

# ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

## TITLE 1. ADMINISTRATION

### PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

#### CHAPTER 355. REIMBURSEMENT RATES

##### SUBCHAPTER J. PURCHASED HEALTH SERVICES

The Texas Health and Human Services Commission (HHSC) adopts amendments to §355.8061, concerning Outpatient Hospital Reimbursement, §355.8121, concerning Reimbursement to Ambulatory Surgical Centers, §355.8610, concerning Reimbursement for Clinical Laboratory Service, and §355.8660, concerning Renal Dialysis Reimbursement.

The amendments are adopted without changes to the proposed text as published in the June 23, 2023, issue of the *Texas Register* (48 TexReg 3375). The rules will not be republished.

#### BACKGROUND AND JUSTIFICATION

The amendments implement the outpatient prospective payment system (OPPS) reimbursement as required by Texas Government Code §536.005, (enacted in the 82nd Texas Legislature, 1st Called Session, 2011) which requires that HHSC "convert outpatient hospital reimbursement systems to an appropriate prospective payment system." In addition, the 2014-15 General Appropriations Act, Senate Bill 1, 83rd Legislature, Regular Session, 2013 (Article II, HHSC, Rider 38) stated that "in order to ensure that access to emergency and outpatient services remain in rural parts of Texas, it is the intent of the Legislature that when HHSC changes its outpatient reimbursement methodology to a 3M(™) Enhanced Ambulatory Patient Groups (EAPG) or similar methodology, HHSC shall promulgate a separate or modified payment level for the above defined providers." HHSC has been unable to implement EAPGs in the current Medicaid Management Information System (MMIS) without significant technology costs. Now that the agency is moving to a modernized MMIS, EAPGs are being implemented on the same timeframe. The contracts related to the modernized MMIS anticipated the new system would become operational on September 1, 2023, but the implementation date has been delayed and the OPPS transition to EAPGs is expected to occur in conjunction with the MMIS modernization implementation. At this time, the implementation is projected to occur on December 1, 2024. Public notices will be issued if there are changes to the implementation timeframe that result from additional modifications to contracts associated with the MMIS modernization implementation.

The OPPS that HHSC will implement in fee-for-service is the EAPG grouper methodology. EAPGs are a visit-based classifica-

tion system intended to reflect the type of resources utilized in outpatient encounters for patients with similar clinical characteristics. EAPGs are used in outpatient prospective payment systems for a variety of outpatient settings, including hospital emergency rooms, outpatient clinics, and same-day surgery. EAPGs are proprietary to 3M Health Information Systems and 3M initially developed Ambulatory Patient Groups prior to 2000. In 2007, 3M made significant changes to its earlier variant of the grouper to reflect current clinical practice, including coding and billing practices, and to describe a broader, non-Medicare population, which resulted in what we now call EAPGs. EAPGs group procedures and medical visits that share similar clinical characteristics, resource utilization patterns, and cost so that payment is based on the relative intensity of the entire visit. The EAPG grouping system is designed to recognize clinical and resource variations in severity, which results in higher payments for higher-intensity services and lower payments for less-intensive services. While each claim may receive multiple EAPGs, each procedure is assigned to only one EAPG.

HHSC continues to work through the evaluation of the potential impacts in payments to hospitals and other impacted providers and shared the results of the preliminary financial models in September 2023. The financial impact models will continue to be refreshed as additional data becomes available prior to implementation of EAPGs. The rule amendments update the reimbursement methodology in each of the four rules to clarify the transition to EAPGs.

#### COMMENTS

The 31-day comment period ended July 24, 2023.

During this period, HHSC received 11 comments from three providers, two managed care associations, one managed care organization, and five provider associations. Comments on the proposed rules were received from the following entities: Texas Organization of Rural and Community Hospitals (TORCH), Children's Hospital Association of Texas (CHAT), Teaching Hospitals of Texas (THOT), Texas Hospital Association (THA), Texas Association of Health Plans (TAHP), Parkland Community Health Plan (PCHP), Texas Children's Hospital (TCH), DaVita, Fresenius Medical Care, and the Texas Ambulatory Surgery Center Society (TASCS).

A summary of comments relating to the rules and HHSC's responses follow.

Comment: Multiple commenters from Medicaid Managed Care Organizations (MCOs) suggested that HHSC should delay the transition to the OPPS methodology. MCOs noted that they believe this transition will have a significant impact on payments to Hospitals and MCOs in Medicaid and respectfully requested that HHSC delay the transition to EAPGs pending the development of a workgroup and a possible phased implementation plan.

Response: HHSC appreciates this suggestion and plans to continue communication with stakeholders, including MCOs and hospitals, prior to implementation of EAPGs and the MMIS modernization initiative. HHSC published preliminary financial modeling in September 2023 and an updated notice regarding the timeline from the MMIS modernization initiative. The implementation date of the OPPS methodological change will coincide with the implementation of the MMIS modernization, currently projected to occur on December 1, 2024. No changes were made to the rule text in response to this comment.

Comment: Multiple commenters in different provider groups suggested that HHSC should delay the transition, citing substantial system and operational modifications on the part of MCOs—including updating payment systems, aligning policies, reconfiguring claims processing, and training staff—but also comprehensive provider engagement. Transitioning to the EAPG rate methodology will also require renegotiating contracts with the MCO's network providers and thoroughly educating them on the new payment system.

Response: HHSC appreciates this suggestion and plans to continue communication with stakeholders, including MCOs and hospitals, prior to implementation of EAPGs and the MMIS modernization initiative. HHSC published preliminary financial modeling in September 2023 and an updated notice regarding the timeline from the MMIS modernization initiative. The implementation date of the OPPS methodological change will coincide with the implementation of the MMIS modernization, currently projected to occur on December 1, 2024. No changes were made to the rule text in response to this comment.

Comment: Multiple commenters suggested that HHSC should delay the transition. Adequate time is required to undertake these complex tasks while maintaining open, constructive dialogue with Medicaid providers to address any concerns or issues that may arise. Importantly, the original proposal indicated a 12-18-month implementation timeline was needed. Now that Medicaid-managed care represents 96% of enrollees, it underscores the importance of collaboration between HHSC and Texas MCOs when planning and implementing such significant changes.

Response: HHSC appreciates this suggestion and plans to continue communication with stakeholders, including MCOs and hospitals, prior to implementation of EAPGs and the MMIS modernization initiative. HHSC published preliminary financial modeling in September 2023 and an updated notice regarding the timeline from the MMIS modernization initiative. The implementation date of the OPPS methodological change will coincide with the implementation of the MMIS modernization, currently projected to occur on December 1, 2024. No changes were made to the rule text in response to this comment.

Comment: Multiple commenters asked that HHSC provide their usual standards to the transition to the new OPPS EAPG system so that providers have sufficient notice and detail regarding the changes to the outpatient payments.

Response: HHSC appreciates this suggestion and plans to continue communication with stakeholders, including MCOs and hospitals, prior to implementation of EAPGs and the MMIS modernization initiative. HHSC published preliminary financial modeling in September 2023 and an updated notice regarding the timeline from the MMIS modernization initiative. The implementation date of the OPPS methodological change will coincide with the implementation of the MMIS modernization,

currently projected to occur on December 1, 2024. The financial modeling published by HHSC is intended to allow interested parties to evaluate the impact on their particular hospital(s) and provide feedback on policy decisions made by HHSC for consideration prior to implementation. No changes were made to the rule text in response to this comment.

