

June 1, 2010
Submitted: rules@tea.state.tx.us

Robert Scott
Commissioner of Education
Texas Education Agency
William B. Travis Building
1701 N. Congress Avenue
Austin, Texas, 78701

Dear Commissioner Scott:

On behalf of the Software & Information Industry Association (SIIA), I write to provide public comment on the Commissioner's proposed new rules for 19 TAC Chapter 66, State Adoption and Distribution of Instructional Materials, Subchapter AA, Subchapter BB, and Subchapter CC, which would implement the requirements of the Texas Education Code (TEC), Chapter 31, as amended by House Bill (HB) 4294, HB 2488, and HB 1332, 81st Texas Legislature, 2009.

SIIA generally supports the steps taken by the new law and Commissioner's rules toward modernizing the Texas adoption system to better meet educational needs in this digital age. We provide comments and recommended changes in the attached document to help ensure the rules better address the legislative intent to provide Texas students and educators with access to a full range of quality electronic and other instructional materials.

SIIA represents more than 500 leading software and digital content companies, including some based in Texas. Many SIIA members publish educational software, digital curricula and related technologies and services for use in education in Texas and around the country. SIIA and our member companies have long advocated for reform of the adoption system in Texas and in other states to better support adoption of electronic and online instructional materials that meet the needs of today's digital age students and educators.

On behalf of the Software & Information Industry Association and our member companies, we thank you for considering our views on the proposed new Commissioner's rules, and we look forward to working with you moving forward to ensure students can take advantage of the full array of instructional materials to meet state standards and educational needs. Meanwhile, if we can be of further assistance, please contact me at (202) 789-4444 or marks@siia.net.

Sincerely,

A handwritten signature in black ink that reads 'Mark Schneiderman'.

Mark Schneiderman
Senior Director of Education Policy

cc: Anita Givens, Associate Commissioner, Standards and Programs
John Lopez, Managing Director, Instructional Materials and Educational Technology

Attachment

**Text of Proposed New 19 TAC. Chapter 66.
State Adoption and Distribution of Instructional Materials**

**Subchapter AA. Commissioner's Rules Concerning the Commissioner's List of Electronic
Textbooks and Instructional Materials**

§66.1007. Manufacturing Standards and Specifications.

SIIA Recommended Change:

(c) If, during the contract period, ~~the commissioner determines that~~ any adopted electronic textbooks and instructional materials are revised and the commissioner determines they no longer do not meet the requirements of the technical standards of the Rehabilitation Act, §508, the materials shall be made compliant ~~replaced~~ by the publisher without cost to the state. If it is determined that good cause exists, the commissioner of education may grant an exception to this requirement.

SIIA Explanation: SIIA recommends in §66.1007(c) that the commissioner should only change a previous ruling on 508 compliance if there was a post-approval change to the electronic material that took it out of compliance.

§66.1009. Procedures Governing Violations of Statutes--Administrative Penalties.

SIIA Recommended Change:

(i) Replacement requirements. If the commissioner determines in a hearing that electronic, web-based, or online instructional materials furnished and supplied under the terms of a contract have faulty manufacturing characteristics or ~~display dated or inferior information that otherwise do not meet the terms of the contract~~ during the contract period, the instructional materials or information shall be updated ~~replaced with complying materials or information~~ by the publisher without cost to the state.

SIIA Explanation: SIIA believes that in §66.1009(i) the criteria of “dated or inferior” are too subjective, and suggests instead a focus on whether the material meets the terms of the contract. SIIA also notes that “replaced” may be a term more a term of art for printed materials, and suggests for electronic materials that the original resource – i.e., licensed software or online content – would instead be updated (e.g., version 1.1).

SIIA Recommended Change:

(j) Content update requests. The publisher must submit a request to the commissioner as specified in §66.1035 of this title (relating to Updates to Electronic Textbooks and Instructional Materials) for approval to substitute updated content or add additional content, except in the case of factual or -software coding errors, which shall not require commissioner approval. The commissioner shall respond to such requests within 45 days, or absence such response, the publisher may make the requested substitute.

SIIA Explanation: SIIA recommends in §66.1009(j) that factual content or software coding errors should not require commissioner approval in order to expedite their correction, and because they do not fundamentally change the content or the TEKS coverage. Further SIIA recommends that the

commissioner review and respond to other general content update requests within 45 days to reflect the timeliness of the electronic medium and the expected revision cycle of publishers, educators and students.

