or a task leader prior to the department's notification of firms short-listed for an interview. A proposed replacement must be designated in the SOQ [~~LOI~~] and must satisfy the applicable precertification and non-listed category [~~NLC~~] requirements.

(g) SOQ screening and evaluation [~~Long list qualification~~].

(1) The department may disqualify an SOQ [~~LOI~~] if the department has knowledge that a firm on the project team or an employee of a firm on the project team is the subject of a final administrative or judicial determination that the firm or employee has violated a statute or rule of a state licensing entity related to occupational or professional conduct.

(2) If an SOQ [~~LOI~~] is not disqualified under paragraph (1) of this subsection, the CST will screen the SOQ [~~LOI~~] to determine whether it complies with the requirements specified in the RFQ [~~NOI~~]. Each SOQ [~~LOI~~] that meets these requirements will be considered responsive to the RFQ [~~NOI, placed on a long list,~~] and evaluated.

(3) The CST will evaluate the responsive SOQ according to the evaluation criteria detailed in the RFQ based on factors the department has identified as most likely to result in the selection of the most qualified provider.

~~[(h) Long list evaluation.]~~

~~[(1) Long list evaluation criteria. The CST will evaluate the long-listed LOIs to establish a short list according to the long list evaluation criteria specified in the NOI. These criteria may include:]~~

~~[(A) project understanding and approach;]~~

~~[(B) project manager's experience with similar projects;]~~

~~[(C) similar project related experience of the task leaders responsible for the major work categories identified in the NOI; and]~~

~~[(D) other qualifications-based criteria approved by the Design Division.]~~

(h) [~~(2)~~] Short list. The short list will consist of the most qualified providers, as indicated by the SOQ [~~long list~~] scores.

(1) [~~(A)~~] For single contract selections, the minimum number of short-listed prime providers is three, unless fewer than three prime providers submitted a responsive SOQ [~~LOIs~~].

(2) [~~(B)~~] For multiple contract selections, the minimum number of short-listed prime providers is the number of desired contracts plus three, unless fewer than the desired number of prime providers submitted a responsive SOQ [~~LOIs~~].

(3) Notification.

(A) The department will notify each prime provider that submitted an SOQ [~~LOI~~] whether it was short-listed.

(B) The department will notify each short-listed prime provider whether a short list meeting will be held.

(i) Short list evaluation.

(1) Interviews [~~and proposals~~]. The department will evaluate the short-listed providers through interviews[~~, proposals, or both~~].

[~~(A)~~] The [~~For interviews, the~~] department will issue an Interview and Contract Guide (ICG) to each short-listed prime provider. The ICG will provide contract information and specify the requirements for the interview. [~~Any requirements pertaining to interview attendance will be specified in the NOI.~~]

~~[(B) For proposals, the department will issue a Request for Proposal (RFP) to each short-listed prime provider. The RFP will provide contract information and specify the requirements for the preparation and submittal of a proposal.]~~

(2) Short list evaluation criteria. The CST will evaluate the interviews [~~and proposals~~] according to the [~~short list evaluation~~] criteria specified in the ICG, including the prime provider's past performance scores in the Consultant Certification Information System database reflecting less than satisfactory performance. [~~and RFP. These criteria may include:~~]

~~[(A) understanding of the scope of services;]~~

~~[(B) experience of the project manager and project team;]~~

~~[(C) ability to meet the project schedule;]~~

~~[(D) prime provider's quality assurance/quality control program;]~~

~~[(E) prime provider's past performance scores in the CCIS database for department contracts reflecting less than satisfactory performance; and]~~

~~[(F) other qualifications-based criteria approved by the Design Division.]~~

(j) Selection.

(1) Basis of final selection. The CST will select the best qualified provider, as indicated by the short list scores.

(2) Tie scores. The managing officer will break a tie using the following method.

~~[(A) Interviews only.]~~

(A) [~~(i)~~] The first tie breaker will be the scores for the interview criterion with the highest RIF.

(B) [~~(ii)~~] The remaining interview criteria shall be compared in the order of decreasing RIF until the tie is broken.

(C) [~~(iii)~~] If the providers have identical scores on all of the interview criteria, the provider will be chosen by random selection.

[~~(B) Proposals only.~~]

~~[(i) The first tie breaker will be the scores for the proposal criterion with the highest RIF.~~]

~~[(ii) The remaining proposal criteria shall be compared in the order of decreasing RIF until the tie is broken.~~]

~~[(iii) If the providers have identical scores on all of the proposal criteria, the provider will be chosen by random selection.~~]

[~~(C) Interviews and proposals, both.~~]

~~[(i) If the interviews are weighted at 50 percent or more of the short list score, subparagraph (A)(i) and (ii) of this paragraph applies. If the providers have identical scores on all of the interview criteria, subparagraph (B)(i) - (iii) of this paragraph applies.~~]

~~[(ii) If the proposals are weighted at more than 50 percent of the short list score, subparagraph (B)(i) and (ii) of this paragraph applies. If the providers have identical scores on all of the proposal criteria, subparagraph (A)(i) - (iii) of this paragraph applies.~~]

[~~(D) Order of comparison. If the interview or proposal criteria have equal RIFs, the criteria will be compared in the order listed in the ICG or RFP.~~]

[~~(3) Submittal of selection. The managing officer will submit the evaluation documentation and recommendation for selection to the Design Division director for review. If the procedural review is acceptable, the executive director or the executive director's designee will concur with the selection.~~]

(3) [~~(4)~~] Notification. The department will:

(A) provide written notification to the prime provider selected for contract negotiation and arrange a meeting to begin contract negotiations;

(B) provide written notification to each short-listed prime provider that was not selected, notifying the provider of the non-selection; and

(C) publish the short list and the selected provider on a web-based bulletin board.

(4) [~~(5)~~] Appeal. A provider may file a written appeal concerning the selection process with the executive director or the executive director's designee as provided under §9.7 of this chapter (relating to Protest of Contract Practices or Procedures).

§9.36. Streamlined Process.

(a) Applicability. The streamlined process described in this section may be used for indefinite deliverable contracts that are not subject to §9.35 of this subchapter (relating to Federal Process) and that are for higher-risk services as determined by the department based on anticipated project costs, number of contracts, or type of service.

(b) Administrative qualification. Section 9.34(b) of this subchapter (relating to Comprehensive Process) applies to contracts under this section.

(c) Selection process. The department will determine whether interviews are required for each solicitation and notify providers in the RFQ. If interviews are required, §9.34(c) - (i) of this subchapter are applicable for this process. If no interviews are required, §9.34(c) - (e) and (g) of this subchapter are applicable for this process.

(d) Selection. If interviews are required, §9.34(j) of this subchapter is applicable for this process. If no interviews are required, §9.37(d) of this subchapter (relating to Accelerated Process) is applicable for this process.

§9.37. Accelerated Process.

(a) Applicability. The accelerated process described in this section may be used for contracts that are not subject to §§9.34, 9.35, or 9.36 of this subchapter (relating to Comprehensive Process, Federal Process, or Streamlined Process, respectively).

(b) Administrative qualification. Section 9.34(b) of this subchapter applies to contracts under this section.

(c) Selection process. Section 9.34(c) - (e) and (g) of this subchapter are applicable for this process.

(d) Selection.

(1) Basis of final selection. The consultant selection team will select the best qualified provider, as indicated by the SOQ scores, which will include evaluation of the prime provider's past performance scores in the Consultant Certification Information System database reflecting less than satisfactory performance.

(2) Tie scores. The managing officer will break a tie using the following method.

(A) The first tie breaker is the scores for the selection criterion with the highest relative importance factor (RIF).

(B) The remaining selection criteria will be compared in the order of decreasing RIF until the tie is broken.

(C) If the providers have identical scores on all of the selection criteria, the provider will be chosen by random selection.

(3) Notification. The department will:

(A) provide written notification to a prime provider selected for contract negotiation and arrange a meeting to begin contract negotiations;

(B) provide written notification to each prime provider that was not selected, notifying the provider of the non-selection; and

(C) publish the selected provider on a web-based bulletin board.

(4) Appeal. Section 9.34(j)(4) of this subchapter applies to this section.

§9.38. Emergency Contract Process.

(a) Applicability. The emergency contract process described in this section may be used when the executive director or the executive director's designee certifies in writing that an emergency situation, including a safety hazard, a substantial disruption of the orderly flow of traffic and commerce, or a risk of substantial financial loss to the department, exists, and that an architectural, engineering, or surveying services contract is needed to address the situation.

(b) Administrative qualification. If the emergency contract is an engineering or design related services contract directly related to a highway construction project and reimbursed with federal-aid highway program (FAHP) funding, a provider must be administratively qualified to compete for the contract, and §9.34(b)(2) - (6) of this subchapter (relating to Comprehensive Process) applies to this section. If the contract is not such a contract, a provider need not be administratively qualified to compete for the contract, and §9.34(b) of this subchapter applies to this section.

(c) Notification.

(1) After an emergency is certified, the department will review its list of precertified firms. If there are a sufficient number of firms, the department will notify at least three of these firms.

(2) The department will inform the firms of the nature of the emergency and will provide the firms with the specifications for the remedy.

(d) Evaluation and selection. The department will evaluate each firm's qualifications and select the best qualified firm to perform the services.

§9.39. Urgent and Critical Process.

(a) Applicability. The urgent and critical process described in this section may be used when the executive director certifies in writing that an urgent and critical need exists that cannot otherwise be met, that there is sufficient objective reason to believe that a specific provider is the most qualified to perform these architectural, engineering or survey services based on that provider's demonstrated competence and qualifications, and that federal funds will not be involved in the contract. An urgent and critical need, is a circumstance that does not rise to the level of an emergency situation as described in §9.38 of this subchapter (relating to Emergency Contract Process), but does expose the department to an undue additional cost, that unless promptly addressed could escalate to an emergency situation.

(b) Administrative qualification. Providers under this section are subject to §9.34(b) of this subchapter (relating to Comprehensive Process).

(c) Process.

(1) After an urgent and critical need has been identified the department will review its list of pre-certified firms and survey available information to identify firms that are most qualified to perform the work needed to resolve the urgent and critical need.

(2) The executive director will determine whether there is sufficient information to determine that one provider is objectively the most qualified to perform this work.

(3) If information is not sufficiently available for the executive director to make this determination, the department may follow the process described in §9.38(c) of this subchapter to identify the most qualified firm.

§9.40. Negotiations.

(a) Contract negotiations.

(1) A contract that is subject to §§9.34, 9.35, 9.36, or 9.37 of this subchapter (relating to Comprehensive Process, Federal Process, Streamlined Process, or Accelerated Process, respectively) will be negotiated in accordance with this subsection.

(2) The department will enter negotiations with a selected prime provider to establish a satisfactory contract containing a fair and reasonable price for the services.

(3) A selected prime provider shall submit to the department the actual salary rates for the proposed team members and the non-salary costs, generated internally, to be billed directly. The department will reference this information in the negotiations.

(4) The department anticipates that a satisfactory contract containing a fair and reasonable price for the services may be negotiated within 30 days after the date that a selected prime provider is notified of the selection. If a solicitation specifies that more than one contract will be awarded, the time for negotiating the contracts is automatically extended by a period equal to the number of additional contracts to be awarded under that solicitation multiplied by five days. The department may grant additional extensions as required. The solicitation may specify a shorter or longer time for the negotiations.

(5) If the department determines that a fair and reasonable price cannot be negotiated, the department will terminate negotiations with the selected prime provider and proceed under this paragraph.

(A) Single contract selection. The department will begin negotiations with the next highest-ranked prime provider. This process will continue as necessary through the three highest-ranked prime providers. If a fair and reasonable price cannot be negotiated with any of the three highest-ranked prime providers, the proposed contract shall be canceled. If the proposed contract is canceled, it may be re-advertised.

(B) Multiple contract selection. The department will begin negotiations with the next highest-ranked prime provider not selected for a contract. This process will continue as necessary through the short-listed prime providers. If a fair and reasonable price cannot be negotiated with any of the short-listed prime providers, the proposed contract shall be canceled. If the proposed contract is canceled, it may be re-advertised.

(b) Emergency contract negotiations.

(1) Contracts subject to §9.38 of this subchapter (relating to Emergency Contract Process) will be negotiated in accordance with this subsection.

(2) The department will enter negotiations with the selected provider to establish a satisfactory contract containing a fair and reasonable price for the services.

(3) If the department determines that a fair and reasonable price cannot be negotiated, the department will terminate negotiations with the provider and begin negotiations with the next highest-ranked provider. This process will continue as necessary through the notified firms.

(4) If a fair and reasonable price cannot be negotiated with any of the notified firms, the department may take any measure necessary to identify and solicit a firm that is able to perform the services.

(c) Urgent and critical negotiations. The department will negotiate with the selected firm to establish a fair and reasonable price and the executive director will execute any agreement.

(d) Indefinite deliverable work authorization negotiations.

(1) Indefinite deliverable work authorizations will be negotiated in accordance with this subsection.

(2) The department will enter negotiations with a selected prime provider to establish a satisfactory work authorization containing a fair and reasonable price for the services.

(3) If the department determines that a fair and reasonable price cannot be negotiated, the department will terminate negotiations with the prime provider and begin negotiations with another prime provider with an indefinite deliverable contract.

§9.41. Contract Administration.