Comment: One commenter expressed concern the proposed methodology for renal dialysis facilities is not based upon a Medicare methodology and the proposed new methodology using the outpatient prospective payment system should be separate from the End-Stage Renal Disease (ESRD) payment system. The commenter requested a minimum rate of \$350 per treatment to cover costs of care and noted they believed a lower reimbursement rate would be detrimental to clinic operations. Since dialysis is not paid for using this system, the commenter is not sure what aspect of Medicare payment this proposal is using as an anchor for Medicaid dialysis rates. Commenters requested financial modeling of results for renal facilities using the EAPG methodology since that is not how dialysis is paid for in Medicare. Providers expressed concerns that a reduction in reimbursement may result in clinic closures as COVID has negatively impacted the renal dialysis industry.

Response: HHSC recognizes the ESRD facilities' concerns and plans to publish further detail on the expected implementation timeline and fiscal impacts through modeling as well as in Medicaid policy. This modeling will allow interested parties to evaluate the impact on their particular organization, the estimated rate to be paid, and provide feedback on policy decisions. No changes were made to the rule text in response to this comment.

Comment: Multiple commenters expressed concerns related to the proposed use of a proprietary software that will require hospitals to purchase a proprietary system as a basis for understanding (to the degree 3M allows through that purchase) how provider rates are established and what they will be reimbursed through 3M and the state.

Response: Providers will not be required to purchase EAPG software to receive reimbursement. No changes were made in response to this comment.

Comment: One commenter recommended that HHSC seek a no-or reduced cost fee for providers in its current or future contracts with 3M.

Response: Providers will not be required to purchase EAPG software to receive reimbursement. No changes were made in response to this comment.

Comment: One commenter recommended that HHSC create tools for providers such as what Nebraska and Florida developed: essentially an online EAPG calculator so that providers can understand and assess their payments.

Response: HHSC appreciates the recommendation and will evaluate the posted calculators for Nebraska and Florida to determine applicability as the OPPS transition continues. No changes were made to the rule text in response to this comment.

Comment: One commenter questioned the statement "...no adverse impact to small businesses..." since Ambulatory Surgical Centers (ASCs) are small businesses and are struggling with the post-COVID environment. The commenter encouraged HHSC to reach a full and complete understanding of the impact of this initiative on providers prior to mandating its implementation.

Response: HHSC is moving to implement the transition to OPPS rates as legislatively directed. The OPPS system applies to many services and providers of various sizes. While the overall impact will be fiscally neutral, it is probable that there will be shifts that may result in increases in revenue for some small or rural hospitals and decreases in revenue for others, but it is not possible to know the precise impact as it will be based on the services provided by each entity following implementation. No changes were made to the rule text in response to this comment.

Comment: Multiple commenters requested modification of the rule before adoption to specify whether the exceptions to OPPS listed are an all-inclusive list and describe the reimbursement methodology applicable to all exceptions or refer to other regulations or written policy. A request was also made to exempt orphan drugs, oncology drugs, high-cost medical equipment, and implants from the OPPS. The following language was suggested: "Any other item or service designated by the Executive Commissioner upon 90 days' notice to providers."

Response: The exemptions listed in the rule text are specifically excluded from the OPPS methodology in order to clearly distinguish what is included and what is not. HHSC plans to use the rule text to communicate specific services and providers that will be included in the OPPS methodology and will update if that list changes prior to the implementation. No changes were necessary in response to this comment.

Comment: One commenter requested class-specific base rates similar to the inpatient hospital methodology.

Response: HHSC did develop base rates based on current hospital classes (children's, urban, and rural) for implementation of the OPPS methodology. No changes were necessary in response to this comment.

Comment: One commenter urged HHSC to include both non-covered and covered charges where there are daily limits in the data.

Response: HHSC included claims for only allowable services under the OPPS methodology. HHSC is not making adjustments to include more allowable procedure codes than currently a benefit in Medicaid fee for service. No changes were made in response to this comment.

Comment: One commenter requested add-ons for geographic location, patient acuity level, and a transitional teaching add-on until a future rebasing.

Response: HHSC did not create any new add-ons when completing the initial modeling as HHSC did not receive appropriations to use for the payment of such an add-on. HHSC will collect additional public comments on financial impacts of the modeling and, if the creation of an add-on is deemed appropriate, HHSC will consider that for future rule changes. No changes were made in response to this comment.

Comment: One commenter recommended the 3M model include social factor assessments as well as clinical intensity in the EAPG system.

Response: The 3M model is an OPPS model used in other states currently. HHSC can change weights as clinically appropriate based on Texas Medicaid policies but cannot modify the 3M software structure. No changes were made in response to this comment.

Comment: One commenter recommended the proposed rules be updated to include details for hospitals to assess the impact

of this transition, such as information about base rates methodology, policy adjustments, and any outlier or carved out payments.

Response: HHSC appreciates the recommendation. The level of detail in the rule is consistent with other initiatives and allows HHSC to adapt and more quickly implement federal coding changes or directives. No changes were necessary in response to this comment.

Comment: One commenter recommended that HHSC change the proposed rule implementation timeline to at least 12 months after the implementation of the MMIS to provide time for policy decisions, modeling of impact, stakeholder input, testing, and for outpatient providers to plan for and implement this significant change in payment methodologies.

Response: HHSC appreciates the commenter's perspective and plans to publish further detail on expected implementation timelines and fiscal impacts through modeling as well as in Medicaid policy. This modeling will allow interested parties to evaluate the impact on their particular hospital(s) and provide feedback if preferred. No changes were made to the rule text in response to this comment.

Comment: One commenter recommended that HHSC beta test the OPPS methodology and estimate impacts before HHSC schedules the implementation.

Response: HHSC is required by legislative direction to implement an OPPS methodology and plans to do so in conjunction with the modernized MMIS system. This has been pending MMIS modernization and HHSC does not plan to beta test prior to implementation. No changes were made to the rule text in response to this comment.

Comment: One commenter asked for policy adjustments and add-ons that recognize highly utilized Medicaid hospitals, as they are heavily reliant on Medicaid payments, and include outlier payments for children, similar to what is provided for inpatient services.

Response: HHSC appreciates the commenter's perspective and plans to publish further detail on the expected implementation timeline and fiscal impacts through modeling as well as in Medicaid policy. This modeling will allow interested parties to evaluate the impact on their particular hospital(s). No changes were made to the rule text in response to this comment.

Comment: One commenter asked for guardrails on the program - at least that the system will accomplish the legislative direction given to the agency on adopting an OPPS and that HHSC does not intend to harm hospitals through the adoption of the EAPG system.

Response: HHSC is adopting the changes to implement the OPPS methodology using EAPGs as directed by the Texas Legislature. HHSC plans to publish further detail on expected implementation timelines and fiscal impacts through modeling as well as in Medicaid policy. This modeling will allow interested parties to evaluate the impact on their particular hospital(s) and provide feedback if preferred. This rule adoption and subsequent implementation will demonstrate that HHSC is implementing an OPPS system as directed. No changes were made to the rule text in response to this comment.

## **DIVISION 4. MEDICAID HOSPITAL SERVICES**

### **1 TAC §355.8061**

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code Chapter 32.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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**DIVISION 7. AMBULATORY SURGICAL CENTERS**

**1 TAC §355.8121**

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code Chapter 32.

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**DIVISION 32. CLINICAL LABORATORY SERVICES**

**1 TAC §355.8610**

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code Chapter 32.

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**DIVISION 35. RENAL DIALYSIS SERVICES**

**1 TAC §355.8660**

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code Chapter 32.