SIIA Recommended Change:

(k) Content removal. The publisher agrees that electronic, web-based, or online instructional materials listed in the contract will not be altered in any way that would remove content from the curriculum ~~or that would change content in the curriculum~~ without prior commissioner approval, except in the case of factual or other errors. If the publisher submits a request to the commissioner to remove content, the commissioner shall respond to such requests within 45 days, or absence such response, the publisher may make the requested removal.

SIIA Explanation: SIIA suggests that §66.1009(k) should focus on content “removal” and not on other types of “change” for purposes of clarity. SIIA again recommends exceptions for factual or other errors, and that that the commissioner review and respond to other general content removal requests within 45 days to reflect expectations of timeliness for electronic materials.

SIIA Recommended Change:

(l) ~~Internet Links~~Online requirements. The publisher will not allow advertising of any type to be placed in or associated with the materials. The publisher will not~~may automatically add any~~ Internet links to the materials ~~without the approval of the commissioner, and will not~~ redirect any user accessing the web-based or online instructional materials to other Internet or electronic sites, including in both cases where the added Internet link or redirect to other Internet or electronic sites is needed to correct an error, fix a broken link, provide additional instances of TEKS coverage, or otherwise provide an equivalent resource to one no longer available or appropriate. Publishers shall provide such new or changed Internet links to the Commissioner at the time the addition or change is made, and the Commissioner shall have up to 45 days to retroactively reject such changes.

SIIA Explanation: SIIA recommends that §66.1009(l) should focus on Internet links, and that other online requirements should be moved to a new paragraph in light of the scale and complexity of these issues. SIIA recommends that the publisher be allowed to add and change Internet links as appropriate to fix bad links, provide additional TEKS coverage and ensure linked resources are timely. This recommended policy would best reflect the expectations that electronic textbooks leverage other resources to be comprehensive and current, and to so in a timely manner. This recommended policy also reflects the reality that Internet links often change for a variety of reasons, including various resources that are removed from the Internet; and absent the authority of publishers to address those changes, educators and students may grow frustrated and the Texas Education Agency may become overburdened.

SIIA Recommended Change:

(m) ~~Online Requirements.~~ The publisher will not allow advertising of any type to be placed in or associated with the materials. ~~The publisher and~~ will not collect any personally identifiable information about the user ~~or computer accessing the materials that would allow determination of personal information, including email addresses, except as necessary for legitimate operational tasks, including for authenticating and managing student access and detecting and preventing security vulnerabilities, delivering the material and providing its educational value as per the intended design, and improving and updating the material, provided that in all of these cases, the types of information and the reasons for its collection are explained to the school district or open-enrollment charter school prior to adoption and provided that the use of such information follows the federal Family Educational Rights and Privacy Act (FERPA).~~

SIIA Explanation: SIIA recommends that §66.1009(m), as renumbered, should be modified to focus on “personally identifiable information” and allow exceptions necessary for the operation of electronic textbooks subject to federal privacy laws. Failure to allow publishers to collect some personal information as agreed to by their school customers and outlined in the proposed changes will greatly impede, and may even prevent, the delivery of many electronic textbooks, especially those delivered online through a subscription model.

§66.1011. Review and Adoption Cycles.

SIIA Recommended Change:

(a) The commissioner of education ~~shall~~may adopt an annual review and adoption cycle for subjects in the foundation and enrichment curriculum for electronic textbooks and instructional materials. The commissioner shall strive to make that cycle a continuous and ongoing cycle, given the nature of electronic textbooks to be developed and revised on a frequent and timely basis. The commissioner shall have the authority to call for, review and adopt materials off cycle.

(b) In addition to the cycle described in paragraph (a), ~~determining an adoption cycle,~~ the commissioner shall carry out a review and adoption for electronic textbooks and instructional materials -for ~~consider the each adoption-cycle-for~~ subjects in the foundation curriculum and enrichment curriculum adopted by the State Board of Education (SBOE). The commissioner may issue requests for content outside of the normal SBOE adoption cycle.