(a) Prime provider's percentage of work. A prime provider shall perform at least 30 percent of the contracted work with its own work force, unless otherwise approved by the department.

(b) Project manager replacement. The prime provider project manager may not be replaced without the prior written consent of the department.

(c) Department audits. The department may perform interim and final audits.

(d) Performance evaluations.

(1) The managing office will document the prime provider's performance on the contract by evaluating the project manager and the firm. Evaluations will be conducted during the ongoing contract activity and at the completion of the contract.

(2) Further evaluations pertaining to project constructability may be conducted during project construction and at the completion of the construction contract.

(3) The department will give a copy of each completed performance evaluation to the prime provider for review and comment. The prime provider's comments will be entered into the Consultant Certification Information System (CCIS).

(4) Performance evaluation scores will be entered into the CCIS and may be used for the purpose of provider selection.

§9.42. Contract Under a Pilot Program.

(a) This section provides an exception to the selection requirements provided by other provisions of this subchapter for the procurement of architectural, engineering, or surveying services under a pilot project approved by the commission for the purposes of improving the efficiency and fairness of the department's qualifications-based procurement processes.

(b) The executive director or the executive director's designee may authorize the execution of an engineering, architecture, or surveying contract under this section. The authorization must be in writing and must contain findings that:

(1) the procurement resulting in the contract:

(A) does not violate state or federal law;

(B) provided a fair opportunity for qualification-based competition; and

(C) was conducted as part of the pilot project described by subsection (a) of this section;

(2) the contract does not expend federal funds; and

(3) execution of the contract is in the public interest.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 26, 2013.

TRD-201303014
Jeff Graham
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: September 8, 2013
For further information, please call: (512) 463-8683

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43 TAC §§9.36 - 9.40

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

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, Transportation Code, §223.041, regarding the use by the department of private sector professional services for transportation projects, and Government Code, Chapter 2254, Subchapter A (Professional Services Procurement Act), which sets forth requirements for selection and contracting of architectural and engineering services.

CROSS REFERENCE TO STATUTE

Government Code, Chapter 2254, Subchapter A (Professional Services Procurement Act) and Transportation Code, §223.041.

§9.36. Small Contract Process.

§9.37. Emergency Contract Process.

§9.38. Negotiations.

§9.39. Contract Administration.

§9.40. Contract Under a Pilot Program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 28. OVERSIZE AND OVERWEIGHT VEHICLES AND LOADS
SUBCHAPTER G. ANALYSIS OF ROUTES FOR SUPERHEAVY PERMITTED LOADS

43 TAC §§28.80 - 28.88

The Texas Department of Transportation (department) proposes new §§28.80 - 28.88, new Subchapter G, concerning Analysis of Routes for Superheavy Permitted Loads.

EXPLANATION OF PROPOSED NEW SECTIONS

The Texas Department of Motor Vehicles (TxDMV) issues permits for the operation of oversize and overweight vehicles on Texas roadways. The department provides assistance to TxDMV by providing routing information in the issuance of permits for the operation of oversize and overweight vehicles. For the permitting of superheavy loads a specific route analysis must be performed. To timely provide the required route information, the department relies on bridge analysis reports submitted by a third-party engineering firm on behalf of the permit applicant. Two engineering firms have been acting as the department's agents under this process. Additional firms have indicated an interest in providing this routing service for the department. In order to ensure that a firm has the necessary experience and training to provide these services, the department has developed the certification process initiated in this rulemaking. The certification process will provide the oversize and overweight permit applicant assurances that the engineering firm used is qualified to provide them with an initial route analysis that meets the requirements of the department.

New §28.80, Purpose, sets out the background and purpose of the subchapter.

New §28.81, Definition, defines a superheavy load to match the definition used by TxDMV in issuing oversize and overweight permits.

New §28.82, Certification Required, clarifies that all private engineering firms performing superheavy route analyses that will be used in issuing an oversize and overweight permit by TxDMV must be approved by the department. The department's Bridge Division specializes in bridge design, inspection, construction, and maintenance. It is within the Bridge Division's area of expertise to evaluate third-party firms for the experience and engineering expertise to perform superheavy route analysis. By having the firms certified, the department will be able to expedite the issuance of the route information to TxDMV.

New §28.83, Certification Application Process, lists the criteria that an engineering firm must meet in order to be certified to prepare engineering analysis reports for moving superheavy loads across bridges in Texas. The firm must be registered by the Texas Board of Professional Engineers; that registration requires that each engineer who performs work for the firm is licensed to practice in Texas. An engineer performing the route analysis must have competence in bridge rating and overload analysis. The department will also conduct an interview of the applicant to further investigate their knowledge of requirements for issuing a route analysis. This application process ensures that the work will be performed by an individual who has received the proper training and has demonstrated competence in the field of structural analysis. Identifying specific criteria for certification also will enable the department to fairly and consistently evaluate the third-party engineering firms seeking certification.

New §28.84, Application Review, identifies the bases on which an application for certification may be denied. The application review process ensures that only those engineering firms with the licensure, experience, and expertise to perform superheavy route analyses will be certified to do so.

New §28.85, Certification Decision, outlines how and when the certification decision is conveyed to the third party engineering firm. This rule gives the department 60 days to approve or deny an application and to notify the applicant in writing of its decision. If the application is denied, the department will set out the specific criteria the firm failed to meet and provide guidance on how the firm may become eligible to re-apply. If denied for qualification purposes, the applicant cannot reapply for 12 months after the date of a denial notice to ensure that any deficiencies in experience are thoroughly addressed.

New §28.86, Bridge Report, contains the requirement that the third party engineering firm must provide a detailed structural analysis of the bridges on the proposed route using the form prescribed by the department. Consistency in reporting is necessary so that applications can be timely reviewed and to ensure that all relevant information regarding the structures to be crossed is included in each analysis. The form is available from the Bridge Division of the department.

New §28.87, Termination of Certification, provides that the department can terminate the certification of a firm for cause at any time. The department will provide written notification of the termination. After the issuance of the notification the department will no longer accept route analysis from that firm. This provides the department with the authority necessary to ensure that only qualified and experienced firms provide routing information.

New §28.88, Disclosure of Bridge Information, requires that as a prerequisite for obtaining bridge information, including bridge plans and inspection reports, from the department, an engineering firm must be certified under Chapter 28, Subchapter G, and must enter into a confidentiality agreement with the department relating to that information. The Office of the Attorney General has held that information contained in bridge inspection files is confidential. As a consequence of providing services to the applicant for an oversize and overweight permit, the engineering firm is acting in a limited agency capacity for the department in the review of the route information. Providing bridge information to a certified firm for the purpose of providing required information for an oversize and overweight permit is not a release of the information to the public. The firm can only use the information to conduct the requested bridge analysis. To ensure that the information maintains its confidential nature the department requires that the firm sign the confidentiality agreement. The confidentiality agreement will prohibit the release of bridge information by the firm and will require that the firm notify and cooperate with the department if the firm receives a request for the documents or if ever ordered by a court to release the information to a third party.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each year of the first five years in which the 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 new sections.

Mr. Gregg Freeby, Director, Bridge Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

PUBLIC BENEFIT AND COST

Mr. Freeby 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 new sections will be greater competition in the market in providing services for the permitting of superheavy loads on Texas roadways and greater efficiency in the permitting process. 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 new sections §§28.80 - 28.88 may be submitted to Robin Carter, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "28.80-28.88." The deadline for receipt of comments is 5:00 p.m. on September 9, 2013. 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 new sections, or is an employee of the department.

STATUTORY AUTHORITY

The new sections 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

Transportation Code, Chapter 623, Subchapter B.

§28.80. Purpose.

Under Transportation Code, §623.003 the department is required to provide information to the Texas Department of Motor Vehicles for the issuance of an oversize and overweight permit. The department relies on outside engineering firms to provide the initial review and analysis for the permit application in providing the specific route for superheavy loads. This subchapter provides the requirements and procedure for the certification of a third-party engineering firm to perform an analysis to be used by the department in establishing route requirements for the Texas Department of Motor Vehicles to issue a permit for the movement of superheavy loads.

§28.81. Definition.

In this subchapter, "superheavy load" means an overweight load that is over 254,300 pounds gross weight, between 200,001 and 254,300 pounds total weight with less than 95 feet overall axle spacing, or over the maximum permitted weight on any axle or axle group as established in §219.11(d)(2) of this title (relating to General Oversize/Overweight Permit Requirements and Procedures).

§28.82. Certification Required.

An engineering firm must be certified under this subchapter before it may provide a report under §28.86 of this subchapter (relating to Bridge Report) to be used by the department in determining the route for an oversize and overweight permit application for a superheavy load.

§28.83. Certification Application Process.

(a) Eligibility requirements. To be eligible for certification under this subchapter, an engineering firm must be registered by the Texas Board of Professional Engineers and must show that each engineer who will perform an analysis under the certification is:

(1) knowledgeable of the laws, including regulations, relating to the permitting of oversize and overweight vehicles; and

(2) able to demonstrate competence in bridge load rating or overload analysis of grossly over-dimensioned vehicles to which the Manual for Bridge Evaluation, by the American Association of State Highway and Transportation Office, does not directly apply.

(b) Application requirements. An applicant must:

(1) submit a completed application on the form provided by the department; and

(2) provide a summary of qualifications indicating experience with bridge load ratings.

(c) The department will conduct an interview with an applicant to determine the applicant's level of experience.

§28.84. Application Review.

(a) The department will review and evaluate certification applications submitted under this subchapter.

(b) The department will deny an application:

(1) if the application:

(A) is not complete; or

(B) contains false or misleading information; or

(2) if the applicant:

(A) does not meet the eligibility requirements; or

(B) does not provide the information required under §28.83(b)(2) of this subchapter (relating to Certification Application Process).

§28.85. Certification Decision.

(a) The department will certify the applicant or deny the application within 60 days after the date that the department receives the completed application.

(b) If the application is denied, the department will notify the applicant in writing of, and state the reasons for, the denial.

(c) If denial of an application is based on the applicant's qualifications, the firm may not reapply for certification within the 12-month period beginning on the date of a denial notice.

(d) The department will notify the Texas Department of Motor Vehicles on approval of a firm under this section.

§28.86. Bridge Report.

(a) Before the department will provide route information to the Texas Department of Motor Vehicles for the issuance of the oversize and overweight permit for a superheavy load, the department must receive from an engineering firm certified under this subchapter a written report that includes a detailed structural analysis of the bridges on the proposed route demonstrating that the bridges and culverts on the route are capable of sustaining the load.

(b) The report must be submitted in the form prescribed by the department.

(c) Failure to submit a report in the prescribed form may result in non-consideration of the analysis.

§28.87. Termination of Certification.

(a) The department at any time may terminate for cause a certification issued under this subchapter.

(b) The department will send written notification of the termination to the engineering firm and the Texas Department of Motor Vehicles. The department will not accept a report under §28.86 of this subchapter (relating to Bridge Report) from the firm after the date of the notification for termination.

§28.88. Disclosure of Bridge Information.

(a) To obtain bridge information, including bridge plans and inspection reports, from the department, an engineering firm must be certified under this subchapter and must enter into a confidentiality agreement relating to that information.

(b) The confidentiality agreement must require that if the engineering firm is requested or ordered to disclose confidential information provided by the department, the firm shall:

(1) provide notice of the request or order to the department within three days of its receipt; and

(2) cooperate with the department to seek an appropriate response to the disclosure request or order.

(c) If disclosure of the confidential information is required by a court, the engineering firm shall disclose only that portion of the information that is specifically required to be disclosed in the court order.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the 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, 31.13, 31.16 - 31.18, 31.21, 31.22, 31.26, 31.36, 31.37, 31.43 - 31.45, 31.48, 31.49, and 31.57, the repeal of §§31.31, 31.40, and 31.42, and new §§31.30, 31.31, 31.38, 31.40, 31.42, and 31.51, all concerning public transportation.

EXPLANATION OF PROPOSED AMENDMENTS, REPEALS, AND NEW SECTIONS

The enactment of Moving Ahead for Progress in the 21st Century, better known as MAP-21, made significant changes to parts of the Federal Transit Law, Chapter 53 of Title 49, United States Code. These amendments align existing department policies and procedures with new or amended federal requirements in MAP-21 and updates from the Federal Transit Administration (FTA).

Additionally, MAP-21 created three new federal programs: §5339 Grant Program for Bus and Bus Facilities, addressed in new §31.30; §5329 Public Transit Safety Program, addressed in new §31.38; and §5326 Asset Management Program, addressed in new §31.51.

Throughout the chapter, changes are made that apply to grammar and uniformity of terminology. Many of the word substitutions clarify intent or reflect changes in definitions. For uniformity with current Texas Administrative Code guidelines, the symbol for percent is replaced with the word "percent"; the word "section" is replaced with the symbol "§"; a reference to the United States Code is changed from "USC" to "U.S.C."; and a reference to the Code of Federal Regulations is changed from "CFR" to "C.F.R."

SUBCHAPTER A, GENERAL

Amendments to §31.3, Definitions, add new definitions including "Americans with Disabilities Act (ADA)" in paragraph (3), "Asset management plan" in paragraph (4), "Clean Air Act" in paragraph (8), "Disability" in paragraph (15), "Public transportation safety plan" in paragraph (43), "Rural area" in paragraph (49), and "Senior" in paragraph (51). "Federal Transit Administration (FTA)" and "Metropolitan Planning Organization (MPO)" appear as deleted or new definitions because they are relocated within the section.