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## TITLE 13. CULTURAL RESOURCES

### PART 2. TEXAS HISTORICAL COMMISSION

#### CHAPTER 12. TEXAS HISTORIC COURTHOUSE PRESERVATION PROGRAM

##### 13 TAC §§12.5, 12.7, 12.9

The Texas Historical Commission (Commission) adopts amendments to the Texas Administrative Code, Title 13, Part 2, Chapter 12, §§12.5, 12.7, and 12.9 related to the Texas Historic Courthouse Preservation Program. The rules are adopted without changes to the text as published in the August 11, 2023, issue of the *Texas Register* (48 TexReg 4368). The rules will not be republished.

Section 12.5 is revised to provide a clearer definition of "courthouse" and "historic courthouse" to align with the intention of the enabling statute that grants funds for the preservation of buildings that serve or have served as the county courthouse. The definition of "historic courthouse structure" is eliminated to avoid redundancy with other definitions, and program eligibility requirements are consolidated in §12.7(a). Definitions of "full restoration" and "restoration period" are added to clarify the parameters for associated grants.

Section 12.7(d) is revised in consideration of Texas Government Code §442.0081(d)(2), which indicates that the commission will give preference to applicants providing at least 15% of the project cost but does not disallow a smaller match. The updated language allows the commission, at its sole discretion, to waive or modify the match requirements in this section.

Section 12.7(e)(3) is revised to reflect a change in the program cap from \$6 million to \$10 million, based on recent legislation that went into effect on September 1, 2023 (Tex. S.B. 1332, 88 Leg., R.S. (2023), to be codified at Texas Government Code §442.0083(e)). Section 12.7(j) is revised to change a program requirement to a recommendation regarding future grant applications. Section 12.7(k) is added to address construction quality issues with completed projects and requires repayment of grants for repairs to poor-quality construction if funds are later recovered through litigation or other remedies.

Section 12.9 is revised to correct grammatical and citation errors, and §12.9(c)(23) is added to create a scoring category in consideration for counties continuing to apply for funding.

No comments pertaining to these rule revisions were received during the thirty-day period following publication on August 11, 2023, in the *Texas Register* (48 TexReg 4368).

These amendments are adopted under the authority of Texas Government Code § 442.005(q), which provides the Commission with the authority to promulgate rules to reasonably affect the purposes of the Commission, and Texas Government Code

§ 442.0081(h), which authorizes the Commission to adopt rules necessary to implement the Texas Historic Courthouse Preservation Program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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#### CHAPTER 13. TEXAS HISTORIC PRESERVATION TAX CREDIT PROGRAM

##### 13 TAC §§13.1 - 13.3

The Texas Historical Commission (Commission) adopts amendments to the Texas Administrative Code, Title 13, Part 2, Chapter 13, §§13.1 - 13.3, related to the Texas Historic Preservation Tax Credit Program. The rules are adopted without changes to the text as published in the August 11, 2023, issue of the *Texas Register* (48 TexReg 4372). The rules will not be republished.

The adopted amendments to §§13.1 - 13.3 are to Texas Tax Code citations. Legislation for the Texas Historic Preservation Tax Credit Program has resided in Subchapter S of Chapter 171 of the code, which defines the state's franchise tax. Legislation that went into effect on September 1, 2023 moved Subchapter S from Chapter 171 into its own chapter, Chapter 172 (Tex. S.B. 1013, 88 Leg., R.S. (2023)). All language in the rules remains the same, except for seven references directly to Chapter 171 of the Texas Tax Code. These references to the Texas Tax Code located in Sections 13.1, 13.2, and 13.3 now reference Chapter 172.

No comments pertaining to these rule revisions were received during the thirty-day period following publication on August 11, 2023, in the *Texas Register* (48 TexReg 4372).

These amendments are adopted under the authority of Texas Government Code §442.005(q), which provides the Commission with the authority to promulgate rules to reasonably effect the purposes of the Commission, including the Commission's oversight authority regarding the Texas Historic Preservation Tax Credit Program and under Texas Tax Code §171.909 which authorizes the Commission to adopt rules necessary to implement the Tax Credit for Certified Rehabilitation of Certified Historic Structures under the Texas Franchise Tax.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## TITLE 16. ECONOMIC REGULATION

### PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

#### CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

##### SUBCHAPTER S. WHOLESALE MARKETS

###### 16 TAC §25.515

The Public Utility Commission of Texas (commission) adopts new 16 Texas Administrative Code (TAC) §25.515, relating to Texas Backup Power Package Advisory Committee. The commission adopts this rule with changes to the proposed text as published in the September 29, 2023, issue of the *Texas Register* (48 TexReg 5608). The rule will be republished. New §25.515 implements Public Utility Regulatory Act (PURA) §34.0203 enacted by Senate Bill (SB) 2627 by the 88th Texas Legislature (R.S.). The new rule will establish an advisory committee, as required by PURA §34.0203, to advise the commission on the administration of the Texas backup power package program. Specifically, the new rule will establish the purpose, duties, composition, membership, procedures, and term of the committee.

The commission received comments on the proposed rule from East Texas Distribution Cooperatives (ETDC); Microgrid Resources Coalition (MRC), RPower LLC (RPower); Texas Electric Cooperatives (TEC); Texas Public Power Association (TPPA).

###### Section 25.515(b) - Purpose and Duties

Section 25.515(b) requires the committee to recommend criteria and procedures for the awarding of grants and loans under PURA Chapter 34, Subchapter B. Subsection (b) also requires the committee to submit written copies of its recommendations and meeting minutes to the commission.

TPPA expressed concern that §25.515(b) could be read to restrict public access to committee recommendations and argued that the commission has historically provided public access to meeting minutes for other groups such as interagency committees, stakeholder and industry task forces, work sessions, and, on occasion, open meetings. To ensure public access, TPPA recommended the commission requires the committee to publicly file all of its work product for the Texas Backup Power Package Program, including meeting minutes, materials, and reports.

###### Commission Response

The commission agrees with TPPA that the public should have access to the work product of the committee. Accordingly, the commission adds new subsection (b)(5) which requires the committee to publicly file on the commission interchange all of its recommendations, reports, and minutes.

###### Section 25.515(c) - Composition and Membership

Section 25.515(c) provides that the advisory committee will consist of between three and nine members and authorizes the executive director to solicit, evaluate, and, after a review of their qualifications, appoint candidates to the committee. Section 25.515(c) also allows interested candidates to submit a resume and statement of interest to the executive director via e-mail.

###### Committee candidate representation and qualifications

RPower, MRC, TEC ETDC, and TPPA recommended the commission expand subsection (c) to require more diverse representation by members with different fields of expertise and backgrounds, and business segments that are applicable to or affected by the backup power package program. RPower and MRC noted that proposed subsection (c) does not specify what the qualifications should be for committee candidates selected by the commission's executive director. Accordingly, RPower and MRC recommended the advisory committee include candidates representing various microgrid technologies, such as microgrids with different fuel types, and include members that have expertise in engineering, finance, and Texas energy policy. MRC further recommended the committee include the entire microgrid "value chain" which includes microgrid customers, investors, developers, providers of automation and controls technologies, providers of software, and a utility representative.

TEC, ETDC and TPPA recommended that the commission consider modifying and expanding the commission segments to ensure all business segments affected by the backup power package program, including consumers, are adequately represented in accordance with Texas Government Code §2110.002(b). To ensure fundamental concerns and differences are recognized by the committee, TEC and ETDC specifically recommended the commission consider candidates representing critical facilities such as hospitals, schools, or first responders; geographically diverse regions of the State such as the Gulf Coast and Panhandle; and different electric providers in Texas such as electric cooperatives, municipally owned utilities, and investor-owned utilities. ETDC recommended at least one advisory committee member represent electric cooperatives given the history of such entities serving customers in geographically remote and diverse locations across Texas. RPower, MRC, and TEC provided redlines consistent with their recommendations.

