# SUPPLEMENTAL MATERIALS

AGENDA ITEM XI-L

Consideration of adopting the Committee's recommendation to the Board relating to a proposed amendment to Chapter 1, Agency Administration, Subchapter A, General Provisions, Section 1.14 of Board rules concerning Negotiated Rulemaking.

The public comment period on the proposed rules ended on October 20. The attached revised blue pages and proposed rules include a summary of the public comments received, the staff response, and the modified proposed rules in red bold font.

AGENDA ITEM XI-L

Consideration of adopting the Committee's recommendation to the Board relating to a proposed amendment to Chapter 1, Agency Administration, Subchapter A, General Provisions, Section 1.14, of Board rules concerning Negotiated Rulemaking.

RECOMMENDATION: Adopt

Background Information:

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to THECB Rules 1.14 concerning Negotiated Rulemaking. Senate Bill 215 from the 83rd Texas Legislature requires the Coordinating Board to engage in negotiated rulemaking with institutions of higher education in accordance with the Negotiated Rulemaking Act, Texas Government Code Chapter 2008, when adopting policies, procedures, or rules relating to certain matters. The proposed amendments to this section implement Senate Bill 215's requirements and set forth the agency's negotiated rulemaking process for those matters where the Board is required to engage in negotiated rulemaking, as well as for those matters where the Board is not required to engage in negotiated rulemaking.

Date approved by the Commissioner for Publication in the *Texas Register*: September 9, 2013

Date published in the *Texas Register*: September 20, 2013

The 30-day comment period with the *Texas Register* ended on: October 20, 2013

Summary of comments received:

Revisions based on the below comments are *italicized* and *highlighted/underlined in red* if added, or [~~struck through in red~~] if deleted.

*Comments were received regarding the proposed negotiated rulemaking rules on behalf of the General Counsel from the six university systems.*

**Comment regarding Costs of Participating in Negotiated Rulemaking (*19 TAC* Section 1.14(g)(2)):** We suggest amending the rule to clarify that participating entities, rather than the representatives of those entities, are responsible for the costs of the facilitator. In addition, allowing each negotiated rulemaking committee to have the option to apportion costs differently will provide necessary flexibility when addressing the varied issues requiring negotiated rulemaking under SB 215 (83rd Legislature).

Suggested Language: "The costs of the negotiated rulemaking facilitator described in subsection (h) of this section shall be borne equally, on a pro rata basis, by all entities represented on the rulemaking committee, unless (i) the negotiated rulemaking committee

unanimously agrees to a different cost allocation; or (ii) the facilitator is an employee of the Board, in which event the costs of the facilitator shall be borne by the board."

**Staff response:** Staff concurs with the suggested modification and has made the changes indicated.

**Comment regarding Consensus and the Negotiated Rulemaking Committee's Report (19 TAC Section 1.14(j) and (k)):** We suggest amending the proposed rules to replace the "Commissioner" with "the Board" in each instance it is referenced in 19 TAC §1.14(j) and (k). Because SB 215 gives the Coordinating Board responsibility for engaging in negotiated rulemaking, we believe it is most appropriate to refer to the Board in the rules. In each instance of negotiated rulemaking, the Board may delegate these responsibilities to the Commissioner.

Suggested Language:
(j) "Consensus and the Negotiated Rulemaking Committee's Report. If the negotiated rulemaking committee reaches a consensus, the committee will draft and send a report to the Board that contains the text of the proposed rule(s). If the committee determines that only a partial agreement on a proposed rule(s) has been reached, the committee will draft and send a report to the Board that describes the partial agreement achieved, lists the unresolved substantive issues, and includes any other information or recommendations of the committee. The committee's report is public information. If consensus is not achieved, the Board shall determine whether to proceed with proposed rule(s). If the Board decides to proceed with proposed rule(s), the Board may use language developed during the negotiations or develop new language for all or a portion of the proposed rule(s)."

(k) "Proposed Rulemaking under the APA. If the Board decides to proceed with rulemaking after receipt of the negotiated rulemaking committee's report, the Board shall initiate rulemaking under the regular Administrative Procedure Act (APA) procedures as prescribed in Texas Government Code Chapter 2001, Subchapter B. In addition to the APA's requirements regarding the contents of notice of proposed rulemaking, the notice will also state that:…"

**Staff response:** Staff concurs with the suggested modifications, has made the changes indicated, and has also added a subsection (m) to address the Commenters' statement regarding delegating these responsibilities to the Commissioner. Subsection (m) reads: "The Board hereby delegates to the Commissioner the responsibilities and authority set forth in this section." Moreover, in recognition of the responsibilities assigned to the agency's Alternative Dispute Resolution (ADR) coordinator by section 1.14(b), staff has also substituted the title "ADR coordinator" in place of "Commissioner" in several subsections of the rule, to wit: 1.14(c), (d)(1)-(4), (e), (e)(5), (e)(7), (f), (g)(1)(ii), and (h). A definition has also been added as follows: "Alternative Dispute Resolution coordinator- A THECB employee appointed under Chapter 1, Subchapter B, Rule 1.22."