Amendments to §31.3 also modify certain definitions. "Allocation" indicates that organizations other than subrecipients may receive an allocation from the department. "Authority" is amended to clarify that for entities created under Transportation Code, Chapter 453, Municipal Transit Department, the population at the time of creation determines the status as an authority. "Designated recipient" language is modified to duplicate that in Transportation Code, §456.001. "District" is amended to reflect organizational changes regarding personnel that oversee public transportation activities. "Job access project" has two different meanings: one defined by MAP-21 (49 U.S.C. §5302), as amended, and the other by Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (49 U.S.C. §5316). "Local governmental entity" is amended to reference "authority", as previously defined, and deletes the duplicative list of agencies that are an authority. "Low-income individual" has two different meanings: one defined by MAP-21 (49 U.S.C. §5302), as amended, and the other by SAFETEA-LU (49 U.S.C. §5316). "Mobility management" is clarified to show it is neither applicable to the §5309 or §5339 Grant Programs nor does it include associated capital maintenance items, which are more clearly identified in this definition. "Public transportation" reflects MAP-21 changes to the definition. "Reverse commute project" has two different meanings: one defined by MAP-21 (49 U.S.C. §5302), as amended, and the other by SAFETEA-LU (49 U.S.C. §5316). "Stakeholders" elaborates on who these persons or organizations are and mirrors federal guidance. "Urban transit district" incorporates language from Transportation Code, Chapter 458 and states that authorities are not considered urban transit districts. "Welfare recipient" has two different meanings: one defined by MAP-21 (49 U.S.C. §5302), as amended, and the other by SAFETEA-LU (49 U.S.C. §5316).

Terms deleted because they are no longer in use in the chapter include: "Deputy executive director", "District engineer", "Rural public transportation (RPT)", and "Strategic priorities". "Operating expenses" is deleted because it is defined within the applicable subsections.

SUBCHAPTER B, STATE PROGRAMS

Amendments to §31.11 clarify the entities that receive urban state grants and add a provision for the department to consider negative performance impacts to allocations for circumstances beyond an urban or rural transit agency's control.

Amendments to §31.11(b)(1)(A) delete text that further defines an urban transit district as the term is defined in §31.3(57) and change "elderly" to "seniors" to be consistent with changes in federal programs as modified by MAP-21. Amendments to §31.11(b)(1)(A) and (B) allow the department to adjust performance allocations to compensate for a negative impact in the performance factor allocations under certain situations. Amendments to §31.11(b)(1)(C) and subsequent paragraphs clarify to which transit agencies the text applies by specifying urban or rural transit district rather than using the generic term designated recipient.

Amendments to §31.13(b) clarify that authorities are not eligible for discretionary funds. Amendments to §31.13(c) remove the term "designated recipient" as not all organizations that are designated recipients are eligible for §31.13 funds. The amendments also delete "district" to reflect department organizational changes.

SUBCHAPTER C, FEDERAL PROGRAMS

Amendments to Subchapter C, Federal Programs, include changes as a result of MAP-21 modification to the structure of numerous areas of the transit portion of the United States Code. Additionally, MAP-21 repurposed §5309 Grant Program (§31.16) and repealed §5316 Grant Program (§31.17) and §5317 Grant Program (§31.18) as stand-alone programs. These sections remain in the chapter because the department still has active grants using appropriations made prior to MAP-21.

Amendments to §31.16(a) respond to a major change in the §5309 capital investment program as a result of MAP-21. Bus and bus facilities projects are no longer part of the revised §5309 federal program. However, the department has active contracts with subrecipients that use funds appropriated prior to MAP-21 and will continue to follow §31.16 in the administration of those grants.

Amendments to §31.17(a) reflect the repeal of the §5316 Job Access and Reverse Commute Program (JARC) by MAP-21. The department has active contracts with subrecipients that use

JARC funds appropriated prior to MAP-21 and will continue to follow §31.17 in the administration of those grants.

Amendments to §31.18(a) reflect the repeal of the §5317 New Freedom Program (NF) by MAP-21. The department has active contracts with subrecipients that use NF funds appropriated prior to MAP-21 and will continue to follow §31.18 in the administration of those grants.

Amendments to §31.21 reflect a change in department procedures for the administration of §5303 metropolitan planning program. Amendments to §31.21(a) add §5303 to correct a missing reference regarding transportation planning and development activities for metropolitan planning organizations.

At the request of the Texas Association of Metropolitan Planning Organizations and the department, the Texas Transportation Commission (commission) directed the consolidation of federal highway and federal transit planning funds for Metropolitan Planning Organizations into a single consolidated grant. Amendments to §31.21(c) reflect this change in the administration of the §5303 metropolitan planning grant program.

Section 31.21(d) is deleted as it is no longer needed.

Amendments to §31.22(a) add §5304 to correct a missing reference regarding eligible planning and research activities. Amendments to §31.22(c) add transportation development credits to the list of eligible local match sources and update the FTA circular reference. For clarity, current text is deleted and replaced with new text. Amendments to §31.22(d) delete reference to a §5303 application which is no longer necessary with the change made in §31.21(c).

Amendments to §31.26(b), the addition of the governor's designee, parallels federal language for the §5307 urbanized grant program. Amendments to §31.26(d) and (e) delete the word "designated" included in the term "designated recipient" as the definition of a designated recipient in §31.3 includes transit agencies that are not part of the governor's apportionment.

Amendments to §31.26(e)(2) add a definition for a transportation management area. Since this is the only time the term appears in 43 TAC Chapter 31, it is not included in the definitions section. Amendments to §31.26(e)(3) clarify the department's role in regards to redistribution of federal funds. Section 31.26(e)(4) is reworded to more clearly describe how the department handles unexpended §5307 funds. For clarity, current text is deleted and replaced with new text.

New §31.30 allows the department to administer the bus and bus facilities program (49 U.S.C. §5339) created by MAP-21. The department is the designated recipient of funds for urbanized areas of less than 200,000 population and rural areas. The section specifies the formula for distribution to eligible subrecipients, eligible activities, and the required nonfederal match and sources. The department's administrative duties are comparable to those of other grant programs.

New §31.31 reflects the revised regulations for the §5310 grant program as a result of significant restructuring that occurs in MAP-21. For clarity, current section text is deleted and replaced with new text. The impact of the many changes to existing and potential subrecipients, and the interest expressed in this program, prompts the following subsection-by-subsection descriptions.

New §31.31(a), Purpose. The previously undefined term "elderly" is replaced with the word "senior", which MAP-21 and this chapter define as an individual 65 and older. This newly defined term will impact the projects that are eligible under the §5310 grant program.

New §31.31(b), Goals and objectives. MAP-21 repealed the New Freedom Program (NF) and made NF type projects eligible under the §5310 grant program. The subsection incorporates objectives reflecting this change.

New §31.31(c), Department role. Prior to MAP-21, the department was the designated recipient of all §5310 funds coming to the state. Under MAP-21, the department is the designated recipient for urbanized areas less than 200,000 population and all rural areas; urbanized areas of 200,000 population or more may request the department to act as their designated recipient. Most administrative functions remain unchanged from the previous text. Recognizing a long-standing practice, a paragraph clarifies that the department may terminate a contract that is not pursued in a timely fashion and re-award the funds to another project.

New §31.31(d), Eligible recipients. The original concepts of primary and alternate recipients of §5310 funds remain for rural and urbanized areas with a population of less than 200,000. Primary recipients are urban and rural transit districts. Alternate recipients are local public bodies, private nonprofit organizations, and taxis providing shared-ride service. Where the department is the designated recipient for an urbanized area with a population of 200,000 or more, the transit authority or an alternate recipient may receive funds.

New §31.31(e), Eligible assistance categories. As is current practice, the department may use up to 10 percent of the annual apportionment to defray administrative expenses. Subrecipient capital expenses now include construction activities typically associated with the NF program. There is a higher reimbursement rate for vehicle purchases that comply with the ADA or Clean Air Act. However, a sliding scale of increased federal share available to states with federal public lands or tribal property is discontinued for this program. Operating expense is a new category of eligible expenses for §5310. A list of typical operating expenses is added in paragraph (3) and may be reimbursed at 50 percent of the net operating expense.

New §31.31(f), Local share requirements. Sources of local match include cash, service agreements with other agencies, in-kind donations, volunteer services, and transportation development credits. The section notes qualifications to these various sources. However, in no instance can U.S. DOT funds be used as match.

New §31.31(g)(1) - (3), Funding distribution. MAP-21 provides for separate apportionments for various geographical areas. A previous uniform formula for statewide application remains unchanged; however, it is broken into three segments to reflect the separate apportionments. Following the boundaries of a department district in which there are eligible urbanized areas of less than 200,000 population, 25 percent of the apportionment will be distributed equally and the remaining 75 percent will be allocated on a pro rata basis using the urbanized population of seniors and individuals with disabilities. Following department district boundaries in which there are eligible rural areas, 25 percent of the apportionment will be distributed equally and the remaining 75 percent will be allocated on a pro rata basis using the rural population of seniors and individuals with disabilities. If the department serves as the designated recipient of any large

urbanized area with a population of 200,000 or more, funds must be used within that geographic area.

New §31.31(g)(4), Funding distribution. If, when an urbanized area with a population of less than 200,000 or rural area project selection process is completed, there remain unallocated funds, the department may allocate the funds to another like area elsewhere in the state. MAP-21 also permits the state to transfer funds between the urbanized less than 200,000 population category and the rural category; the department may use this authority to fully obligate the state's apportionment. Unless the department serves as the designated recipient, it has no authority over funds apportioned to specific urbanized areas with populations of 200,000 or more. However, when the department is the designated recipient for an urbanized area with a population of 200,000 or more, the funds must be used within that specific urbanized area or left for allocation at a later date.

New §31.31(h), Application requirements. This section is unchanged from the current language in §31.31(h) and requires prospective applicants to submit formal applications in the format and at the time specified by the department. All applications must document the need for services and the inclusion of the project in the coordinated public transit-human service plan.

New §31.31(i), Project selection. The consultative process continues but with some major modifications. The recommended composition of the stakeholder group includes transportation partners, passengers and advocates, and human service and work force agencies. 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. In addition to the current uniform requirements for all projects, there are new, specific guiding criteria for selecting projects. The requirement for a district-wide three-year transit development plan is discontinued to better align with other regional planning activities.

New §31.31(j), Vehicle leasing. This subsection is unchanged from the current language §31.31(l) and allows a subrecipient to lease a §5310 vehicle to another entity under certain conditions.

New §31.31(k), Incidental vehicle use. This subsection is unchanged from the current language in §31.31(m) and allows a subrecipient to use a vehicle for other than its intended purposes, as long as the activity does not interfere with public transportation services and the subrecipient does not alter the vehicle to accommodate the incidental use.

New §31.31(l), Private for-profit transportation business participation, provides for the role of private for-profit transportation businesses in the §5310 program.

Amendments to §31.36 reflect the revised regulations for the §5311 grant program as a result of MAP-21. Amendments throughout §31.36 substitute the word "rural" for "nonurbanized" to conform with MAP-21 terminology for the §5311 program. Additional amendments include a provision for the department to react to negative performance impacts and place an emphasis on certain types of intercity bus projects.

Amendments to §31.36(b)(1) emphasize the intercity bus component of the §5311 program. Amendments to §31.36(c) use the word "apportioned" instead of "appropriated" to more correctly define the flow of funds from the Federal Transit Administration to the department. Amendments to §31.36(e)(1) decrease the maximum state administration amount to 10 percent of the annual apportionment to comply with MAP-21. Amendments to §31.36(e)(2)(C) add the higher reimbursement rate for vehicle purchases that comply with the ADA or Clean Air Act. New §31.36(e)(5) defines planning activities eligible in the §5311 program. MAP-21 added planning as an eligible activity.

Amendments to §31.36(f)(2) delete text concerning a minimal amount of cash as the local share because it is no longer a requirement of FTA. New §31.36(f)(4) adds a new match source for intercity bus projects as codified by MAP-21. New §31.36(f)(5) clearly identifies transportation development credits as a match source.

Amendments to §31.36(g)(1) reinforce the rural connection nature of the intercity bus program. Amendments to §31.36(g)(1)(A) and (B) highlight the growing participation of rural transit districts in providing intercity bus services. Amendments to §31.36(g)(2)(C)(i) use the word "apportioned" instead of "appropriated" to more correctly define the flow of funds from the Federal Transit Administration to the department. New §31.36(g)(2)(C)(ii) allows the department to adjust performance allocations to compensate for a negative impact in the performance factor allocations under certain situations. Amendments to §31.36(g)(3) add a reference to department goals, incorporating a long-standing consideration in the award of discretionary funds. Amendments to §31.36(g)(6) delete reference to district offices to reflect current department organizational structure.

Amendments to §31.36(i) allow the department to consider the overall needs of the intercity bus program and target areas of greatest need, eligible applicant groups, or project types within the annual solicitation of projects.

Amendments to §31.37(d)(1) replace the word "will" with "may" to allow the department to use an interagency agreement to secure assistance from state universities for research and technical assistance projects.

SUBCHAPTER D, PROGRAM ADMINISTRATION

Changes to Subchapter D include the addition of two new sections and several amended sections as a result of changes under MAP-21.