###### Commission Response

The executive director will take the above recommendations of commenters regarding the composition of the committee into consideration when reviewing applicants and selecting members. However, to ensure the executive director possesses sufficient flexibility to fully evaluate candidates based on the availability and interest of possible members, the commission declines to impose specific criteria in the rule for selection of committee members. A holistic, individual review of candidates is necessary to ensure adequate committee representation, and the establishment of pre-determined requirements or quotas for membership would impede that goal. Preserving this flexibility is also consistent with statute. PURA §34.0203 does not impose any limitations on the composition of the committee, and Tex. Gov't Code Chapter 2110 does not require the rule establishing the committee to include membership requirements.

The commission further notes that the function of the advisory committee is to serve as one source of input to the commission's efforts to implement the Texas backup power package program. The committee itself does not have any independent policymak-

ing authority. The commission will also receive input from commission staff, a statutorily required research entity, and any interested person that chooses to file comments in the commission's rulemaking process. Moreover, the recommendations made by the committee will be publicly available, allowing any commenter to review and critique the committee's recommendations prior to the adoption of a rule implementing the Texas backup power package program.

Additionally, the commission declines to explicitly codify the requirement of Tex. Gov't Code, Chapter 2110.002(b)(1) and (2) for advisory committees to provide balanced representation between industry and consumer interests because it is unnecessary. The requirements of Chapter 2110 apply to the backup power package committee regardless of any specific reference to Chapter 2110 in the rule.

#### Number of Committee Members

RPower, MRC, TEC, ETDC, and TPPA commented that a three-member committee is likely too small to provide adequate representation. RPower and MRC indicated that the committee may need to comprise up to 11 members to be sufficiently diverse. TEC, ETDC, and TPPA noted that Tex. Gov't Code §2110.002(a) authorizes an advisory committee to have up to 24 members. TEC and ETDC specifically recommended the maximum number of committee members be increased to 24 for the same reasons. RPower, MRC, and TEC provided redlines consistent with their recommendations.

#### Commission Response

An advisory committee of between three and nine members allows the commission to efficiently assemble the advisory committee so the committee can begin work on its stated duties. At the same time, a maximum size of nine members will allow all members to meet with sufficient frequency to make meaningful recommendations to the commission. Increasing the upper limit of committee member positions will compound scheduling and coordination difficulties and adversely affect the committee's ability to provide recommendations to the commission in a timely manner. Further, as stated above, the executive director will take diverse representation into consideration when selecting committee members, and there will be an opportunity for any interested person who is not selected to serve on the committee to review the recommendations of the committee and provide public comments in the commission's rulemaking process.

#### Section 25.515(d) - member removal

Section 25.515(d) allows the executive director to remove an advisory committee member "for any reason or for no reason."

TPPA objected to granting the executive director the unilateral authority to remove a committee member without cause and recommended that portion of the provision be removed. TPPA commented that such authority may impede the committee's objective of providing advice to the commission by preventing open and honest discussion due to fear of retaliation. TPPA noted that the commission has historically empowered the executive director to appoint members of other task forces or committees but has never authorized the director to wield unilateral authority to remove a member. TPPA further argued that even task forces led by commissioners have only allowed for removal of a member for "lack of participation or any other reason with written notice to the member."

#### Commission Response

The commission modifies the rule to remove the ability of the executive director to unilaterally remove a committee member, as recommended by TPPA. The commission also modifies the rule to allow the executive director to recommend the removal of a committee member and to require the executive director to notify the removed member and the presiding officer of the committee if the commission does remove a member.

This new rule is adopted under the following provisions: PURA §14.002, which provides the commission with the authority to make adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §34.0203, which requires the commission to convene an advisory committee in the manner provided by Chapter 2110 of the Texas Government Code. The new rule is also adopted under Texas Government Code, Chapter 2110 which provides a framework for the establishment of an advisory committee by a State of Texas government entity.

Cross reference to statutes: Public Utility Regulatory Act §§14.002 and 34.0203, and Texas Government Code Chapter 2110.

#### §25.515. *Texas Backup Power Package Advisory Committee.*

##### (a) Definitions.

(1) Advisory committee -- the advisory committee convened under the authority described in the Public Utility Regulatory Act (PURA) §34.0203.

(2) Texas backup power package -- a stand-alone, behind-the-meter, multiday backup power source that can be used for islanding.

(b) Purpose and duties. The advisory committee is established to recommend criteria for the commission to employ in making a grant or loan under PURA chapter 34, subchapter B. The advisory committee must:

(1) No later than October 1, 2024, submit, in writing, recommendations for the types of Texas backup power package projects that should be funded by loans and the types of Texas backup power package projects that should be funded by grants.

(2) No later than October 1, 2024, submit, in writing, a report to the commission with recommendations for procedures for the application for and awarding of a grant or loan in accordance with PURA chapter 34, subchapter B.

(3) Make any other recommendation to the commission regarding matters associated with PURA chapter 34, subchapter B that the advisory committee finds appropriate.

(4) Record minutes of each advisory committee meeting and provide a copy of those minutes to the commission.

(5) Publicly file all written recommendations, reports, and minutes produced by the committee on the commission interchange.

(c) Composition and membership. The advisory committee will consist of no fewer than three and no more than nine members. The executive director is authorized to solicit candidates, evaluate their qualifications, and make an appointment to the advisory committee to fill any open position on the advisory committee. The executive director will select members of the advisory committee after reviewing qualifications of potential members. Persons interested in serving on the advisory committee may submit a resume and statement of interest to the executive director at [TexasBackupPower@puc.texas.gov](mailto:TexasBackupPower@puc.texas.gov).

(d) Membership term. An advisory committee member's term begins when the executive director files notice of the member's appoint-

ment on the commission's filing interchange. Each member will serve on the advisory committee until the member resigns or is removed. A member may resign by submitting written notice of resignation to the executive director. The executive director may recommend the removal of a member. The commission may remove an advisory committee member for lack of participation or any other reason. The executive director must notify the removed member and the presiding officer of the committee of the member's removal.

(e) Reimbursement. Members of the advisory committee will not be reimbursed for expenses.

(f) Meetings. The first advisory committee meeting will be called by the executive director. At this first meeting, the advisory committee members must designate a presiding officer to preside over the advisory committee and report to the commission. The presiding officer must call all subsequent meetings of the advisory committee as frequently as necessary to carry out the advisory committee's purpose. A majority of seated members will constitute a quorum necessary for carrying out advisory committee business. The advisory committee may seek and incorporate the input of any person while carrying out its duties.

(g) Duration. The advisory committee will automatically be abolished on the earlier of 180 days after the date the advisory committee delivers the reports described in subsection (b) of this section or four years after the effective date of this rule.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 3, 2023.

TRD-202304064

Adriana Gonzales  
Rules Coordinator

Public Utility Commission of Texas  
Effective date: November 23, 2023

Proposal publication date: September 29, 2023  
For further information, please call: (512) 936-7322

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**TITLE 22. EXAMINING BOARDS**

**PART 5. STATE BOARD OF DENTAL EXAMINERS**

**CHAPTER 102. FEES**

**22 TAC §102.1**

The State Board of Dental Examiners (Board) adopts this amendment to 22 TAC §102.1, concerning fees, without changes to the proposed text as published in the September 29, 2023, issue of the *Texas Register* (48 TexReg 5615). The rule will not be republished. The adopted amendment increases the peer assistance fees for registered dental assistants to account for the increased peer assistance costs to the agency. Specifically, the adopted amendment increases the peer assistance fees by \$1 for initial and renewal registered dental assistant applications.

No comments were received regarding adoption of this rule.

This rule is adopted under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 3, 2023.

