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| MEMORANDUM **TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES** |

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| TO: | Department of Family and Protective Services Logo**Chair and Members Department of Family and Protective Services Council** |
| FROM: | **John J. Specia, Jr. Commissioner** |
| SUBJECT: | **Agenda Item Recommendation to propose rule changes in 40 TAC Chapter 705 Adult Protective Services and 711 Investigations in DADS and DSHS Facilities and Related Programs** |
| DATE: | **April 22, 2016** |

## BACKGROUND AND PURPOSE

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), updated Chapters 705 and 711 in Title 40 of the Texas Administrative Code, concerning Adult Protective Services and Investigations in [Department of Aging and Disability Services (DADS)](http://www.dads.state.tx.us/)and [Department of State Health Services (DSHS)](http://www.dshs.state.tx.us/) Facilities and Related Programs. The purpose of the modified and new rules is to implement Senate Bills 760 and 1880 (84th Legislature), the APS Scope and Jurisdiction Bills, which expanded the APS Provider (formerly APS Facility) program's jurisdiction to investigate abuse, neglect, and exploitation. These bills ensure continued State of Texas compliance with the Center for Medicaid and Medicare Services (CMS) requirements for the health and welfare of recipients of home and community-based services (HCBS). The bills (1) expanded the authority of Adult Protective Services (APS) to investigate, inter alia, all home and community-based service providers whether providing services in a traditional or managed care service delivery model, (2) clarified and addressed the gaps and inconsistencies that resulted from evolving service delivery changes and changes in contracting arrangements, and (3) updated statutory language and requirements related to provider and agency responsibilities.

These modified and new rules implement APS's expanded jurisdiction and modify existing DFPS rules, as applicable, to the expanded jurisdiction. These rules will take effect on September 1, 2016. The updates in Chapters 705 and 711 will implement statutory changes as required by the APS Scope and Jurisdiction Bills.

## DETAILED SECTION ANALYSIS AND DISPOSITION TABLE

| **Current Rule Sections** | **Proposed Action; New Rule Section** | **Summary Explanation of Proposed Action** |
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| §705.1001 | Amend | Updates and adds definitions for emergency protective services, home and community support services agencies (HCSSA), paid caretaker, protective services, and purchased client services.  Removes definitions of terms not used in the subchapter. |
| §705.2103 | Repeal and New | Updates to establish who is eligible for emergency protective services. |
| §705.2105  §705.2107 | Amend | Updates term and establishes who is eligible for purchased client services and when purchased client services are available. |
| §705.3102 | Amend | Updates term to clarify when APS can apply for a protective order. |
| §705.4103 | Amend | Clarifies the circumstances in which a designated perpetrator has the right to appeal a validated finding. |
| §705.4105 | Amend | Clarifies to whom APS may release the findings of an investigation when the findings of the investigation are valid. |
| §705.4107 | Amend | Updates language. |
| §705.6101 | Amend | Updates to clarify when APS uses assessments in an in-home case and when a case worker must consult with a supervisor. |
| §705.7103 | Amend | Clarifies title; deletes outdated language regarding investigatory authority. |
| §705.7105 | Amend | Updates terms to align with APS Scope and Jurisdiction bills, in particular the APS Provider program's expanded authority to investigate providers; makes minor clarifying edits. |
| §711 title | Amend | Updates title to mirror APS Scope and Jurisdiction bills; reflects APS's new authority to investigate individuals receiving services from certain providers. |
| §711.1 | Amend | Updates purpose to align with APS Scope and Jurisdiction Bills; describes APS's expanded investigatory authority. |
| §711.3 | Repeal and New | Updates terms and abbreviations to align with APS Scope and Jurisdiction bills and other clarifications made in this rules update, in particular the definitions of: direct provider, facility, home and community-based services, individual receiving services, limited service provider, non-serious physical injury, provider, serious physical injury, and service provider. |
| §711.5 | Amend | Updates and clarifies what APS investigates; deletes provision on sexual exploitation as it is subsumed within the definition of sexual abuse; deletes the term “person served” and uses the statutory term "individual receiving services" instead. |
| §711.7 | Amend | Updates and clarifies what APS does not investigate. Deletes confusing examples. Expands exclusion of investigating business or operational issues related to managed care or consumer directed services. Expands exclusion of investigating clinical issues to all licensed professionals rather than just specific ones. |
| §711.9 | Repeal | Deletes as guidance will be moved to policy; the illustrations were confusing and rarely applicable. |
| §711.11 | Amend | Updates and clarifies language to more appropriately align with APS Scope and Jurisdiction Bills. Expands rule citations for restraints for new providers. |
| §711.13 | Amend | Updates and clarifies language to more appropriately align with APS Scope and Jurisdiction Bills; updates to include definition of sexual exploitation as part of sexual abuse definition in subsection (a)(8). |
| §711.15 | Repeal | Moves the content to 40 TAC 711.13(a)(8) as part of the sexual abuse definition. |
| §711.17 | Amend | Updates and clarifies language to more appropriately align with APS Scope and Jurisdiction Bills. |
| §711.19 | Amend | Updates and clarifies language to more appropriately align with APS Scope and Jurisdiction Bills; clarifies confusing examples. |
| §711.21 | Amend | Updates and clarifies who is an alleged perpetrator of exploitation to align with APS Scope and Jurisdiction Bills. Expands definition of exploitation to include attempted exploitation and theft in a home or community setting other than HCS and TxHML waiver program. |
| §711.23 | Amend | Updates and clarifies language to more appropriately align with APS Scope and Jurisdiction Bills; clarifies what is not considered abuse, neglect, or exploitation. Expands rule citations for new providers. |
| §711.25 | Repeal | Deletes emergency rule that expires September 1, 2016. |
| §711.201 | Amend | Clarifies reporting requirements; maintains one hour notification for facilities, community centers, local authorities, and HCS/TxHmL waiver programs. |
| §711.401 | Repeal and New | Removes original graphic and replaces with updated notification chart of whom APS investigates upon intake of allegation. Updates APS requirements for notification to providers, law enforcement, and OIG. |
| §711.403 | Amend | Clarifies steps taken when a general complaint is received. |
| §711.405 | Repeal and New | Clarifies what action is taken if the alleged perpetrator is a licensed professional. |
| §711.407  §711.409  §711.411 | Repeal | Consolidates affected rules into 711.405. |
| §711.419 | Amend | Clarifies who is notified of investigation extensions. |
| §711.423 | Amend | Updates terms related to unknown perpetrator and systems issues. |
| §711.603 | Amend | Clarifies what is included in the investigation report. |
| §711.605 | Repeal and New | Updates and clarifies who receives the investigation report. |
| §711.607 | Repeal | Moves the content to 711.605 regarding who receives the investigation report. |
| §711.609  §711.611 | Amend | Updates and clarifies how the reporter and alleged victim, guardian, or parent are notified of the finding and how to appeal. |
| §711.613 | Amend | Clarifies when the report can be released by the service provider. |
| §711.801  §711.802 | Amend | Clarifies what steps an investigator takes if an individual receiving services from an HCS waiver provider requires emergency protective services. Clarifies what steps an investigator takes if an individual receiving services from an ICF-IID provider requires emergency protective services. |
| §711.804  §711.806 | New | Identifies what steps an investigator takes if an individual, adult or child, living in an HCS waiver provider home but not receiving waiver services requires emergency protective services. |
| New Subchapter J | New | Creates a new subchapter for appealing the investigation finding. |
| §711.901 | New | Defines and describes an appeal of the investigation finding. |
| §711.903 | New | Clarifies how an appeal of the investigation finding affects an act of reportable conduct. |
| §711.905 | New | Clarifies who may request an appeal of the investigation finding. |
| §711.907 | New | Describes how a qualified party requests an appeal of the investigation finding. |
| §711.909 | New | Describes the timeline for an appeal of the investigation finding. |
| §711.911 | New | Describes how and when an appeal of the investigation finding is conducted. |
| §711.913 | New | Describes the process for the administrator of a state-operated facility to contest a decision of the APS Assistant Commissioner. |
| §711.915 | New | Describes when a finding may be changed without an appeal of the investigation finding |
| Subchapters K and M | Repeal | Consolidates Subchapters in new Subchapter J, which updates and clarifies methods for appealing a finding taking into account APS’ expanded authority. |