New §31.38 allows the department to administer the public transit safety program (49 U.S.C. §5329) required by MAP-21. Absent more definitive federal guidance, the section outlines the basic requirements stated in federal law for the department and its subrecipients. The department must certify the safety plans of §5311 subrecipients and will assist these agencies upon request. Components of the transit safety plan as detailed in MAP-21 are listed.

New §31.40 removes references to metropolitan planning and reflects necessary added language for projects funded by programs repealed by MAP-21 but still active. For clarity, current text is deleted and replaced with new text.

New §31.42 replaces a list of 85 specific citations of federal laws and procedures with three over-arching paragraphs. For clarity, current text is deleted and replaced with new text.

Amendments to §31.43(c) reflect the current department organizational structure. Additionally, required references for subcontracts are deleted as these requirements are included in the Master Grant Agreement each agency signs.

Amendments to §31.44(b)(1)(B) allow less complex procurement procedures to be used for purchases of goods, services, or equipment with a total cost of $3,000 or less.

Amendments to §31.48(b)(5)(B) require subrecipients who must have transit asset management plans (49 U.S.C. §5326) to provide the department with requested data. Amendments to §31.48(b)(5)(C) - (E) clarify that all transit operators are required to submit data to the department for the listed performance-based measures.

Amendments to §31.48(c)(2)(B) reflect the continuing drug and alcohol testing requirements for §5316 and §5317 subrecipients receiving funds appropriated prior to the passage of MAP-21. Amendments to §31.48(c)(3) and (7) reflect the current department organizational structure.

Amendments to §31.49(b)(1) correct a cross reference.

SUBCHAPTER E, PROPERTY MANAGEMENT STANDARDS

Changes to Subchapter E include the addition of a new section as a result of changes under MAP-21 and one amended section to mirror current practice.

New §31.51 authorizes the department to administer the asset management program (49 U.S.C. §5326) created by MAP-21. Absent more definitive federal guidance, the section outlines the basic requirements stated in federal law for the department and its subrecipients. The department must certify subrecipient compliance and will assist these agencies upon request. Components of the asset management plan are listed.

Amendments to §31.57(c) state the department's preference that equipment or property, purchased with federal funds and scheduled for disposition, be offered to another FTA recipient before being passed to a third party. Similarly, amendments to §31.57(d) state the department's preference that equipment or property, purchased with state funds and scheduled for disposition, be offered to another FTA or state recipient before being passed to a third party.

Section 31.57(d)(1)(D) is revised and moved to the end of the section as new §31.57(e). Amendments to §31.57(d)(2)(B) clarify that equipment as well as property is covered by this subparagraph.

New §31.57(e) incorporates previously deleted language and allows the department to consider alternatives to standard disposition procedures on a case-by-case basis.

The statutory duties of the Public Transportation Advisory Committee's (PTAC) include advising the commission on the needs and problems of the state's public transportation providers, including recommending methods for allocating public transportation funds, and providing feedback on proposed rule changes involving public transportation matters during development and prior to final adoption.

PTAC met on July 9, 2013, and by motion recommended to the commission all of the amendments, repeals, and new sections.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years in which the amendments, repeals, and new sections as proposed are in effect, there will be fiscal implications for state or local governments as a result of enforcing or administering the amendments. The amount of the impact cannot be determined at this time as provisions in federal law require the U.S. Secretary of Transportation to promulgate rules for various changes enacted by MAP-21. To date, the Secretary has not promulgated rules.

Eric L. 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, repeals, and new sections.

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, repeals, and new sections will be a uniformly administered public transportation program implementing current state and federal law to improve the efficiency, effectiveness, and safety of public transportation providers and to increase the availability of transportation services to the public. 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 Wednesday, September 4, 2013, 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 Communications Division, 125 East 11th Street, Austin, Texas 78701-2483, (512) 305-9503 at least five working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§31.3, 31.11, 31.13, 31.16 - 31.18, 31.21, 31.22, 31.26, 31.36, 31.37, 31.43 - 31.45, 31.48, 31.49, and 31.57; new §§31.30, 31.31, 31.38, 31.40, 31.42, and 31.51; and repeal of §§31.31, 31.40 and 31.42, may be submitted to Robin Carter, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "Ch. 31." The deadline for receipt of comments is 5:00 p.m. on September 9, 2013. In accordance with Transportation Code, §201.811(a)(5), a person who

submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

SUBCHAPTER 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, Transportation Code, Chapter 455, which provides the general powers and duties for the Department of Transportation regarding mass transportation.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 455.

§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 [a ~~subrecipient~~] during the fiscal year, subject to the entity's [~~subrecipient'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) [~~(3)~~] 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; [~~according to the most recent federal census,~~] or a coordinated county authority created under Transportation Code, Chapter 460.

(6) [~~(4)~~] Average revenue vehicle capacity--The number of seats in all revenue vehicles divided by the number of revenue vehicles.

(7) [~~(5)~~] 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) [~~(6)~~] Commission--The Texas Transportation Commission.

(10) [~~(7)~~] Common Rule [~~rule~~]--49 C.F.R. Part 18 [~~49 CFR Part 18~~], Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments or 49 C.F.R. Part 19 [~~49 CFR Part 19~~], Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations.

(11) [~~(8)~~] Contractor--A recipient of public transportation funds through a contract or grant agreement with the department.

(12) [~~(9)~~] Department--The Texas Department of Transportation.

[~~(10) Deputy executive director--The deputy executive director of the department.~~]

(13) [~~(11)~~] 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.

(14) [~~(12)~~] Director--The director of public transportation for the department.

(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.

(16) [~~(13)~~] District--One of the 25 districts of the department for [~~having responsibility for administration of public transportation programs in~~] a designated geographic area.

[~~(14) District engineer--The chief executive officer in charge of a district.~~]

(17) [~~(15)~~] 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.

(18) [~~(16)~~] 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.

(19) [~~(17)~~] Executive director--The executive director of the department.

(20) [~~(18)~~] Fare box [~~Farebox~~] 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 [~~farebox~~] revenues.

(21) Federal Transit Administration (FTA)--The Federal Transit Administration of the United States Department of Transportation.

(22) [~~(19)~~] 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. [~~49 USC §5301 et seq.~~], the Federal-Aid Highway Act of 1973, as amended, 23 U.S.C. §101 et seq. [~~23 USC §101 et seq.~~], or any other federal program for funding public transportation.

(23) [~~(20)~~] 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.

[~~(21) FTA--The Federal Transit Administration, an agency of the United States Department of Transportation.~~]

(24) [~~(22)~~] 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.

(25) [~~(23)~~] 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.

(26) [~~(24)~~] 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 [~~49 USC §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).

(27) [~~(25)~~] 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.

(28) [~~(26)~~] 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.

(29) [~~(27)~~] Local governmental entity--Any local unit of government including a city, town, village, municipality, county, city transit department, or authority [~~metropolitan transit authority, coordinated county transportation authority, or regional transit authority~~].

(30) [~~(28)~~] Local public entity [~~body~~]--Includes a city, county, or [~~cities, counties, and~~] other political subdivision [~~subdivisions~~] of the state, a [~~states;~~] public agency, or an instrumentality [~~agencies; and instrumentalities~~] of one or more states, municipalities, or political subdivisions of states.

(31) [~~(29)~~] Local share requirement--The amount of funds required and eligible to match federally funded projects for the improvement of public transportation.

(32) [~~(30)~~] 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) [~~42 USC §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 [~~49 USC §5316~~], the Job Access and Reverse Commute program as established under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users.

(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.

(34) [~~(31)~~] 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) [~~49 USC Section 5301 et seq. (other than Section 5309)~~]. 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.

[~~(32) MPO--Metropolitan Planning Organization, the organization designated by the governor as the responsible entity for transportation planning in urbanized areas over 50,000 in population.~~]

(35) [~~(33)~~] Net operating expenses--Those expenses that remain after fare box [~~farebox~~] revenues are subtracted from eligible operating expenses.

(36) [~~(34)~~] 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 individuals [~~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.

(37) [~~(35)~~] 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) [~~26 USC §501(c)~~], one that is exempt from taxation under 26 U.S.C. §504(a) or §101 [~~26 USC §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 [~~nonprofit~~] organization.

(38) [~~(36)~~] Nonurbanized area--An area outside an urbanized area.

(39) [~~(37)~~] Obligated funds--Monies made available under a valid, unexpired contract or grant agreement between the department and a public transportation subrecipient.

[~~(38) Operating expenses--Costs directly related to system operations of a transit agency regardless of the category of funding. At a minimum, this definition includes:~~]

[~~(A) fuel, oil, replacement tires, replacement parts that do not meet the criteria for capital items, drivers' dispatchers' and mechanics' salaries and fringe benefits, dispatchers' salaries, and licenses;~~]

[~~(B) maintenance, repair, servicing, and inspection of transit agency property, including both vehicles and other property, whether routine or to remedy the effects of collision damage or vandalism; and~~]

[~~(C) expenses funded with capital or administrative funds, including preventative maintenance, provision of paratransit service under the Americans with Disability Act (ADA), capital cost of contracting, and insurance.~~]

(40) [~~(39)~~] Private--Pertaining to nonpublic entities. This definition does not include municipalities or other political subdivi-

sions of the state; public agencies or instrumentalities of one or more states; Native American [~~Indian~~] tribes (except private nonprofit corporations formed by Native American [~~Indian~~] 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.

(41) [~~(40)~~] Project--The public transportation activities to be carried out by a subrecipient, as described in its application for funding.

(42) [~~(41)~~] Public transportation--Shared-ride transportation [~~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[~~, but~~] excludes services provided by aircraft, ambulances, [~~and~~] 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.

(43) Public transportation safety plan--The agency safety plan prepared in accordance with 49 U.S.C. §5329 and certified by the department. The plan must be approved by the agency's governing body and must include at a minimum:

(A) methods for identifying and evaluating safety risks throughout all elements of the public transportation system of the agency;

(B) strategies to minimize the exposure of the public, personnel, and property to hazards and unsafe conditions;

(C) a process and timeline for conducting an annual review and update of the safety plan;

(D) performance targets based on the safety performance criteria and state of good repair standards established by the U.S. Department of Transportation;

(E) assignment of an adequately trained safety officer who reports directly to the general manager, president, or equivalent officer of the recipient; and

(F) a comprehensive staff training program for the operations personnel and personnel directly responsible for safety of the agency.

(44) [~~(42)~~] Real property--Land, including improvements, structures, and appurtenances, but excluding movable machinery and equipment.

(45) [~~(43)~~] 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.

(46) [~~(44)~~] 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.

(47) [~~(45)~~] 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 [~~49 USC §5316~~], the Job Access and Reverse Commute program as established under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users.

(48) [~~(46)~~] Ridership--Unlinked passenger trips.

(49) Rural area--Nonurbanized area.

[~~(47) Rural public transportation (RPT)--A generic term used to identify subrecipients who provide service in nonurbanized areas.~~]

(50) [~~(48)~~] 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.

(51) Senior--An individual who is 65 years of age or older.

(52) [~~(49)~~] 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.

[~~(50) Strategic priorities--Projects that the commission has determined will:~~]

[~~(A) stabilize funding levels;~~]

[~~(B) increase transit operating efficiency or effectiveness as demonstrated by significant cost savings or substantial enhancements to service delivery; or~~]

[~~(C) advance the level of coordination among transportation service providers, and among transportation service providers and health and human services agencies.~~]

(53) [~~(51)~~] 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) [~~(52)~~] 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) [~~(53)~~] U.S. DOT--United States Department of Transportation.

(56) [~~(54)~~] 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) [~~(55)~~] Urban transit district--A [~~In accordance with Transportation Code, Chapter 458, a~~] local governmental entity [~~body~~] or a political subdivision of the state that provides and coordinates public transportation within an urbanized area in accordance with Transportation Code, Chapter 458 [~~operates a public transportation system in an urbanized area with a population between 50,000 and 200,000, according to the most recent federal census~~]. This definition includes [~~small~~] urban transportation providers under Transportation Code, Chapter 456, that received state money through the department on September 1, 1994. This definition excludes authorities.

(58) [~~(56)~~] 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) [~~(57)~~] 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) [~~(58)~~] 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) [~~(59)~~] 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) [~~(60)~~] 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 as otherwise defined by 49 U.S.C. §5302 or 49 U.S.C. §5316 [~~49 USC §5316~~], the Job Access and Reverse Commute program as established under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER B. STATE PROGRAMS

43 TAC §31.11, §31.13

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, Transportation Code, Chapter 455, which provides the general powers and duties for the Department of Transportation regarding mass transportation.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 455.

§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 transportation, 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 $57,482,135 or less, the commission will allocate 35 percent of the appropriated amount to urban transit districts and 65 percent of the appropriated amount to rural transit districts.

(A) Urban funds available under this section will be allocated to urban transit districts as provided by this subparagraph. [~~that are designated recipients or transit providers in urbanized areas that are not served by an authority and to designated recipients that received state transit funding during the fiscal biennium ending August 31, 1997, that are not served by an authority but are located in urbanized areas that include one or more authorities. A transit authority is ineligible to participate in the formula program provided by this section unless the authority was created under Transportation Code, Chapter 453 or former Article 1118z, Revised Statutes, by a municipality having a population of less than 200,000. The commission will distribute the money in the following manner.~~]

(i) 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 [~~the elderly~~] and individuals [~~persons~~] with disabilities. Funding available in tier one is calculated by multiplying the available urban funding by the population of seniors [~~elderly~~] and individuals [~~persons~~] 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 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 urbanized area relative to the sum of all 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 within each tier provided under clause (i) of this subparagraph will be allocated to urban transit districts as a performance based allocation. An urban 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 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.