TRD-202304067

Lauren Studdard  
General Counsel

State Board of Dental Examiners  
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Proposal publication date: September 29, 2023  
For further information, please call: (512) 305-8910

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**TITLE 37. PUBLIC SAFETY AND CORRECTIONS**

**PART 13. TEXAS COMMISSION ON FIRE PROTECTION**

**CHAPTER 403. CRIMINAL CONVICTIONS AND ELIGIBILITY FOR CERTIFICATIONS**

**37 TAC §§403.3, 403.5, 403.15**

The Texas Commission on Fire Protection (Commission) adopts amendments to 37 Texas Administrative Code Chapter 403, Criminal Convictions and Eligibility for Certifications, §403.3, Scope, §403.5, Access to Criminal History Record Information, and §403.15, Report of Convictions by an Individual or a Department.

The purpose of the adopted amendments to the rule is to reflect grammatical corrections and change "fire department" to a "regulated entity" which better reflects the Commission's regulatory authority.

Chapter 403, Criminal Convictions and Eligibility for Certifications, §403.3, Scope, §403.5, Access to Criminal History Record Information, and §403.15, Report of Convictions by an Individual or a Department, is adopted without changes to the text as published in the September 8, 2023, issue of the *Texas Register* (48 TexReg 5014). These rules will not be republished.

No comments were received from the public regarding the adoption of the rule.

The rule is adopted under Texas Government Code §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission. The rule is also adopted under Texas Government Code §419.032, which authorizes the commission to adopt rules establishing the requirements for certification; and §419.0325, which authorizes the commission to obtain the criminal history record information for the individual seeking certification by the commission.



The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 2, 2023.

TRD-202304058

Mike Wisko

Agency Chief

Texas Commission on Fire Protection

Effective date: November 22, 2023

Proposal publication date: September 8, 2023

For further information, please call: (512) 936-3841



## CHAPTER 439. EXAMINATIONS FOR CERTIFICATION

### SUBCHAPTER A. EXAMINATIONS FOR ON-SITE DELIVERY TRAINING

#### 37 TAC §439.19

The Texas Commission on Fire Protection (the Commission) adopts the amendments to 37 Texas Administrative Code Chapter 439, Examinations for Certifications, §439.19, Number of Test Questions.

The amendment corrects the number of test questions and allowable time for exams in Figure: 37 TAC §439.19(b).

Chapter 439, Examinations for Certifications, §439.19, Number of Test Questions., is adopted without changes to the text as published in the September 8, 2023, issue of the *Texas Register* (48 TexReg 5016). These rules will not be republished.

No comments were received from the public regarding the adoption of the amended rule.

The rule is adopted under Texas Government Code §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission. The rule is also adopted under Texas Government Code §419.032, which authorizes the commission to adopt rules establishing the requirements for certification; and §419.0325, which authorizes the commission to obtain the criminal history record information for the individual seeking certification by the commission.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 31, 2023.

TRD-202304033

Mike Wisko

Agency Chief

Texas Commission on Fire Protection

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For further information, please call: (512) 936-3841



## TITLE 40. SOCIAL SERVICES AND ASSISTANCE

### PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

#### CHAPTER 364. REQUIREMENTS FOR LICENSURE

##### 40 TAC §364.5

The Texas Board of Occupational Therapy Examiners adopts amendments to 40 Texas Administrative Code §364.5, concerning Recognition of Out-of-State License of Military Spouse. The amendments add military service members to those eligible for the recognition of an out of state license and make further changes regarding the recognition pursuant to changes required by Senate Bill 422 of the 88th Regular Legislative Session. In addition, the amendments remove from the section information concerning an address of record pursuant to changes required by SB 510 of the 88th Regular Legislative Session. The amendments also include adding that individuals provide the Board phone number and mailing address information and update the Board of related changes and include further cleanups and/or clarifications. The amendments are adopted with changes to the proposed text as published in the September 1, 2023, issue of the *Texas Register* (48 TexReg 4784) and will be republished. The change upon adoption is to add to the section the following provision as the new subsection (i) of the section: "This section establishes requirements and procedures authorized or required by Chapter 55, Texas Occupations Code, and does not modify or alter rights that may be provided under federal law." The addition will help ensure that the section will not be construed as modifying or altering other rights provided under federal law.

With regard to the amendments, Senate Bill 422 requires the adoption of rules to implement changes to Texas Occupations Code §55.0041. The changes, which take effect September 1, 2023, will add military service members to those eligible to practice without obtaining the applicable occupational license. The bill also requires that not later than the 30th day after the date a military service member or military spouse submits certain information, a state agency verify the military service member's or military spouse's license and that in the event of a divorce or similar event that affects a person's status as a military spouse, the spouse may continue to engage in the business or occupation under the authority of the section until the third anniversary of the date the spouse received the confirmation described by the section. Amendments to §364.5 implement these requirements.

Senate Bill 510 adds Texas Government Code §552.11765, Confidentiality of Certain Information Maintained by State Licensing Authority. The new section, which takes effect September 1, 2023, includes that applicants', licensees', and former licensees' home addresses are confidential and not available public information. Pursuant to such, the Board has also adopted amendments to §364.5, as well as 40 Texas Administrative Code §369.2, Changes of Name or Contact Information, and §370.1, License Renewal, to remove information concerning the election an individual may make to designate a home, mailing, or business address as the address available to the public.

An additional change to §364.5 concerns adding the requirement that individuals seeking the authorization described by the section provide the Board with their phone number and mailing address and notify the Board of changes to such. The change is adopted to enhance the Board's ability to communicate with individuals who are seeking or who have received the authorization and remain apprised of changes to such information. The change will also enhance the consistency of the Board's rules, as prior rulemaking required the same for applicants for a license and licensees.

No public comment was received regarding adoption of the amendments.

The amendments are adopted under Texas Occupations Code §454.102, Rules, which authorizes the Board to adopt rules to carry out its duties under Chapter 454; Texas Occupations Code §55.0041, Recognition of Out-of-State License of Military Service Members and Military Spouses, amended by Senate Bill 422 and effective September 1, 2023, which requires the Board to adopt rules to implement the legislation; and under Texas Government Code §552.11765, Confidentiality of Certain Information Maintained by State Licensing Authority, enacted by Senate Bill 510 and effective September 1, 2023, which includes that certain address information is confidential and not available public information.

The amendments implement Texas Occupations Code §55.0041, Recognition of Out-of-State License of Military Service Member and Military Spouses, amended by SB 422 and effective September 1, 2023, and Texas Government Code §552.11765, Confidentiality of Certain Information Maintained by State Licensing Authority, enacted by Senate Bill 510 and effective September 1, 2023.

*§364.5. Recognition of Out-of-State License of Military Service Members and Military Spouses.*

(a) Notwithstanding any other law, a military service member or military spouse may engage in the practice of occupational therapy without obtaining the applicable occupational therapy license if the service member or spouse is currently licensed in good standing by another jurisdiction of the U.S. that has licensing requirements that are substantially equivalent to the requirements for the license in this state.

(b) Before engaging in the practice of occupational therapy, the military service member or military spouse must:

(1) notify the Board in writing of the following:

(A) the service member's or spouse's intent to practice in this state;

(B) the service member's or spouse's full name and any previous last names, social security number, date of birth, phone number, business phone number, residential address, business address, mailing address, and email address;

(C) the license type, license number, and jurisdiction in which the service member or spouse is currently licensed in good standing; and

(D) a list of all jurisdictions in which the service member or spouse has held or currently holds a license with the license type, license number, and license expiration date of each;

(2) submit to the Board proof of the service member's or spouse's residency in this state and a copy of the service member's or spouse's military identification card. Proof of residency may include a copy of the permanent change of station order for the military service member or, with respect to a military spouse, the permanent change of

station order for the military service member to whom the spouse is married; and

(3) receive from the Board written confirmation that:

(A) the Board has verified the service member's or spouse's license in the other jurisdiction; and

(B) the service member or spouse is authorized to engage in the practice of occupational therapy in accordance with this section.