Agenda Item XI-L
Supplemental Materials

# CHAPTER 1. AGENCY ADMINISTRATION

## SUBCHAPTER A. GENERAL PROVISIONS

Section

1.1. Dates for Regular Quarterly Meetings of the Board
1.2. Authority of the Commissioner to Interpret Rules
1.3. Educational Data
1.4. Rules of Order
1.5. Coordinating Board Committees
1.6. Advisory Committees
1.7. Petition for the Adoption of Rules
1.8. Historically Underutilized Business (HUBs) Program
1.9. Training for Members of Governing Boards and Board Trustees
1.10. Administration of the Open Records Act
1.11. Protest Procedures for Resolving Vendor Protests Relating to Purchasing Issues
1.12. Foreign Travel
1.13. Internal Auditor
1.14. Negotiated Rulemaking
1.15. Authority of the Commissioner to Propose Board Rules
1.16. Contracts for Materials and Services
1.17. Authority of the Commissioner to Provide Direct Supervision of the Education Research Centers
1.18. Operation of Education Research Centers
1.19. Education and Training of Board Administrators and Employees

1.1 – 1.13 (No change.)

1.14. Negotiated Rulemaking

(a) *Definitions.* The following words and terms, when used in this rule, shall have the following meaning: [~~The Board encourages negotiated rulemaking whenever appropriate. Rulemaking may be negotiated informally, in the manner that has been established by this agency, or it may be negotiated formally, in accordance with the procedures established in the Texas Government Code, at Chapter 2008.~~]

(1) Alternative Dispute Resolution coordinator- An agency employee appointed under Chapter 1, Subchapter B, Rule 1.22.

(2) Board or agency– Texas Higher Education Coordinating Board

(3) Commissioner – The Commissioner of Higher Education

(4) Consensus – The negotiated rulemaking committee has reached consensus on a matter only if the agreement is unanimous, unless the committee has unanimously agreed to define consensus in another manner. The absence or silence of a member at the time the final consensus vote is taken is equivalent to agreement. If consensus is achieved, negotiated rulemaking committee members may not thereafter withdraw their agreement.

*(5)* Institutions of higher education – As defined in Texas Education Code Section 61.003

(6) Private or independent institutions of higher education – As defined in Texas Education Code Section 61.003

(b) If the Assistant Commissioner whose Division has jurisdiction over the subject matter of the rule or rules to be adopted concludes that the agency may benefit from negotiated rulemaking, he or she shall request that the agency's Alternative Dispute Resolution (ADR) coordinator assist in determining whether it is advisable to proceed under the procedures established in Chapter 2008 of the Texas Government Code.

(1) *Scope and Purpose.* This rule also implements Texas Education Code Sections 61.0331, 61.0572, 61.058, and 61.07761 which require the Board to engage in negotiated rulemaking with institutions of higher education in accordance with the procedures established in Texas Government Code Chapter 2008 when adopting a policy, procedure, or rule relating to:

(2) the transfer of credit under Texas Education Code Section 61.827 or admission policies regarding:

(A) the common admission application under Texas Education Code Section 51.762;

(B) uniform admissions under Texas Education Code Section 51.807; or

(C) graduate and professional admissions under Texas Education Code 51.843; or

(3) the reevaluation of data requests under Texas Education Code Section 51.406;

(4) compliance monitoring under Texas Education Code Section 61.035;

(5) the standards for cost, efficiency, space need, and space use under Texas Education Code Sections 61.0572 and 61.058 in regards to:

(A) new construction, rehabilitation, repair of buildings and facilities at institutions of higher education; and

(B) the purchases of improved real property added to institutions of higher education's educational and general buildings and facilities inventory; or

(6) the allocation (including the allocation methodologies and related procedures) or distribution of funds, including financial aid or other trusteed funds under Texas Education Code Section 61.07761, to institutions of higher education and private or independent institutions of higher education. For rulemaking on this issue, the Board shall engage in negotiated rulemaking with both institutions of higher education and private or independent institutions of higher education, as applicable.

(A) With the exception of sections 1.14(a), (b), and (d)(3)-(4), this rule and the procedures set forth herein apply only to those matters, as set forth in (b-1), in which the Board is required to engage in negotiated rulemaking.

(B) In matters other than those addressed in (b-1), the Board retains the right to engage in negotiated rulemaking in accordance with the procedures established in the Texas Government Code, Chapter 2008.