(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 nonurbanized 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 nonurbanized area relative to the sum of all nonurbanized 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 [~~a designated recipient~~] 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 [~~designated recipient~~] 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) 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 [~~the designated recipient~~] 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 [~~the designated recipient~~] 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 [~~designated recipient~~] 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.

§31.13. Discretionary Program.

(a) Purpose. Transportation Code, Chapter 456 allows the commission to allocate any funds not obligated in accordance with the terms of §31.11 of this subchapter on a discretionary basis. This section sets out the policies, procedures, and requirements for that discretionary allocation.

(b) Discretionary allocation. The commission will allocate funds under this section to a local governmental entity, other than [except] an authority, or to a private nonprofit organization that has the power to operate or maintain a public transportation system. Funds may be used for:

(1) the same purposes as described in §31.11(b) of this subchapter; and

(2) 80 percent [80%] of the cost of capital expenditures associated with ridesharing activities.

(c) Application. To receive funds under this section, an entity [a designated recipient] must first submit a completed application, in the form prescribed by the department[, to the appropriate district]. The application must include:

(1) a description of the project, including estimates of the population that would benefit from the project and the anticipated date of project completion;

(2) a statement of the estimated cost of the project, including estimates of the federally financed portions of the project costs; and

(3) certifications that:

(A) local funds are available for local share requirements if required and that the proposed project is consistent with comprehensive regional transportation plans (federal approval of a proposed public transportation project will be accepted as a determination that all federal planning requirements have been met);

(B) federal funds are not available under §31.11 of this subchapter;

(C) equipment furnished by the applicant in connection with ridesharing activities will be used primarily for commuting purposes;

(D) ridesharing activities will be operated on a nonprofit basis without state subsidies and with accountability in operating the van pool equipment; and

(E) any funding available through the United States Department of Transportation to participate in the capitalized portion of state and locally supported ridesharing activities will be applied for and utilized to supplement the availability of local resources for the recapitalization of van pool equipment.

(d) 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.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER C. FEDERAL PROGRAMS

43 TAC §§31.16 - 31.18, 31.21, 31.22, 31.26, 31.30, 31.31, 31.36, 31.37

STATUTORY AUTHORITY

The amendments and new sections 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, Transportation Code, Chapter 455, which provides the general powers and duties for the Department of Transportation regarding mass transportation.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 455.

§31.16. Section 5309 Grant Program.

(a) Applicability. The United States Congress revised 49 U.S.C. §5309, with the passage of Moving Ahead for Progress in the 21st Century (MAP-21). MAP-21 significantly changes the purpose and eligible activities. This section applies only to subrecipients receiving grants with funds appropriated under federal authorization bills prior to the enactment of MAP-21.

(b) [(a)] Purpose. Section 5309, Federal Transit Act (49 U.S.C. §5309 [49 USC §5309]), authorizes the Secretary of the U.S. DOT to make capital investment grants.

(c) [(b)] Eligible recipients. Section 5309 funds are available to states and local public entities [bodies].

(d) [(c)] Department role. The department acts as the designated recipient for §5309 [Section 5309] statewide grants. 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 based on the purpose as specified in the grant;

(3) develop evaluation criteria and select projects for funding so that:

(A) for vehicle replacement, each eligible subrecipient will receive a proportional share of available funding based on the remaining useful life of its fleet and the cost of replacing its fleet; and

(B) for non-vehicle replacement, each eligible subrecipient will receive a proportional share of available funding;

(4) prepare the state's funding application and submit that material to the FTA for approval;

(5) negotiate and execute contracts with subrecipients;

(6) prepare requests for federal reimbursement and process payment requests from subrecipients;

(7) monitor and evaluate the progress of local projects, including compliance with federal regulations; and

(8) provide technical assistance to subrecipients as necessary.

(e) [~~(d)~~] Local share requirements. Section 5309 grants require a federally mandated match amount as the local share. FTA program funds cannot be used as the local share. Eligible match sources include local or state programs, unrestricted federal funds, and transportation development credits. Donations are eligible as local share if the value is documented.

§31.17. Section 5316 Grant Program.

(a) Applicability. The United States Congress repealed 49 U.S.C. §5316, with the passage of Moving Ahead for Progress in the 21st Century (MAP-21). This section applies only to subrecipients receiving grants with funds appropriated under federal authorization bills prior to the enactment of MAP-21.

(b) [~~(a)~~] Purpose. Section 5316, Federal Transit Act (49 U.S.C. §5316 [~~49 USC §5316~~]), authorizes the Secretary of the U.S. DOT to make grants for public transportation projects for access to jobs and reverse commute purposes. The commission has been designated by the governor to administer the §5316 [~~Section 5316~~] program, known as the Job Access and Reverse Commute program, or JARC, in areas with less than 200,000 population.

(c) [~~(b)~~] Goal and objectives. The department's goal in administering the §5316 [~~Section 5316~~] program is to promote the availability of public transportation services targeted to employment and employment-related transportation needs. To achieve this goal, the department's objectives are to:

(1) promote the development of employment transportation services throughout the state, in partnership with local officials, public and private non-profit agencies, and operators of public transportation services;

(2) fully integrate the §5316 [~~Section 5316~~] program with other federal and state programs supporting public, employment, and human service transportation;

(3) foster the development of local, coordinated public transit-human service transportation [~~and human service transportation service~~] plans from which JARC projects are derived;

(4) support local economic development; and

(5) improve the efficiency and effectiveness of the §5316 [~~Section 5316~~] program through the provision of technical assistance.

(d) [~~(c)~~] Department role. The department acts as the designated recipient for §5316 [~~Section 5316~~] funds apportioned to the state for all urbanized areas with less than 200,000 population and all nonurbanized areas. The subrecipient shall retain control of daily operations.

(e) [~~(d)~~] Project types.

(1) Job access projects include:

(A) financing the eligible costs of projects that provide public transportation services targeted to welfare recipients and eligible low income [~~low-income~~] individuals;

(B) promoting public transportation use by low income [~~low-income~~] workers, including the use of public transportation by workers with nontraditional work schedules;

(C) promoting the use of employer-provided transportation, including the transit pass benefit program under Section 132 of the Internal Revenue Code of 1986;

(D) supporting mobility management and coordination programs among public transportation providers and other human service agencies providing employment or employment-related transportation services; and

(E) otherwise facilitating or providing transportation for employment or employment-related purposes by welfare recipients and low income persons.

(2) Reverse commute projects include:

(A) subsidizing the costs associated with adding reverse commute bus, train, carpool, van routes, or service from urbanized areas and other than urbanized areas to suburban workplaces;

(B) subsidizing the purchase or lease by a nonprofit organization or public agency of a van or bus dedicated to shuttling employees from their residences to a suburban workplace;

(C) supporting mobility management and coordination programs among public transportation providers and other human service agencies providing employment or employment-related transportation services; and

(D) otherwise facilitating or providing public transportation services to suburban employment opportunities.

(f) [~~(e)~~] Eligible subrecipients.

(1) State agencies, local governmental entities [~~authorities~~], private nonprofit organizations, private for-profit operators, and operators of public transportation services are eligible to receive §5316 [~~Section 5316~~] funds through the department.

(2) Applicants who are subrecipients of public transportation funds through another program administered by the department must be in good standing with the department as defined in §31.3 of this chapter.

(g) [~~(f)~~] Eligible assistance categories.

(1) State administrative expenses. The department may use up to 10 percent [~~10%~~] of the annual federal apportionment for urbanized areas with less than 200,000 population and nonurbanized areas to defray the expenses incurred for the planning and administration of the §5316 [~~Section 5316~~] program. State administrative and technical assistance expenses do not require a non-federal match.

(2) Capital expenses.

(A) Eligible items are:

(i) buses, vans, or other paratransit vehicles, fare boxes, wheelchair lifts and restraints;

(ii) equipment for transporting bicycles on public transit vehicles;

(iii) radios and communication equipment;

(iv) equipment installation costs;

(v) vehicle procurement, testing, inspection, and acceptance costs;

(vi) preventive maintenance, including all maintenance costs;

(vii) vehicle rebuilding or overhaul;

(viii) capital and operating support including computer hardware or software, with prior department approval;

(ix) transit-related intelligent transportation systems;

(x) the introduction of new technology, through innovative and improved products, into public transportation;

(xi) passenger shelters, bus stop signs, and similar passenger amenities, with prior department approval;

(xii) mobility management;

(xiii) the lease of vehicles or equipment, provided that the subrecipient, with the concurrence of the department, determines that a lease is more cost effective than purchase after considering management efficiency, availability of equipment, staffing capabilities, and guidelines on capital leases as contained in 49 C.F.R. Part 639 [~~49 CFR Part 639~~];

(xiv) the capital portions of costs for service under contract; and

(xv) the provision of Americans with Disabilities Act of 1990 (ADA) paratransit service directly related to fixed route JARC services, which shall be used only by subrecipients that are in compliance with ADA requirements for both fixed route and demand responsive service.

(B) Reimbursement rates.

(i) federal funds may be used to reimburse up to 80 percent [~~80%~~] of eligible capital expenditures;

(ii) the federal share may increase [~~to~~] up to 90 percent [~~90%~~] for incremental costs related to compliance with the Clean Air Act or with the ADA; and

(iii) eligibility standards for the higher federal share are defined in FTA Circular 9050.1, or its latest version.

(3) Project administration. Administrative costs associated with a JARC project are eligible for a federal reimbursement rate of 50 percent [~~50%~~].

(4) Planning activities. The federal reimbursement rate is 80 percent [~~80%~~]. Planning activities may include:

(A) studies relating to management, operations, and capital requirements;

(B) evaluation of previously funded projects; and

(C) other similar or related activities prior to and in preparation for the undertaking or improvement of JARC-eligible services.

(5) Marketing projects. The federal reimbursement rate is 80 percent [~~80%~~]. Marketing activities may include:

(A) market research;

(B) production of route maps and schedules;

(C) information delivery;

(D) website development;

(E) advertising;

(F) promotion of the use of transit vouchers by welfare recipients and eligible low income individuals; and

(G) promotion of employer-provided transportation, including the Internal Revenue Service's transit pass benefit.

(6) Operating expenses. Operating expenses are reimbursed at 50 percent [~~50%~~] of net operating expenses. Operating expenses are those costs directly tied to systems operations. FTA Circular 9030.1C or its latest published version shall be the guide for determining eligible operating expenses. Examples are:

(A) fuel;

(B) oil;

(C) driver, dispatcher, and mechanic salaries;

(D) purchase of service; and

(E) purchase of vouchers.

(h) [~~(g)~~] Ineligible expenses include:

(1) construction, except for passenger shelters, signage, and similar passenger amenities specifically approved by the department;

(2) extended vehicle warranties;

(3) purchase and/or maintenance of vehicles intended for private use;

(4) purchase of transit passes for use on fixed route or ADA complementary paratransit services; and

(5) other FTA-prohibited expenses.

(i) [~~(h)~~] Local share requirements.

(1) Eligible match sources include local, state, or federal programs, including funds disbursed from the Texas Workforce Commission, local workforce development boards, human service agencies, and the Medicaid Medical Transportation Program. Unrestricted federal funds are also eligible as match, such as Temporary Assistance for Needy Families (42 U.S.C. §603(a)(5)(C)(vii) [~~42 USC 603(a)(5)(C)(vii)~~]). With prior department approval, in-kind contributions, volunteer services, and donations directly attributable to the project are eligible as local share if the value is documented.

(2) Other U.S. Department of Transportation program funds cannot be used as the local share required for §5316 [~~Section 5316~~] grants. Fares cannot be used as match for any expense but must, instead, be used to determine the net operating expense to reduce the amount of requested reimbursement.

(j) [~~(i)~~] Planning requirement.

(1) Projects submitted in response to the department's call for projects must be derived from a locally developed, coordinated public transit-human service transportation plan. The plan must be developed through a process that includes representatives of public, private, and nonprofit transportation and human service providers and participation by the public.

(2) The commission supports the development of regional service plans that respond to the department's charge in Transportation Code, §461.004 to identify:

(A) overlaps and gaps in the provision of public transportation services, including services that could be more effectively provided by existing, privately funded transportation resources;

(B) underused equipment owned by public transportation providers; and

(C) inefficiencies in the provision of public transportation services by any public transportation provider.

(3) The commission anticipates that the regional service planning process will be used to meet the requirements of the local coordinated planning process described in paragraph (1) of this subsection. Regions interested in participating in the JARC program shall develop and prioritize §5316 [~~Section 5316~~] projects in response to the employment transportation deficiencies identified in the regional planning process and documented in the plan.

(4) A JARC project must:

(A) contain goals and objectives;

(B) discuss rider origination location and employment and employment-related destinations and how the project fills the transportation gap;

(C) describe how it implements the regional service plan;

(D) describe the role of the local workforce development board or its service provider in developing the project;

(E) explain how the project will maximize use of existing transportation service providers;

(F) provide a cost estimate; and

(G) identify match sources including employer-provided or employer-assisted transportation service strategies incorporated in the project.