(c) The military service member or military spouse shall comply with all other laws and regulations applicable to the practice of occupational therapy in this state, including all other laws and regulations in the Occupational Therapy Practice Act and the Texas Board of Occupational Therapy Examiners Rules. The service member or spouse may be subject to revocation of the authorization described by subsection (b)(3)(B) of this section for failure to comply with these laws and regulations and the Board may notify any jurisdictions in which the service member or spouse is licensed of the revocation of such.

(d) A military service member or military spouse may engage in the practice of occupational therapy under the authority of this section only for the period during which the military service member or, with respect to a military spouse, the military service member to whom the spouse is married is stationed at a military installation in this state but not to exceed three years from the date the service member or spouse receives the confirmation described by subsection (b)(3) of this section.

(e) Notwithstanding subsection (d) of this section, in the event of a divorce or similar event that affects a person's status as a military spouse, the spouse may continue to engage in the practice of occupational therapy under the authority of this section until the third anniversary of the date the spouse received the confirmation described by subsection (b)(3) of this section.

(f) During the authorization period described by subsection (b)(3)(B) of this section, the military service member or military spouse must:

(1) maintain a current license in good standing in another jurisdiction that has licensing requirements that are substantially equivalent to the requirements for the license in this state;

(2) update the Board of any changes to information as specified in subsections (b)(1)(B)-(C) and (b)(2) of this section within 30 days of such change(s); and

(3) notify the Board within 30 days of any disciplinary action taken against the service member or spouse by another jurisdiction.

(g) The Board will identify, with respect to each type of license issued by the Board, the jurisdictions that have licensing requirements that are substantially equivalent to the requirements for the license in this state; and not later than the 30th day after the receipt of the items described by subsections (b)(1)-(2) of this section, the Board shall verify that the military service member or military spouse is licensed in good standing in a jurisdiction of the U.S. that has licensing requirements that are substantially equivalent to the requirements for the license in this state.

(h) In this section, "military service member" and "military spouse" have the meaning as defined in Chapter 55, Texas Occupations Code, §55.001.

(i) This section establishes requirements and procedures authorized or required by Chapter 55, Texas Occupations Code, and does not modify or alter rights that may be provided under federal law.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 30, 2023.

TRD-202304010

Ralph A. Harper  
Executive Director

Texas Board of Occupational Therapy Examiners

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For further information, please call: (512) 305-6900



## CHAPTER 368. OPEN RECORDS

### 40 TAC §368.1

The Texas Board of Occupational Therapy Examiners adopts amendments to 40 Texas Administrative Code §368.1, Open Records. The amendments concern updating the references in the section, including to update information regarding the setting of costs for the copying of records due to the abolishment of the General Services Commission. The amendments also clarify that state or federal statutes in addition to Texas Government Code Chapter 552 may affect the disclosure of certain information and add information regarding the use of a designee for the Executive Director, the agency's open records coordinator. The amendments include further cleanups, including those concerning aligning the section with Texas Government Code Chapter 552. The amendments are adopted without changes to the proposed text as published in the September 1, 2023, issue of the *Texas Register* (48 TexReg 4786) and will not be republished.

The amendments will improve the accuracy of the information in the section, clarify that statutes other than those contained in Chapter 552 may affect the agency's disclosure of information, and align the section more closely with Texas Government Code Chapter 552.

No public comment was received regarding adoption of the amendments.

The amendments are adopted under Texas Occupations Code §454.102, Rules, which authorizes the Board to adopt rules to carry out its duties under Chapter 454.

The amendments implement Texas Government Code Chapter 552, which concerns the availability of information to the public.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Ralph A. Harper  
Executive Director

Texas Board of Occupational Therapy Examiners

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For further information, please call: (512) 305-6900

## CHAPTER 369. DISPLAY OF LICENSES

### 40 TAC §369.2

The Texas Board of Occupational Therapy Examiners adopts amendments to 40 Texas Administrative Code §369.2, Changes of Name or Contact Information. The amendments concern removing from the section information concerning an address of record pursuant to changes required by Senate Bill 510 of the 88th Regular Legislative Session. The amendments are adopted without changes to the proposed text as published in the September 1, 2023, issue of the *Texas Register* (48 TexReg 4788) and will not be republished.

Senate Bill 510 adds Texas Government Code §552.11765, Confidentiality of Certain Information Maintained by State Licensing Authority. The bill, which takes effect September 1, 2023, includes that applicants', licensees', and former licensees' home addresses are confidential and not available public information. Pursuant to such, the Board has also adopted amendments to §369.2, as well as 40 Texas Administrative Code §364.5, Recognition of Out-of-State License of Military Spouse, and §370.1, License Renewal, to remove information concerning the election an individual may make to designate a home, mailing, or business address as the address available to the public

No public comment was received regarding adoption of the amendments.

The amendments are adopted under Texas Occupations Code §454.102, Rules, which authorizes the Board to adopt rules to carry out its duties under Chapter 454, and under Texas Government Code §552.11765, Confidentiality of Certain Information Maintained by State Licensing Authority, enacted by Senate Bill 510 and effective September 1, 2023, which includes that certain address information is confidential and not available public information.

The amendments implement §552.11765, Confidentiality of Certain Information Maintained by State Licensing Authority, enacted by Senate Bill 510 and effective September 1, 2023.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Ralph A. Harper  
Executive Director

Texas Board of Occupational Therapy Examiners

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For further information, please call: (512) 305-6900



## CHAPTER 370. LICENSE RENEWAL

### 40 TAC §370.1

The Texas Board of Occupational Therapy Examiners adopts amendments to 40 Texas Administrative Code §370.1, License Renewal. The amendments concern removing from the section information concerning an address of record pursuant to

changes required by Senate Bill 510 of the 88th Regular Legislative Session. The amendments are adopted without changes to the proposed text as published in the September 1, 2023, issue of the *Texas Register* (48 TexReg 4789) and will not be republished.

Senate Bill 510 adds Texas Government Code §552.11765, Confidentiality of Certain Information Maintained by State Licensing Authority. The bill, which takes effect September 1, 2023, includes that applicants', licensees', and former licensees' home addresses are confidential and not available public information. Pursuant to such, the Board has also adopted amendments to §370.1, as well as 40 Texas Administrative Code §364.5, Recognition of Out-of-State License of Military Spouse, and §369.2, Changes of Name or Contact Information, to remove information concerning the election an individual may make to designate a home, mailing, or business address as the address available to the public.

No public comment was received regarding adoption of the amendments.

The amendments are adopted under Texas Occupations Code §454.102, Rules, which authorizes the Board to adopt rules to carry out its duties under Chapter 454, and under Texas Government Code §552.11765, Confidentiality of Certain Information Maintained by State Licensing Authority, enacted by Senate Bill 510 and effective September 1, 2023, which includes that certain address information is confidential and not available public information.

The amendments implement §552.11765, Confidentiality of Certain Information Maintained by State Licensing Authority, enacted by Senate Bill 510 and effective September 1, 2023.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Ralph A. Harper

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Texas Board of Occupational Therapy Examiners

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For further information, please call: (512) 305-6900



## PART 20. TEXAS WORKFORCE COMMISSION

### CHAPTER 838. TEXAS INDUSTRY-RECOGNIZED APPRENTICESHIP GRANT PROGRAM

The Texas Workforce Commission (TWC) adopts amendments to the following sections of Chapter 838, relating to the Texas Industry-Recognized Apprenticeship Programs Grant Program.