(c) *Appointment of Convener.* The [~~Commissioner~~] *ADR coordinator* will appoint an agency employee to serve as the convener to assist in negotiated rulemaking. The convener may not have a financial or other interest in the outcome of the rulemaking process that would interfere with the person's impartial and unbiased service as the convener.

(d) *Duties of Convener.* (1) The convener will assist the [~~Commissioner~~] *ADR coordinator* in identifying institutions of higher education (and private or independent institutions when rulemaking under 1.14(a)(5) is considered) and other stakeholders (such as students, state agencies, and accreditors) who are likely to be affected by the proposed rule(s), including identifying institutions and other stakeholders who may oppose the issuance of rule(s). The convener will discuss with institution representatives and other stakeholders whether they are willing to participate in negotiated rulemaking, which issues a negotiated rulemaking committee should address, and whether there are other institutions or persons the convener needs to identify who may be affected by the proposed rule(s).

(2) Where the Board is required to engage in negotiated rulemaking, the convener shall report to the [~~Commissioner~~] *ADR coordinator* the outcome of the above discussions.

(3) Where the Board is not required to engage in negotiated rulemaking, the convener shall report to the [~~Commissioner~~] *ADR coordinator* on the relevant considerations regarding negotiated rulemaking, including, but not limited to:

(i) the number of identifiable interests that would be significantly affected by the proposed rule(s),

(ii) the probable willingness and authority of the representatives of affected interests to negotiate in good faith,

(iii) the probability that a negotiated rulemaking committee would reach a unanimous or a suitable general consensus on the proposed rule(s),

(iv) the adequacy of Board, institution, and citizen resources to participate in negotiated rulemaking, and

(v) the probability that the negotiated rulemaking committee will provide a balanced representation between affected stakeholder interests.

(4) Where the Board is not required to engage in negotiated rulemaking, the convener shall also recommend to the [~~Commissioner~~] *ADR coordinator* whether negotiated rulemaking is appropriate.

(5) The report and recommendations of a convener are public information and available on request to any member of the public.

(e) *Publishing Notice of Proposed Negotiated Rulemaking.* To initiate negotiated rulemaking, the Commissioner will publish a notice of intent to establish a negotiated rulemaking committee to prepare proposed rules. Such notice will be published both in the *Texas Register* and on the Board's website. The [~~Commissioner~~] *ADR coordinator* will consider all comments received by the close of the comment period pursuant to the notice of intent. The notice of intent will include:

(1) a statement that the Board intends to engage in negotiated rulemaking;

(2) a description of the subject and scope of the rule(s) to be developed;

(3) a description of the known issues to be considered in developing the rule(s);

(4) a list of the interests likely to be affected by the proposed rule(s);

(5) a list of the individuals the [~~Commissioner~~] *ADR coordinator* proposes to appoint to the negotiated rulemaking committee to represent the Board and affected interests (each committee will include at least one agency staff representative);

(6) a request for comments on the proposal to engage in negotiated rulemaking, including a description of the issues the commenter believes will need to be addressed in developing the rule(s), as well as on the proposed membership of the negotiated rulemaking committee; and

(7) a description of the procedure through which an institution or person who will be significantly affected by the proposed rule(s) may, before the [~~Commissioner~~] *ADR coordinator* appoints members to the negotiated rulemaking committee, apply [~~to the Commissioner~~] for

membership on the committee or nominate another to represent the institution's or person's interests on the committee (before nominating an individual to the committee, the nominator should confirm that the potential nominee can and will make the necessary time commitment to the negotiations).

(f) *Appointment of Negotiated Rulemaking Committee Members.* After considering comments and nominations received in response to the notice of proposed negotiated rulemaking, the [~~Commissioner~~] *ADR coordinator* will appoint members to a negotiated rulemaking committee to serve until the proposed rule(s) (if any) is adopted by the Board. The [~~Commissioner~~ *ADR coordinator* will appoint members to the committee with a goal of providing adequate and balanced representation for the affected interests while keeping the size of the committee manageable. The [~~Commissioner~~] *ADR coordinator* shall select individuals with demonstrated expertise or experience in the relevant matters under negotiations and who reflect the diversity of the identifiable interests which could be significantly affected by the proposed rule(s). An individual selected to serve on the committee will be expected to represent the interests of his or her entity, organization or group, and participate in the negotiations in a manner consistent with the goal of developing proposed rules on which the committee will reach consensus.

(g) *Costs of Participating in Negotiated Rulemaking.*

(1) The Board will provide appropriate administrative support to the negotiated rulemaking committee. Except as provided below, a member of a negotiated rulemaking committee is responsible for the member's own costs in serving on the committee. However, if:

(A) The member certifies that he or she (or the entity, organization or group which the member represents) lacks sufficient financial resources to participate as a member of the committee and provides any requested proof of same; and

(B) The [~~Commissioner~~] *ADR coordinator* determines that the member's service on the committee is necessary for the adequate representation of an affected interest,

(C) then, the Board may pay a member's reasonable travel and per diem costs related to the member's service on the committee at the rate set in the General Appropriations Act for state employees.