(k) [~~(j)~~] Allocation [~~of funds~~]. As part of its administration of the §5316 [~~Section 5316~~] program, the department is charged with ensuring that there is a fair and equitable distribution of program funds within the state [~~(49 USC §5316(f)(2))~~].

(1) The department will act as the designated recipient for projects in urbanized areas with [~~of~~] less than 200,000 population and in nonurbanized areas. Of the amount apportioned to these areas by FTA's annual publication in the *Federal Register,* the department may use up to 10 percent [~~10%~~] of the total for its administrative, planning, and technical assistance activities to support the JARC program statewide.

(2) The department will allocate the remaining §5316 [~~Section 5316~~] funds to subrecipients through a statewide competitive selection process.

(3) Unless the governor certifies that all program objectives are being met, funds apportioned to urbanized or to nonurbanized areas will be available only to fund projects in urbanized or nonurbanized areas, respectively.

(4) The origination location of the riders, not their destination, shall be the basis for determining which apportionment the department uses to fund an approved project.

(5) At a minimum, the department will publish a notice in the *Texas Register* soliciting proposals for the award of §5316 [~~Section 5316~~] JARC grants. An eligible entity may submit a proposal for an eligible project in response to the published notice.

(A) The proposal must include a detailed description of:

(i) the project and the need for the project;

(ii) how the award of transportation JARC funds will expand the availability of employment related transportation services;

(iii) how the project will:

(I) promote the development of employment transportation services;

(II) support local economic development and expand economic opportunity for economically disadvantaged individuals;

(III) fully integrate the JARC program with other federal and state programs supporting public, employment, and human service transportation; and

(IV) improve the efficiency and effectiveness of employment related transportation opportunities.

(B) The proposal must describe the project's relationship to the locally developed, coordinated public transit-human service transportation plan.

(C) The department may require supplemental information to clarify the issues described in subparagraphs (A) and (B) of this paragraph.

(l) [~~(k)~~] Grant award.

(1) After commission and FTA approval of the program of projects, the department will enter into grant agreements with individual subrecipients. A subrecipient must comply with all rules and regulations applicable to the §5316 [~~Section 5316~~] program.

(2) The commission will make the final selection of projects and will select projects based on the potential of the project to:

(A) reduce congestion;

(B) expand economic opportunity;

(C) enhance safety;

(D) improve air quality; and

(E) increase the value of transportation assets.

(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.

(m) [~~(l)~~] Vehicle leasing. Vehicles acquired under the §5316 [~~Section 5316~~] program may be leased to other entities, with prior department approval, such as local public entities [~~bodies~~] or agencies, private non-profit agencies, or private for-profit operators. The lessee shall operate the vehicles on behalf of the §5316 [~~Section 5316~~] subrecipient and provide the transportation services as described in the grant application. The §5316 [~~Section 5316~~] subrecipient is responsible for seeing that all federal and state rules and regulations are observed by the lessee.

(n) [~~(m)~~] Incidental vehicle use. A vehicle that is purchased with §5316 [~~Section 5316~~] funds may be used for incidental uses that do not conflict with the primary use of the vehicle to provide transportation services for employment and employment-related transportation. Examples of permissible incidental uses are stopping for retail purchases en route [~~enroute~~] home from the workday, allowing riders not engaged in employment activities to occupy vacant seats, delivering meals, or using the vehicle for other public transportation activities when it is not required for JARC project purposes. The vehicle shall not be altered in any way to accommodate incidental use.

(o) [~~(n)~~] Disposition of vehicles at end of the grant. If a subrecipient is no longer receiving funds for a JARC project and has purchased a vehicle with JARC funds, the vehicle may be transferred to another subrecipient, in accordance with state laws and procedures governing disposition requirements.

§31.18. Section 5317 Grant Program.

(a) Applicability. The United States Congress repealed 49 U.S.C. §5317, with the passage of Moving Ahead for Progress in the 21st Century (MAP-21). This section applies only to subrecipients receiving grants with funds appropriated under federal authorization bills prior to the enactment of MAP-21.

(b) [~~(a)~~] Purpose. Section 5317, Federal Transit Act[~~,~~] (49 U.S.C. §5317 [~~49 USC §5317~~]), authorizes the Secretary of the U.S. DOT to make grants for public transportation projects that provide new public transportation services and public transportation alternatives beyond those currently required by the Americans with Disabilities Act of 1990 (ADA) that assist individuals with disabilities with transporta-

tion, including transportation to and from jobs and employment support services. The commission has been designated by the governor to administer the §5317 [~~Section 5317~~] program, known as the New Freedom Program, or NF, in areas with less than 200,000 population.

(c) [~~(b)~~] Goal and objectives. The department's goal in administering the §5317 [~~Section 5317~~] program is to provide new or improved public transportation services and alternatives, beyond the requirements of the ADA, to assist individuals with disabilities. To achieve this goal, the department's objectives are to:

(1) promote the development and maintenance of a network of transportation services and alternatives, beyond the requirements of the ADA, for individuals [~~persons~~] with disabilities throughout the state, in partnership with local officials, public and private nonprofit agencies, and operators of public transportation services;

(2) fully integrate the §5317 [~~Section 5317~~] program with other federal, state, and local resources and programs that are designed to serve similar populations;

(3) foster the development of local, coordinated public transit-human service transportation [~~and human service transportation service~~] plans from which NF projects are derived;

(4) improve the efficiency, effectiveness, and safety of §5317 [~~Section 5317~~] project providers through the provision of technical assistance; and

(5) include private sector operators in the overall plan to provide NF program transportation services for individuals [~~persons~~] with disabilities.

(d) [~~(c)~~] Department role. The department acts as the designated recipient for §5317 [~~Section 5317~~] funds apportioned to the state for all urbanized areas with less than 200,000 population and all nonurbanized areas. The subrecipient shall retain control of daily operations.

(e) [~~(d)~~] Project types.

(1) New public transportation service projects, "beyond ADA", include:

(A) providing paratransit services beyond minimum requirements (3/4 mile to either side of a fixed route) for a transit provider operating fixed route service;

(B) making accessibility improvements to existing transit and intermodal stations not designated as key stations; for example, adding an elevator or ramps, detectable warnings, improving signage;

(C) building an accessible path to a bus stop that is currently inaccessible, including curb cuts [~~curbcuts~~], sidewalks, pedestrian signals or other accessible features;

(D) implementing technology improvements that enhance accessibility for individuals [~~persons~~] with disabilities;

(E) implementing "same day" paratransit services; and

(F) otherwise facilitating or providing transportation services beyond ADA requirements, including transportation to and from employment and employment-related destinations.

(2) New public transportation alternatives, "beyond ADA", include:

(A) purchasing vehicles and supporting accessible taxi, ride-sharing, and vanpooling programs;

(B) supporting voucher programs for transportation services offered by human service providers;

(C) supporting volunteer driver and aide programs;

(D) acquiring transportation services by a contract, lease, or other arrangement;

(E) supporting mobility management and coordination programs among public transportation providers and other human service agencies providing transportation;

(F) new feeder service (transit service that provides access) to commuter rail, commuter bus, intercity rail and intercity bus stations, for which complementary paratransit service is not required under the ADA;

(G) new training programs for individual users on awareness, knowledge, and skills of public and alternative transportation options available in their communities. This includes travel instruction and travel training services; and

(H) otherwise facilitating or providing new transportation services for individuals [~~persons~~] with disabilities, including transportation to and from employment and employment-related destinations.

(f) [~~(e)~~] Eligible subrecipients.

(1) State agencies, local governmental entities [~~authorities~~], private nonprofit organizations, private for-profit operators, and operators of public transportation services are eligible to receive §5317 [~~Section 5317~~] funds through the department.

(2) Applicants who are subrecipients of public transportation funds through another program administered by the department must be in good standing with the department as defined in §31.3 of this chapter.

(g) [~~(f)~~] Eligible assistance categories include:

(1) State administrative expenses. The department may use up to 10 percent [~~10%~~] of the annual federal apportionment for urbanized areas with less than 200,000 population and nonurbanized areas to defray its expenses incurred for the planning and administration of the §5317 [~~Section 5317~~] program. State administrative and technical assistance expenses do not require a non-federal match.

(2) Capital expenses.

(A) Eligible items include:

(i) buses, vans, or other paratransit vehicles, fare boxes [~~fareboxes~~], wheelchair lifts and restraints;

(ii) radios and communications equipment;

(iii) accessibility aids;

(iv) equipment installation costs;

(v) vehicle procurement, testing, inspection, and acceptance costs;

(vi) vehicle rebuilding or overhaul;

(vii) capital and operational support including computer hardware or software, with prior department approval;

(viii) preventive maintenance, including all maintenance costs, with prior department approval;

(ix) transit-related intelligent transportation systems;

(x) the introduction of new technology, through innovative and improved products, into public transportation;

(xi) curb cuts [~~curbcuts~~], sidewalks, pedestrian signals or other accessible features;

(xii) mobility management;

(xiii) the lease of vehicles or equipment, provided that the subrecipient, with the concurrence of the department, determines that a lease is more cost effective than the purchase after considering management efficiency, availability of equipment, staffing capabilities, and guidelines on capital leases as contained in 49 C.F.R. Part 639 [~~49 CFR Part 639~~]; and

(xiv) the capital portions of costs for service under contract.

(B) Reimbursement rates.

(i) Federal funds may be used to reimburse up to 80 percent [~~80%~~] of eligible capital expenditures; and

(ii) The [~~the~~] federal share may increase up to 90 percent [~~90%~~] for incremental costs related to compliance with the Clean Air Act or with the ADA. Eligibility standards for the higher federal share are defined in FTA Circular 9045.1, or its latest version.

(3) Project administration. Administrative costs associated with a NF project are eligible for a federal reimbursement rate of 50 percent [~~50%~~].

(4) Operating expenses. Operating expenses are reimbursed at 50 percent [~~50%~~] of net operating expenses. Operating expenses are those costs directly tied to systems operations. FTA Circular 9030.1C, or its latest published version, shall be the guide for determining eligible operating expenses not specifically listed in this paragraph. Examples are:

(A) fuel and oil;

(B) maintenance, with prior department approval;

(C) driver, dispatcher, and mechanic salaries;

(D) purchase of service;

(E) reimbursement of costs associated with a volunteer driver program; and

(F) purchase of vouchers.

(h) [~~(g)~~] Ineligible expenses include:

(1) extended vehicle warranties;

(2) purchase and/or maintenance of vehicles intended for private use;

(3) marketing;

(4) planning;

(5) purchase of transit passes for use on fixed route or ADA complementary paratransit services; and

(6) other FTA-prohibited expenses.

(i) [~~(h)~~] Local share requirements.

(1) Eligible match sources include local, state, or federal program funds disbursed from the Texas Workforce Commission, local workforce development boards, human service agencies and the Medicaid Medical Transportation Program. Unrestricted federal funds are also eligible as match, such as Temporary Assistance for Needy Families (42 U.S.C. §603(a)(5)(C)(vii) [~~42 USC 603(a)(5)(C)(vii)~~]). With prior department approval, in-kind contributions, volunteer services, and donations directly attributable to the project are eligible as local share if the value is documented.

(2) Other U.S. Department of Transportation program funds cannot be used as the local share required for §5317 [~~Section 5317~~] grants. Fares cannot be used as match for any expense but must, instead, be used to determine the net operating expense to reduce the amount of requested reimbursement.

(j) [~~(i)~~] Planning requirement.

(1) Projects submitted in response to the department's call for projects must be derived from a locally developed, coordinated public transit-human service transportation plan. The plan must be developed through a process that includes representatives of public, private, and nonprofit transportation and human service providers and participation by the public.

(2) The commission supports the development of regional service plans that respond to the department's charge in Transportation Code, §461.004 to identify:

(A) overlaps and gaps in the provision of public transportation services including services that could be more effectively provided by existing, privately funded transportation resources;

(B) underused equipment owned by public transportation providers; and

(C) inefficiencies in the provision of public transportation services by any public transportation provider.

(3) The commission anticipates that the regional service planning process will be used to meet the requirements of the local coordinated planning process defined in paragraph (1) of this subsection. Regions interested in participating in the NF program shall develop and prioritize §5317 [~~Section 5317~~] projects in response to the opportunities to improve transportation for individuals [~~persons~~] with disabilities uncovered in the regional planning process and documented in the plan.

(4) An NF project must:

(A) contain goals and objectives;

(B) discuss rider origination location and destinations and how the project fills the transportation gap by providing new transportation services or new transportation alternatives beyond ADA requirements;

(C) describe how it implements the regional service plan;

(D) explain how the project will maximize use of existing transportation service providers;

(E) provide a cost estimate; and

(F) identify match sources.

(G) Where transportation to employment or employment-related destinations is part of the project, any employer-provided or employer-assisted transportation service strategies incorporated in the project must also be identified.

(k) [~~(j)~~] Allocation of funds. As part of its administration of the §5317 [~~Section 5317~~] program, the department is charged with ensuring that there is a fair and equitable distribution of program funds within the state [~~(49 USC §5317(e)(2))~~].

(1) The department will act as the designated recipient for projects in urbanized areas with [~~of~~] less than 200,000 population and in nonurbanized areas. Of the amount apportioned to these areas by FTA's annual publication in the *Federal Register,* the department may use up to 10 percent [~~10%~~] of the total for its administrative, planning, and technical assistance activities to support the NF program statewide.