Subchapter A. General Purpose and Definitions, §838.1 and §838.2

Subchapter B. Grant Program, §§838.11 - 838.14

Subchapter C. Program Administration, §§838.21, 838.22, and 838.24

Amended §§838.1, 838.2, 838.11 - 838.14, 838.21, 838.22, and 838.24 are adopted without changes to the proposal, as published in the September 1, 2023, issue of the *Texas Register* (48 TexReg 4790), and, therefore, the adopted rule text will not be published.

#### PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the amendments to Chapter 838 is to remove references to the federal Industry-Recognized Apprenticeship Program (IRAP) and Standards Recognition Entities (SREs) because they no longer exist, and to state the eligibility criteria and application process for entities that apply to take part in the Texas Industry-Recognized Apprenticeship (TIRA) Grant Program.

In May 2020, the US Department of Labor (DOL) established a process to recognize third-party entities--SREs--which would evaluate and recognize IRAPs. In November 2021, DOL proposed rescinding this regulatory framework. Beginning November 25, 2022, DOL ceased recognizing SREs or IRAPs and rescinded the related rules that were under Title 29 Code of Federal Regulations Part 29. In response to DOL's action on IRAPs and SREs, TWC is amending Chapter 838 to remove DOL-related references.

In 2019, House Bill 2784, enacted by the 86th Texas Legislature, Regular Session, amended Texas Labor Code Chapter 302 by adding Subchapter I to create the Texas Industry-Recognized Apprenticeship Programs Grant Program. The grant program's purpose is to address Texas' immediate industrial workforce needs resulting from the impact of hurricanes, other natural disasters, and overall workforce shortages. Amendments to Chapter 838 clarify the eligibility criteria and application process for entities wishing to take part in this state program.

#### Rule Review

Texas Government Code §2001.039 requires that every four years each state agency review and consider for readoption, revision, or repeal each rule adopted by that agency. TWC has assessed whether the reasons for adopting or readopting the rules continue to exist. TWC finds that the rules in Chapter 838 are needed, reflect current legal and policy considerations, and reflect current TWC procedures. The reasons for initially adopting the rules continue to exist. TWC, therefore, readopts Chapter 838 as amended.

#### PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

#### CHAPTER 838. TEXAS INDUSTRY-RECOGNIZED APPRENTICESHIP PROGRAMS GRANT PROGRAM

TWC adopts the following amendment to the title of Chapter 838:

The Chapter 838 title is amended to remove "Programs" to reflect that the rules no longer include references to the former federal Industry-Recognized Apprenticeship Program. The chapter title is amended to read "Texas Industry-Recognized Apprenticeship Grant Program."

#### SUBCHAPTER A. GENERAL PURPOSE AND DEFINITIONS

The section language throughout the subchapter is amended to remove DOL-related references and update the apprenticeship

grant program name to Texas Industry-Recognized Apprenticeship (TIRA) program.

#### §838.1. Scope and Purpose

Section 838.1 is amended to remove IRAP language, replacing these references with TIRA program references.

#### §838.2. Definitions

Section 838.2 is amended to update the definition for "Industry-Recognized Apprenticeship Program" removing in (3)(A) "by the US Department of Labor (DOL)" and updating the remaining portion of paragraph (3) to incorporate the provisions of former §838.13(b)(5) of this chapter. Additionally, §838.2(5) is removed.

### SUBCHAPTER B. GRANT PROGRAM

The section language throughout the subchapter is amended to remove DOL-related references and update the program name to "Texas Industry-Recognized Apprenticeship (TIRA) program."

Additionally, TWC adopts the following amendments to Subchapter B:

#### §838.11. General Statement of Purpose

Section 838.11 is amended to remove IRAP language, replacing these references with TIRA program references.

#### §838.12. Notice of Grant Availability and Application

Section 838.12(a) is amended to remove "in the *Texas Register*," allowing TWC's three-member Commission to expedite funding actions resulting from the impact of hurricanes, other natural disasters, and overall workforce shortages.

Section 838.12(b) is amended and new §838.12(d) is added to lay out the application process and the form and manner for an application's submission.

#### §838.13. Eligible Applicants

Section 838.13 is amended to rename the section "Eligible and Approved Applicants."

Section 838.13(a) is amended to set forth TIRA program requirements.

Section 838.13(b) is amended to replace references to the federal IRAP with the state's TIRA.

Section 838.13(b)(2) is removed and (b)(5) is relocated to the definition for TIRA in Section 838.2.

#### §838.14. Funding Qualifications for Industry-Recognized Apprenticeship Programs

Section 838.14 is amended to remove DOL-related references and update the apprenticeship grant program name to Texas Industry-Recognized Apprenticeship (TIRA) grant program. Section 838.14's title is amended to reflect this update.

### SUBCHAPTER C. PROGRAM ADMINISTRATION

TWC adopts the following amendments to Subchapter C:

#### §838.21. Grants for Industry-Recognized Apprenticeship Programs

Section 838.21 is amended to remove IRAP language, replacing these references with TIRA program references. Section 838.21's title is amended to reflect this update.

#### §838.22. Program Objectives

Section 838.22 is amended to remove IRAP language, replacing these references with TIRA program references.

#### §838.24. Performance

Section 838.24 is amended to remove IRAP language, replacing these references with TIRA program references.

### PART III. PUBLIC COMMENTS

The public comment period closed on October 2, 2023.

TWC received comments from the following organizations:

- Texas AFL-CIO
- Texas Association of Manufacturers
- Texas Public Policy Foundation

TWC received comments from the following electrical contractors:

- The Brandt Companies, LLC
- Britain Electric Co.
- Bronco Electric, Inc.
- C.F. McDonald Electric, Inc.
- Christopher Electric, Inc.
- Crown Electric, Inc.
- CW Henderson Electric
- Electrical Specialties, Inc.
- Fisk Electric Company
- Gulf Coast Electric Co., Inc.
- Henderson Telecom Services, Inc.
- Jefferson Electric Co., Inc.
- JPL Electric, LLC
- Liberty Electrical Contractors, Inc.
- Mid-West Electric Co.
- Minton Electronic Co., Inc.
- Newtron Beaumont, LLC
- R.D. Martin Electric Shop, Inc.
- Rosendin Electric, Inc.
- Sabre Electric Company
- Wayne Electric, Inc.

TWC received comments from State Representative Chris Turner and State Representative Armando L. Walle.

TWC received 301 comments from an instructor and individuals who state they are enrolled in Registered Apprenticeship programs.

COMMENT: The Texas Association of Manufacturers and the Texas Public Policy Foundation expressed strong support for the amendments to the Chapter 838 rules.

RESPONSE: The Commission appreciates the comments.

COMMENT: State Representative Chris Turner expressed support for the amendments to Chapter 838. He stated that TIRA is an additional resource to increase worker training in industries where shortages and skills gaps exist. Rep. Turner also

described the program as an opportunity to support efforts to increase the number of skilled workers in Texas and to help workers obtain long-term marketable skills.

Rep. Turner also expressed concern that Registered Apprenticeship Programs (RAPs) be able to participate in the TIRA program with no impact on the quality of the training because RAPs must adhere to DOL standards. He asked the Commission to consider allowing RAPs to use other benchmarks to meet the six-month requirements for eligibility, and to ensure portability of skills across industries. He also requested for the rule to include eligibility for pre-apprenticeship programs that address remedial instruction to develop more eligible students to enter apprenticeships. Lastly, Rep. Turner stated concern about differences in apprenticeship funding amounts between TIRA and Texas Education Code Chapter 133 and the need to provide RAPs the flexibility needed to meet the timeline standards outlined in the proposed rules.