## STATUTORY AUTHORITY AND STATUTES AFFECTED

The modifications are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Department of Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The rule changes implement HRC Chapter 48, as amended by S.B. 1880 and S.B. 760, notably Subchapter F, §48.251 through 48.258 and Family Code §261.404.

## FISCAL IMPLICATIONS

(a) Lisa Subia, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed section will be in effect there will be fiscal implications for state or local government as a result of enforcing or administering the section.

(b) Ms. Subia also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that the expanded authority of DFPS to investigate abuse, neglect, and exploitation of individuals receiving services from certain providers. Due to needed additional staffing and technology, the estimated impact on state government and appropriated funding levels is $1,603,723 for Fiscal Year (FY) 2016, $1,712,345 FY 2017, $1,712,345 FY 2018, $1,712,345 FY 2019, and $1,712,345 FY 2020. The impact on federal government will be $333,585 FY 2016, $370,716 FY 2017, $370,716 FY 2018, $370,716 FY 2019, and $370,716 FY2020. Upon implementation, actual experience has yielded higher caseloads than originally assumed resulting in additional costs to the state. The fiscal impact of these additional costs cannot be estimated at this time.

(c) There will be no effect on large, small, or micro businesses because the proposed change does not impose new requirements on any business and does not require the purchase of any new equipment or any increased staff time in order to comply.

(d) There is no anticipated economic cost to persons who are required to comply with the proposed section. HHSC has determined that the proposed new section does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under §2007.043, Government Code

(e) The cost estimate for the APS Scope and Jurisdiction bills, which was incorporated into the estimate for this rule proposal, included the technology impact cost estimate for DFPS to make changes to DFPS’s systems to be able to capture data regarding the new provider types in order to meet CMS requirements. Technology costs were not separately estimated but were included in the overall estimate.

## STAKEHOLDER INPUT

APS coordinated and held stakeholder meetings July 16, 2015, August 4, 2015, October 15, 2015, January 8, 2016, and February 8, 2016. These meetings discussed stakeholder concerns, recommendations, and rule proposals. Stakeholder feedback was incorporated into rule development.

## RECOMMENDATION

It is recommended that the Council consider the proposed rule action, as discussed in this memorandum, and that the Council recommend proposal, with or without changes to the rules as they are attached to this memo.

## ATTACHMENTS

Attached is a copy of the proposed change to the rule section as staff recommended for submittal to the Texas Register.