(2) The department will allocate the remaining §5317 [~~Section 5317~~] funds to subrecipients through a competitive selection process.

(3) Funds apportioned to urbanized areas with less than 200,000 population will be available only to fund projects in these geographic areas.

(4) Funds apportioned to nonurbanized areas will be available only for projects serving nonurbanized areas.

(5) The origin of the riders, not their destination, shall be the basis for determining which apportionment the department uses to fund an approved project.

(6) At a minimum, the department will publish a notice in the *Texas Register* soliciting proposals for the award for §5317 [~~Section 5317~~] NF grants.

(A) An eligible entity may submit a proposal for an eligible project in response to the published notice. The proposal must include a detailed description of:

(i) the project and the need for the project;

(ii) the methods by which the award of transportation NF funds will provide new transportation services or new alternatives, beyond ADA requirements, for individuals [~~persons~~] with disabilities;

(iii) how the project will:

(I) promote the development and maintenance of a network of transportation services for individuals [~~persons~~] with disabilities;

(II) expand economic opportunity for individuals with disabilities;

(III) fully integrate the NF program with other federal, state, and local resources and programs that are designed to serve similar populations; and

(IV) improve the efficiency, effectiveness, and safety of transportation services for individuals [~~persons~~] with disabilities.

(B) The proposal must describe the project's relationship to the locally developed, coordinated public transit-human service transportation plan.

(C) The department may require supplemental information to clarify the issues described in paragraph (6)(A) and (B) of this subsection.

(l) [~~(k)~~] Grant Award.

(1) After commission and FTA approval of the program of projects, the department will enter into grant agreements with individual subrecipients. A subrecipient must comply with all requirements, rules, and regulations applicable to the §5317 [~~Section 5317~~] program.

(2) The commission will make the final selection of projects and will select projects based on the potential of the project to:

(A) reduce congestion;

(B) expand economic opportunity;

(C) enhance safety;

(D) improve air quality; and

(E) increase the value of transportation assets.

(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.

(m) [~~(l)~~] Vehicle leasing. Vehicles acquired under the §5317 [~~Section 5317~~] program may be leased to other entities, with prior department approval, such as local public entities [~~bodies~~] or agencies, private nonprofit [~~non-profit~~] agencies, or private for-profit operators. The lessee shall operate the vehicles on behalf of the §5317 [~~Section 5317~~] recipient and provide the transportation services as described in the grant application. The §5317 [~~Section 5317~~] recipient is responsible for seeing that all federal and state rules and regulations are observed by the lessee.

(n) [~~(m)~~] Incidental vehicle use. A vehicle that is purchased with §5317 [~~Section 5317~~] funds may be used for incidental uses that do not conflict with the primary use of the vehicle to provide new or alternative transportation services beyond ADA requirements. Examples of permissible incidental uses are meal delivery, allowing able-bodied persons to occupy vacant seats or using the vehicle for other public transportation activities not required for its NF project purposes. The vehicle shall not be altered in any way to accommodate incidental use.

(o) [~~(n)~~] Disposition of vehicles at end of the grant. If a subrecipient is no longer receiving funds for an NF project and has purchased a vehicle with NF funds, the vehicle may be transferred to another subrecipient, in accordance with state laws and procedures governing disposition requirements.

§31.21. Section 5303 Grant Program.

(a) Purpose. Section 5305, Federal Transit Act[~~,~~] (49 U.S.C. §5305 [~~49 USC §5305~~]), authorizes the Secretary of the U.S. DOT to make grants to benefit metropolitan planning organizations (MPOs) [~~MPOs~~] to support the development of transportation plans and programs as defined in §5303 and §5305. Funds apportioned to the states for this purpose must be allocated to the MPOs.

(b) Eligible recipients. Section 5303 funds are available only to MPOs. Other entities may participate in the program through contracts with MPOs.

(c) Department role. The department acts as the designated recipient for §5303 metropolitan planning grants. The department will request the transfer of the annual FTA §5303 apportionment from the Federal Transit Administration to the Federal Highway Administration (FHWA) to support the required metropolitan planning program, which will be administered by the department as a consolidated grant program from FHWA.

[~~(c) Department role. The department acts as the designated recipient for Section 5303 metropolitan planning grants. As the administering agency the department will:~~]

[~~(1) allocate the available program funds using the latest census data for the population of the urbanized area served by the MPO, so that all MPOs receive funds based on the ratio of each MPO's population to the total population of all MPOs, except that:~~]

[~~(A) any MPO that would otherwise receive less than an established minimum threshold amount will have its funding level adjusted upward to that amount; and~~]

[~~(B) to the maximum extent practical no MPO will be allocated less than the amount it received by administrative formula at the time of the last decennial census;~~]

[~~(2) prepare the state's funding application in conjunction with the state's application for a Section 5304 grant and submit the material to the FTA for approval;~~]

[~~(3) execute contracts with MPOs;~~]

[~~(4) prepare requests for federal reimbursement and process payment requests from MPOs;~~]

[~~(5) monitor and evaluate the progress of annual work programs, including compliance with federal regulations; and~~]

[~~(6) provide technical assistance as necessary.~~]

[~~(d) Local share requirements. Section 5303 grants require a 20% match as the local share. U.S. DOT program funds cannot be used as the local share. Eligible match sources include local or state programs or unrestricted federal funds. In-kind services, volunteer services, and donations are eligible as local share if the value is documented.~~]

§31.22. Section 5304 Grant Program.

(a) Purpose. Section 5305, Federal Transit Act[~~,~~] (49 U.S.C. §5305 [~~49 USC §5305~~]), authorizes the Secretary of the U.S. DOT to make grants to states for planning and research activities as defined in §5304 and §5305.

(b) Eligible recipients. Section 5304 funds are available only to the state. Other entities may participate in the program through contracts with the state.

(c) Local share requirements. Section 5304 grants require a 20 percent match, which may be in the form of cash, transportation development credits, or in-kind services [~~20% cash or in-kind match as the local share.~~]. Certain human resource program activities [~~Projects of national importance and certain grants to universities~~] may have a lower match requirement in accordance with [~~as defined in~~] FTA Circular 8100.1C [~~8200.1~~], or its latest version. U.S. DOT program funds cannot be used as the local share.

(d) Department role. The department will prepare the state's funding application [~~in conjunction with the state's application for a Section 5303 grant~~] and submit the material to the FTA for approval.

§31.26. Section 5307 Grant Program.

(a) Purpose. Section 5307, Federal Transit Act[~~,~~] (49 U.S.C. §5307 [~~49 USC §5307~~]), authorizes the Secretary of the U.S. DOT to make capital and operating grants for public transportation projects in urbanized areas.

(b) Eligible recipients. Section 5307 funds for urbanized areas with populations of 200,000 or more are dispensed by the FTA directly to eligible recipients designated by the governor or the governor's designee. Section 5307 funds for urbanized areas with populations of less than 200,000 may be dispensed by the governor or may be dispensed by FTA directly to eligible recipients designated by the governor or the governor's designee.

(c) Allocation of funds. For the urbanized areas with populations of 200,000 or more, funds are apportioned to the urbanized area by the FTA. For the urbanized areas with populations of less than 200,000, funds are apportioned to the governor for allocation to those areas. This section governs the allocation of those funds if the governor delegates this responsibility to the commission or to the department.

(d) Department role. After notification from the FTA that the §5307 [~~Section 5307~~] governor's apportionment funds are available, the department will notify the FTA of the amounts allocated to each [~~designated~~] recipient from the governor's apportionment and will notify the [~~designated~~] recipient of that amount.

(e) Funding distribution. The department will allocate §5307 [~~Section 5307~~] funds [~~to designated recipients~~] in the following manner.

(1) Each [~~designated~~] recipient will receive the amount published in the *Federal Register* under the §5307 [~~Section 5307~~] formula apportionment, except as provided in paragraphs (2) - (4) of this subsection.

(2) Any deobligated funds still available to Texas from previous years will be distributed to [~~designated~~] recipients on a pro rata basis except for urbanized areas that are under 200,000 in population and that are located within the planning boundaries of a transportation management area (a metropolitan planning organization with over 200,000 population, as defined by the U.S. Census).

(3) Recipients [~~Designated recipients~~] must notify the department if allocated funds are not needed in a given year. These funds may be distributed to the remaining [~~designated~~] recipients on a pro rata basis or distributed at the department's [~~commission's~~] discretion.

(4) The department may review grant balances from previous years and adjust individual awards as needed. Adjustments that increase the overall available apportionment will be distributed to all recipients on a pro rata basis. An adjustment under this paragraph and any resulting distribution do not apply to an urbanized area that is under 200,000 in population and that is located within the planning boundaries of a transportation management area. [~~Except for urbanized areas that are under 200,000 in population and that are located within the planning boundaries of a transportation management area, the department may review grant balances from previous years and adjust individual awards. Adjustments that increase the overall apportionment will be distributed to all remaining designated recipients on a pro rata basis.~~]

§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 agencies in urbanized areas with less than 200,000 population and §5311 rural transit agencies. As the administering agency, 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 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.

(d) Eligible assistance categories. Eligible projects are those listed in FTA Circular 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.

(e) Link to asset management plan. 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.

(f) Reimbursement rates.

(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.

(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.

(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 will be the primary recipients of funds for their respective service areas.

(2) For an area not covered by a transit provider or for which the existing provider is not willing or able to provide the transportation, the director may choose a local public entity or a private organization as 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.

(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 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 and restraints;

(ix) vehicle rehabilitation, remanufacture, or overhaul;

(x) 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) Reimbursement rates.

(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.

(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 al-

located 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) Department personnel will establish, 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 9070.1F, 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, 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) 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.

(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.

(5) Based on stakeholder input, department personnel assigned to cover district areas will rank projects in priority order.

(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 [~~49 USC §5311~~]), authorizes the Secretary of the U.S. DOT to make grants for public transportation projects in rural [~~nonurbanized~~] areas. The department has been designated by the governor to administer the §5311 [~~Section 5311~~] program.

(b) Goal and objectives. The department's [~~Department's~~] goal in administering the §5311 [~~Section 5311~~] program is to promote the availability of [~~professional,~~] cost-effective, efficient, and coordinated passenger transportation services to the general public in rural [~~nonurbanized~~] 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 [~~in nonurbanized~~] areas throughout the state, in partnership with local officials;

(2) fully integrate the §5311 [~~Section 5311~~] program with other federal, state, and local resources that are designed to serve rural [~~nonurbanized~~] populations;

(3) improve the efficiency, effectiveness, and safety of §5311 [~~Section 5311~~] systems through the provision of technical assistance; and

(4) include private sector operators in the overall plan to provide public transportation services.

(c) Department role. The department acts as the designated recipient for all §5311 [~~Section 5311~~] funds apportioned [~~appropriated~~] to the state and has an oversight responsibility for all rural [~~nonurbanized~~] 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 [~~Section 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 [~~Section 5311~~] subrecipients;

(6) prepare requests for federal reimbursement, and process payment requests from §5311 [~~Section 5311~~] subrecipients;

(7) monitor and evaluate the progress of ongoing transportation operations, including compliance with federal regulations; and

(8) provide technical assistance to §5311 [~~Section 5311~~] subrecipients to aid them in improving transit services.

(d) Eligible subrecipients. State agencies, local public entities [~~bodies~~], private nonprofit organizations, Native American tribes and organizations, and operators of public transportation services are eligible to receive §5311 [~~Section 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 [~~Section 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 [~~Section 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 [~~Section 5311~~] program.

(1) State administrative expenses. The department may use up to 10 [~~15~~] percent of the annual federal apportionment to defray its expenses incurred for the administration of the §5311 [~~Section 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[~~, but are not limited to~~]:

(i) buses;

(ii) vans or 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 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 [~~49 CFR Part 639~~];

(xv) the capital portions of costs for service under contract;

(xvi) joint development projects (FTA Circular 9300.1B [~~9300.1A~~], 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 [~~Section 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) Reimbursement rates. Based on funding availability, the reimbursement provisions of this subparagraph apply.

(i) Federal funds may be used to reimburse up to 80 percent of eligible capital expenditures.

(ii) A grant that involves acquiring vehicles to comply with the Americans with Disabilities Act or the Clean Air Act may be reimbursed at 85 percent of the net project cost.

(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.

(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. Eligibility standards for the higher federal share are defined in FTA Circular 9040.1F, or its latest version.

[~~(C) Based on funding availability, federal funds may be used to reimburse up to 80 percent of eligible capital expenditures. The federal share may increase to up to 90 percent for bicycle facilities projects or for incremental costs related to compliance with the Clean Air Act or with the Americans with Disabilities Act of 1990. 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 Indian 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 9040.1F, 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) [~~23 U.S.C. 120(b)(2)~~] as determined by FTA regarding the area of nontaxable Native American [~~Indian~~] 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 9040.1F, or its latest version.