(2) The costs of the negotiated rulemaking facilitator described in subsection (h) shall be borne equally, on a pro rata basis, by all [~~members of~~] entities represented on the negotiated rulemaking committee, unless the negotiated rulemaking committee unanimously agrees to a different cost allocation; or the facilitator is an employee of the Board, in which event the costs of the facilitator shall be borne by the Board.

(h) *Appointment of Negotiated Rulemaking Facilitator.* The [~~Commissioner~~] *ADR coordinator* will appoint a negotiated rulemaking facilitator who will utilize alternative dispute resolution skills to attempt to arrive at a consensus on a proposed rule(s). The [~~Commissioner~~] *ADR coordinator* may appoint a Board employee or contract with another state employee or private individual to serve as the facilitator. The [~~Commissioner's~~] *ADR coordinator's* appointment of

the facilitator is subject to the approval of the negotiated rulemaking committee and the facilitator serves at the will of the committee. The [~~Commissioner~~] *ADR coordinator* will appoint the facilitator utilizing, among other things, the following criteria:

(1) The facilitator must possess the qualifications required for an impartial third party under Civil Practice and Remedies Code Section 154.052(a) and (b);

(2) The facilitator is subject to the standards and duties prescribed by Civil Practice and Remedies Code Sections 154.053(a) and (b) and has the qualified immunity prescribed by Civil Practice and Remedies Code Section 154.055, if applicable;

(3) The facilitator will not be the person designated to represent the Board on the negotiated rulemaking committee on substantive issues related to the rulemaking; and

(4) The facilitator will not have a financial or other interest in the outcome of the rulemaking process that would interfere with the person's impartial and unbiased service as the facilitator.

(i) *Duties of Negotiated Rulemaking Committee and Facilitator.* The facilitator will preside over meetings of the negotiated rulemaking committee and assist the members of the committee to establish procedures for conducting negotiations and will utilize alternative dispute resolution skills to encourage a consensus on the proposed rule(s). The facilitator may not, however, compel or coerce the members to reach a consensus.

(j) *Consensus and the Negotiated Rulemaking Committee's Report.* If the negotiated rulemaking committee reaches a consensus, the committee will draft and send a report to the [~~Commissioner~~] Board that contains the text of the proposed rule(s). If the committee determines that only a partial agreement on a proposed rule(s) has been reached, the committee will draft and send a report to the [~~Commissioner~~] Board that describes the partial agreement achieved, lists the unresolved substantive issues, and includes any other information or recommendations of the committee. The committee's report is public information. If consensus is not achieved, the [~~Commissioner~~] Board shall determine whether to proceed with proposed rule(s). If the [~~Commissioner~~] Board decides to proceed with proposed rule(s), the [~~Commissioner~~] Board may use language developed during the negotiations or develop new language for all or a portion of the proposed rule(s).

(k) *Proposed Rulemaking under the APA.* If the [~~Commissioner~~] Board decides to proceed with rulemaking after receipt of the negotiated rulemaking committee's report, the [~~Commissioner~~] Board shall initiate rulemaking under the regular Administrative Procedures Act (APA) procedures, as prescribed in Texas Government Code Chapter 2001, Subchapter B. In addition to the APA's requirements regarding the contents of notice of proposed rulemaking, the notice will also state that:

(1) the Board used negotiated rulemaking in developing the proposed rule, and

(2) the negotiated rulemaking committee report is public information and the report's location at which it will be available to the public.

All published proposed rules will conform to the agreements resulting from consensus, if any, achieved through negotiated rulemaking (as reflected in the negotiated rulemaking committee's report).

(l) *Confidentiality of Certain Records and Communications.* Civil Practice and Remedies Code (CPRC) Sections 154.053 and 154.073 apply to the communications, records, conduct, and demeanor of the facilitator and the members of the negotiated rulemaking committee as if the negotiated rulemaking were a dispute being resolved in accordance with CPRC Chapter 154. In the negotiated rulemaking context, the Texas Office of the Attorney General, subject to review by a Travis County district court, decides in accordance with CPRC Section 154.073(d) whether a communication or material subject to Section 154.073(d) is confidential, excepted from required disclosure, or subject to required disclosure. Notwithstanding CPRC Section 154.073(e):

(1) a private communication and a record of a private communication between a facilitator and a member or members of the committee are confidential and may not be disclosed unless the member or members of the committee, as appropriate, consent to the disclosure; and

(2) the notes of a facilitator are confidential except to the extent that the notes consist of a record of a communication with a member of the committee who has consented to disclosure in accordance with subdivision (1).

(m) The Board hereby delegates to the Commissioner the responsibilities and authority set forth in this section.