**RESPONSE:** The Commission appreciates the comments. TWC staff have communicated with DOL's Office of Apprenticeship relating to flexibility for RAPs to participate in TIRA and determined such flexibility is allowable. The maximum 26-week duration for TIRA grant programs is determined by Texas Labor Code §302.255; therefore, changing the maximum duration for TIRA grant programs would require legislative action. Similarly, legislative action would be needed to adjust funding for Chapter 133 apprenticeships to make the funding comparable to TIRA grant funding.

Regarding portability, applicants must ensure that participants advance to industry-recognized mid-level skills within TIRA's 26-week maximum duration.

The Commission will be accepting applications from private-sector employers representing industries in the state's 25 target occupations that can demonstrate their apprenticeship training models meet the eligibility criteria set forth in the application. Applications must include all requirements of the statute and rule, including full-time employment requirements during and after training. Pre-apprenticeship programs are potentially eligible if all the requirements are met. No changes were made in response to these comments.

**COMMENT:** State Representative Armando L. Walle expressed support for apprenticeship programs and advocated for RAPs to be eligible to participate in the TIRA program. As a member of the House Committee on Appropriations, which had oversight of the \$20 million appropriated for the TIRA program, Rep. Walle expressed his desire that the funds will significantly contribute to creating new apprenticeships and provide support to existing and successful apprenticeships so that the programs will grow to continue to meet the state's needs. He asked the Commission to ensure that RAPs are eligible to participate in the TIRA grant program without limiting their requirements or on-the-job training. He also requested that pre-apprenticeship programs be eligible because those programs provide the basic skills necessary to enter an apprenticeship. Further, Rep. Walle requested strengthening the language addressing portability of skills across an industry, stated concern over the inequity between TIRA funding and Chapter 133 and the need for future legislation, and allowing flexibility in the rule.

**RESPONSE:** The Commission appreciates the comments. TWC staff have communicated with DOL's Office of Apprenticeship relating to flexibility for RAPs to participate in TIRA and determined such flexibility is allowable. The maximum 26-week

duration for TIRA grant programs is determined by Texas Labor Code §302.255; therefore, changing the maximum duration for TIRA grant programs would require legislative action. Similarly, legislative action would be needed to adjust funding for Chapter 133 apprenticeships to make the funding comparable to TIRA grant funding.

Regarding portability, applicants must ensure that participants advance to industry-recognized mid-level skills within TIRA's 26-week maximum duration.

The Commission will be accepting applications from private-sector employers representing industries in the state's 25 target occupations that can demonstrate their apprenticeship training models meet the eligibility criteria as set forth in the application. Applications must include all requirements of the statute and rule, including full-time employment requirements during and after training. Pre-apprenticeship programs are potentially eligible if all the requirements are met. No changes were made in response to these comments.

**COMMENT:** The Texas AFL-CIO stated its strong support for RAPs and expressed appreciation for the Commission's confirmation that RAPs will be eligible to apply for TIRA grants. However, the organization expressed concern about TIRA's 26-week grant duration and stated that it is critical for RAPs to be eligible for TIRA funding without needing to reduce their training program requirements. It also requested confirmation that pre-apprenticeship training programs will also be eligible to apply for TIRA grants. Additionally, it stated that there is an imbalance between Texas Education Code Chapter 133 and TIRA apprenticeship funding. It also expressed concern regarding more funding going to new programs that have fewer requirements and safeguards, which may result in unfair and unequal competition among state-funded apprenticeships within the construction and building trades industry. Additionally, the organization expressed concern that the proposed rule does not make clear what would be considered 'industry-recognized and accredited training curriculum' so that portability of skills is maintained. Lastly, the Texas AFL-CIO expressed desire to see language in the rule addressing requirements for safety training in the construction and building trade fields.

**RESPONSE:** The Commission appreciates the comments. TWC staff have communicated with DOL's Office of Apprenticeship relating to flexibility for RAPs to participate in TIRA and determined such flexibility is allowable. The maximum 26-week duration for TIRA grant programs is determined by Texas Labor Code §302.255; therefore, changing the maximum duration for TIRA grant programs would require legislative action. Similarly, legislative action would be needed to adjust funding for Chapter 133 apprenticeships to make the funding comparable to TIRA grant funding.

Regarding portability, applicants must ensure that participants advance to industry-recognized mid-level skills within TIRA's 26-week maximum duration.

The Commission will be accepting applications from private-sector employers representing industries in the state's 25 target occupations that can demonstrate their apprenticeship training models meet the eligibility criteria as set forth in the application. Applications must include all requirements of the statute and rule, including full-time employment requirements during and after training. Pre-apprenticeship programs are potentially eligible if all the requirements are met. No changes were made in response to these comments.

COMMENT: A group of 21 electrical contractors submitted comments requesting confirmation that their Registered Apprenticeship programs will qualify to receive TIRA grants.

RESPONSE: The Commission appreciates the comments. TWC staff have communicated with DOL's Office of Apprenticeship relating to flexibility for RAPs to participate in TIRA and determined such flexibility is allowable.

The Commission will be accepting applications from private-sector employers representing industries in the state's 25 target occupations that can demonstrate their apprenticeship training models meet the eligibility criteria as set forth in the application. Applications must include all requirements of the statute and rule, including full-time employment requirements during and after training. No changes were made in response to these comments.

COMMENT: Several individuals who stated they are enrolled in RAPs expressed concern that RAPs will not be considered eligible to apply to the Commission for TIRA funding.

RESPONSE: The Commission appreciates the comments and understands the concerns expressed by those enrolled in RAPs. TWC staff have communicated with DOL's Office of Apprenticeship relating to flexibility for RAPs to participate in TIRA and determined such flexibility is allowable.

The Commission will be accepting applications from private-sector employers representing industries in the state's 25 target occupations that can demonstrate their apprenticeship training models meet the eligibility criteria as set forth in the application. No changes were made in response to these comments.

## SUBCHAPTER A. GENERAL PURPOSE AND DEFINITIONS

### 40 TAC §838.1, §838.2

#### STATUTORY AUTHORITY

The rules are adopted under the general authority of Texas Labor Code §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

They are also adopted under the specific authority set out below:

House Bill 2784, 86th Texas Legislature, Regular Session (2019), enacted the following statutory authority under which these rule amendments are proposed to be adopted:

--Texas Labor Code §302.253 requires TWC to establish and administer the program.

--Texas Labor Code §302.257 grants TWC the authority to adopt rules to administer and enforce the program.

The rules implement Title 4, Texas Labor Code, particularly Chapter 302, Subchapter I.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 31, 2023.

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Les Trobman

General Counsel

Texas Workforce Commission

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Proposal publication date: September 1, 2023

For further information, please call: (512) 850-8356



## SUBCHAPTER B. GRANT PROGRAM

### 40 TAC §§838.11 - 838.14

The rules are adopted under the general authority of Texas Labor Code §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

They are also adopted under the specific authority set out below:

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## SUBCHAPTER C. PROGRAM ADMINISTRATION

### 40 TAC §§838.21, 838.22, 838.24

The rules are adopted under the general authority of Texas Labor Code §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

They are also adopted under the specific authority set out below:

House Bill 2784, 86th Texas Legislature, Regular Session (2019), enacted the following statutory authority under which these rule amendments are proposed to be adopted:

--Texas Labor Code §302.253 requires TWC to establish and administer the program.

--Texas Labor Code §302.257 grants TWC the authority to adopt rules to administer and enforce the program.

The rules implement Title 4, Texas Labor Code, particularly Chapter 302, Subchapter I.

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