(4) Operating expenses. Costs [~~Those costs~~] directly tied to systems operations, such as costs for fuel, oil, and replacement parts, and driver, mechanic, and dispatcher salaries, [~~drivers' mechanics', and dispatchers' salaries, and replacement parts~~] 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) [~~23 U.S.C. 120(b)(2)~~] as determined by FTA regarding the area of nontaxable Native American [~~Indian~~] 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 9040.1F, 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 [~~Section 5311~~] grants. [~~Eligible match sources include local or state programs, or unrestricted federal funds. At least half of the local share for both net operating and non-operating expenses must be cash or cash equivalent. In-kind contributions, volunteer services, and donations are eligible as local share if the value is documented.~~]

(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 [~~Section 5311~~] program, the department is charged with ensuring that there is a fair and equitable distribution of funds within the state (FTA Circular 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 [~~Section 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 [~~Section 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 [~~Section 5311~~] federal apportionment, plus the remaining balance of previous §5311 [~~Section 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 [~~nonurbanized~~] area relative to the sum of all rural [~~nonurbanized~~] 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 [~~appropriation~~], 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 [~~Section 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 [~~Section 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. 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) Vehicle revenue mile allocation. Any amount of the annual §5311 [~~Section 5311~~ federal apportionment that is not otherwise allocated under this subsection will be allocated to rural [~~nonurbanized~~] areas, with the amount allocated to a rural [~~nonurbanized~~] area based on the proportion of vehicle revenue miles for that rural [~~nonurbanized~~] area to the total of vehicle revenue miles for all rural [~~nonurbanized~~] 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 nonurbanized 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 [~~Section 5311~~] program. A completed application must be submitted, in a form prescribed by the department, [~~to the appropriate district office,~~] 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.

§31.37. Rural Transportation Assistance Program.

(a) Purpose. The Rural Transportation Assistance Program (RTAP) will foster the development of state and local capacity to meet the training and technical assistance needs of rural [~~nonurbanized~~] public transportation systems.

(b) Objectives. The RTAP will develop training and training materials to improve the quality of information and technical assistance available to local transit operators, develop networks of transit professionals, and support the coordination of public, private, specialized, and human service transportation services.

(c) Eligible recipients. Private consultants, universities, nonprofit organizations, state transit associations, state agencies, and transit operators are eligible to receive RTAP funds.

(d) Program development and project selection. Budgetary requirements for the annual RTAP program of projects will be determined by the department [~~for individual projects~~]. The department retains final approval for all RTAP projects. Projects will be selected as follows.

(1) Research and statewide technical assistance projects may [~~will~~] be competitively advertised and evaluated by department personnel. The department will establish evaluation criteria specific to each project to be funded under this paragraph.

(2) Requests from individual transit operators for technical assistance funds will be reviewed and evaluated by the director, or the director's designee, based on the following criteria:

(A) the demonstrated need for technical assistance, examples of which may include, but are not limited to, agency training plans and resolutions from local governments requesting feasibility studies;

(B) the applicant's capability to benefit from technical assistance;

(C) anticipated benefits of the project that can be replicated or used by other transit operators in the state;

(D) evidence of local support for the proposal, if applicable, which includes, but is not limited to, resolutions by local governing bodies and endorsement letters from other organizations or individuals; and

(E) the availability of funds.

(e) Local matching requirements. The department may require RTAP subrecipients to defray a portion of project expenses either through cash payments or in-kind donations if:

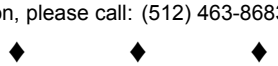
(1) a match requirement will allow the department to extend RTAP benefits to a broader audience; or

(2) the benefits of a project are limited to that RTAP subrecipient and cannot be replicated or used by other transit operators in the state.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 26, 2013.

TRD-201303019
Jeff Graham
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: September 8, 2013
For further information, please call: (512) 463-8683



43 TAC §31.31

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeal is 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, Transportation Code, Chapter 455, which provides the general powers and duties for the Department of Transportation regarding mass transportation.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 455.

§31.31. Section 5310 Grant Program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 26, 2013.

TRD-201303020
Jeff Graham
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

SUBCHAPTER D. PROGRAM ADMINISTRATION

43 TAC §§31.38, 31.40, 31.42 - 31.45, 31.48, 31.49

STATUTORY AUTHORITY

The amendments and new sections 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, Transportation Code, Chapter 455, which provides the general powers and duties for the Department of Transportation regarding mass transportation.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 455.

§31.38. Public Transit Safety Program.

(a) Purpose. Title 49 U.S.C. §5329, authorizes the Secretary of the U.S. DOT to create and implement a National Public Transportation Safety Plan. Recipients and subrecipients must develop transit asset management plans and report to the Secretary annually.

(b) Affected agencies. Subrecipients of §5311 Rural Formula Grants through the department must comply with 49 U.S.C. §5326.

(c) Department role. As the administering agency the department will:

(1) provide guidance to agencies requesting assistance with the development of a transit safety plan;

(2) prepare plans for agencies requesting the department prepare plans on their behalf; and

(3) certify subrecipient compliance with 49 U.S.C. §5329 requirements.

(d) Subrecipient responsibilities. Subrecipients will develop a transit safety plan that, at a minimum, includes:

(1) a requirement that the governing body of the subrecipient approve the agency safety plan and any updates to the agency safety plan;

(2) methods for identifying and evaluating safety risks throughout all elements of the public transportation system of the subrecipient;

(3) strategies to minimize the exposure of the public, personnel, and property to hazards and unsafe conditions;

(4) a process and timeline for conducting an annual review and update of the safety plan of the subrecipient;

(5) performance targets based on the safety performance criteria and state of good repair standards when established by the U.S. DOT Secretary in the National Public Transportation Safety Plan;

(6) assignment of an adequately trained safety officer who reports directly to the general manager, president, or equivalent officer of the subrecipient; and

(7) a comprehensive staff training program for operations personnel and personnel directly responsible for safety that includes:

(A) the completion of a safety training program; and

(B) continuing safety education and training.

§31.40. Public Involvement.

Recipients of state and federal public transportation funds through the department, as applicable, shall:

(1) satisfy the certification requirements of 49 U.S.C. §5310(e)(2)(A)--Project Selection and Plan Development, Enhanced Mobility of Seniors and Individuals with Disabilities Program;

(2) satisfy the certification requirements of 49 U.S.C. §5316(g)(3)(B)--Project Selection and Planning, Job Access and Reverse Commute Program, as governed by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU);

(3) satisfy the certification requirements of 49 U.S.C. §5317(f)(3)(B)--Project Selection and Planning, New Freedom Program, as governed by SAFETEA-LU; and

(4) provide the annual FTA certifications and assurances.

§31.42. Standard Federal Requirements.

(a) Federal Transit Administration programs are subject to 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 the Common Rule [~~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. [~~Notice shall be given to the district or to the Public Transportation Division, whichever is responsible for administering the grant.~~] 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. [~~All subcontracts in excess of $25,000 shall contain the following required provisions from the pro forma grant contract between the department and the subrecipient:~~]

[~~(1) financial management;~~]

[~~(2) civil rights; and~~]

[~~(3) disadvantaged business enterprise program requirements.~~]

§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 the Common Rule [~~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 [~~bids~~] 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 the Common Rule [~~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 [~~contractor~~] 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.

§31.48. Project Oversight.

(a) Purpose. This section describes reporting requirements for designated recipients and subrecipients of state or [~~and~~] 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.

(3) Charter service. Section 5311 subrecipients [~~subrecipient~~] 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 [~~Subrecipient~~] shall submit reports in accordance with Chapter 9, Subchapter L [~~§9.54~~] of this title (relating to Historically Underutilized Business (HUB) Program).

(5) Operations reports. All FTA [~~designated~~] 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 [~~Section 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) [~~(B)~~] Pursuant to the requirements of Transportation Code, §456.008(a) and (b), the department will collect data from transit operators in urbanized areas, including transit authorities, and publish annually [~~the following~~] performance-based indicators including: [~~for recipients of FTA Section 5307 funds, including metropolitan transportation authorities.~~]

(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) [~~(C)~~] Pursuant to the requirements of Transportation Code, §456.008(a) and (b), and 49 U.S.C. §5311, the department will collect data from transit operators in rural areas, and publish annually [~~the following~~] performance-based indicators, including [~~for RPT subrecipients of FTA Section 5311 funds~~]:

(i) Service efficiency--Operating expense per vehicle mile.

(ii) Cost effectiveness--Operating expense per unlinked passenger trip.

(iii) Service effectiveness--Unlinked passenger trips [~~per capita and 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 data 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 performance-based indicators, including, as applicable:

(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 [~~Section 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 [~~Section 5310, 5316, and 5317~~] 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 [~~Section 5307 or 5311~~] funding, the subrecipient shall include §§5310, 5316, and 5317 [~~Section 5310, 5316, and 5317~~] employees in their FTA testing program.

(3) Fiscal responsibility. A department [~~The district~~] employee [~~responsible for coordinating the district's public transportation program~~] 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. 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 [~~district employee responsible for coordinating the district's public transportation program~~] 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 [~~Checksheets developed by the department~~] will be maintained by the department [~~district~~] to ensure all benchmark activities are accomplished in the proper sequence.

(d) Noncompliance. A subrecipient that fails [~~subrecipient's failure~~] 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).

§31.49. Transportation Needs of Clients of Health and Human Service Agencies and Coordination of Services.

(a) Purpose. This section describes requirements for addressing the transportation needs of clients of health and human service agencies and for the coordination of services between recipients of state and federal public transportation grant funds and other transportation operators.

(b) Planning for client transportation.

(1) The department will consider and will encourage metropolitan planning organizations to consider the transportation needs of persons who are clients of health and human services agencies in the planning processes performed under Chapter 16, Subchapter B,

[~~Chapter 15, Subchapter A,~~] of this title (relating to Transportation Planning).

(2) An applicant for state or federal financial assistance under this chapter must submit evidence of coordination efforts to the department. This evidence must include a certification that, whenever possible, and to the maximum extent feasible, the existing network of transportation providers, and in particular the fixed route components of public transportation systems, will be used to meet the client transportation requirements of the state's social service agencies and their clients.

(3) The department will encourage, to the maximum extent possible, state health and human services agencies to base their transportation funding decisions on the recommendations that result from the:

(A) planning processes described under paragraph (1) of this subsection; and

(B) evidence of coordination efforts submitted under paragraph (2) of this subsection.

(c) Standards. Contractors shall at all times coordinate the provision of public transportation services with other transportation operators, both public and private, in the local area. Contractors shall furnish the department copies of any coordination agreements or other documents that demonstrate a good faith effort to reduce duplication of effort while improving the efficiency and effectiveness of transit services to the public. The department may suggest coordination efforts and may direct state and federal grant funding towards that end.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel
Texas Department of Transportation
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43 TAC §31.40, §31.42

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

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, Transportation Code, Chapter 455, which provides the general powers and duties for the Department of Transportation regarding mass transportation.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 455.

§31.40. Public Involvement.

§31.42. Standard Federal Requirements.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. PROPERTY MANAGEMENT STANDARDS

43 TAC §31.51, §31.57

STATUTORY AUTHORITY

The amendments and new section 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, Transportation Code, Chapter 455, which provides the general powers and duties for the Department of Transportation regarding mass transportation.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 455.

§31.51. Asset Management.

(a) Purpose. Title 49 U.S.C. §5326 authorizes the Secretary of the U.S. DOT to establish and implement a national transit asset management system. Recipients and subrecipients must develop transit asset management plans and report to the Secretary annually.

(b) Affected agencies. Subrecipients of federal transit assistance through the department must comply with 49 U.S.C. §5326.

(c) Department role. The department acts as the designated recipient of multiple Federal Transit Act programs. As the administering agency the department will:

(1) provide guidance to agencies requesting assistance with the development of a transit asset management plan;

(2) certify subrecipient compliance with 49 U.S.C. §5326 requirements;

(3) provide the Federal Transit Administration (FTA) with an annual report that includes at a minimum:

(A) overall condition of transit assets;

(B) changes since the last report;

(C) performance measures; and

(D) progress in meeting performance measure targets.

(d) Subrecipient responsibilities.

(1) Subrecipients shall develop a transit asset management plan that covers rolling stock, equipment, infrastructure, and facilities leased or owned by the agency. At a minimum, the plan must include:

(A) capital asset inventories;

(B) condition assessments;

(C) decision support tools; and

(D) investment prioritization.

(2) Subrecipients shall provide the department the data needs to comply with §31.48(b)(5)(B) of this chapter (relating to Project Oversight).

(3) After the U.S. DOT Secretary establishes a definition for the term "state of good repair" (SOGR), agencies must set performance targets to attain SOGR status. The department will assist subrecipients to establish performance targets that may vary by the subrecipient's FTA funding program.

§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 the Common Rule [~~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 the Common Rule [~~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 the Common Rule [~~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 [~~a third party~~]. 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.

(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 [~~a third party~~].

(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.

[~~(D) Exceptions. As allowed under 49 USC §5334(h), a subrecipient may petition the department to allow the transfer of the federal interest in any real property and equipment subject to the standards contained in this subsection. If a petition is filed, the subrecipient must furnish information requested by the department to determine if the real property or equipment is no longer needed for public transportation purposes. The department will consider other exceptions to the standards contained in subparagraphs (A) and (B) of this paragraph on a case-by-case basis. If an exception is claimed, 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 insure compliance with federal standards.~~]

(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) [~~paragraph (1)(D)~~] of this section [~~subsection~~]. 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) [~~49 USC §5334(h)~~], the department will release only the federal portion of its contractual interest. The department will consult with FTA as necessary to insure 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) [~~paragraph (1)(D)~~] of this section [~~subsection~~], 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) [~~49 USC §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 insure compliance with federal standards.

(C) Net proceeds from sale of capital assets. In cases in which the Common Rule [~~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.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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