SIIA Explanation: SIIA recommends that §66.1011(a) and (b) be clarified to better ensure the opportunity for schools and students to have the most updated content and instructional technologies. SIIA recommends that electronic textbooks be adopted at least on an annual basis, and in the future, SIIA recommends that the Texas Education Agency move toward a continuous and ongoing cycle where electronic textbooks are submitted as they are developed. Recognizing that state instructional materials funds are most often allocated in conjunction with the SBOE adoption cycle, SIIA also recommends that electronic textbooks additionally be reviewed and approved each time there is an SBOE adoption to ensure choice from the full range of instructional materials.

§66.1013. Request, Public Notice, and Schedule for Adopting Electronic Textbooks and Instructional Materials.

SIIA Recommended Change:

(a) The commissioner of education shall issue a request calling for electronic textbooks and instructional materials according to a cycle outlined in §66.1011. ~~for foundation and enrichment subjects as determined by the commissioner or according to the review and adoption cycle for subjects in the foundation curriculum and enrichment curriculum adopted by the State Board of Education.~~ The request shall serve as notice to all publishers and to the public that bids to furnish new electronic textbooks and instructional materials to the state are being invited.

SIIA Explanation: SIIA recommends that §66.1013(a) be edited for consistency to refer directly to the commissioner’s list cycle described in §66.1011, as amended by SIIA’s proposed changes.

§66.1027. Electronic Textbooks and Instructional Materials Offered for Adoption by the Commissioner.

SIIA Recommended Change:

(c) Electronic textbooks and instructional materials adopted by the commissioner of education shall include appropriate training for teachers at no additional cost to districts or open-enrollment charter schools. Appropriate training for teachers is defined as acquiring knowledge and skills that are necessary to effectively ~~operate provide instruction in the classroom using~~ the adopted electronic textbooks and instructional materials to provide instruction.

SIIA Explanation: SIIA notes that, with regard to §66.1027(c), the publisher's traditional primary responsibility is to support educators in their ability to effectively use the software. The goal to "effectively provide instruction" may require a level of school and teacher support that goes well beyond what a publisher can and should provide at no cost, including professional development around teaching practices and classroom management that are often not product specific. In some cases, electronic materials may require a redesign of the curriculum and instruction, and the support needed for this must fall on the school and not to a single publisher. SIIA therefore recommends clarification that the publisher's obligation for free training be limited in scope.

SIIA Recommended Change:

(d) Any ~~price variations and~~ discounts offered ~~that are dependent on~~ ~~for~~ numbers of users of adopted electronic textbooks and instructional materials shall be included in price information submitted with the publisher's response.

SIIA Explanation: SIIA recommends this modest clarification in §66.1027(d).

SIIA Recommended Change:

(g) On or before the deadline established in the schedule of adoption procedures, publishers shall submit correlations of electronic textbooks and instructional materials submitted for adoption with required essential knowledge and skills. These correlations shall include essential knowledge and skills covered a certain number of times. Correlations shall be submitted in a format approved by the commissioner, which shall include the option of an electronic format.

SIIA Explanation: SIIA recommends an explicit allowance in §66.1027(g) that correlations can be demonstrated electronically. Correlation of electronic materials is best, and often only, demonstrated through digital means. Publishers should not be required to print an electronic material, especially in cases where that material is not simply a digital version of a textbook but is more an interactive, multi-media and adaptive courseware.

§66.1031. Consideration and Adoption of Electronic Textbooks and Instructional Materials.

SIIA Recommended Change:

- (a) The commissioner of education shall review all electronic textbooks and instructional materials submitted for consideration for adoption. The commissioner's review shall include the following:
- (1) evaluations of electronic textbooks and instructional materials prepared by electronic textbooks and instructional materials review panel members, including the extent to which the materials align to the required Texas Essential Knowledge and Skills (TEKS);
 - (2) compliance with applicable manufacturing standards and specifications and, if applicable, technical requirements of the Rehabilitation Act, §508; and
 - (3) recommended corrections of factual errors identified by electronic textbooks and instructional materials review panels; and
 - (4) prices of electronic textbooks and instructional materials submitted for adoption.

SIIA Explanation: SIIA recommends in §66.1031(a) that price should not be a criteria for review of electronic textbooks. It is our understanding that price is not reviewed in the SBOE adoption process, and that schools may select materials at a wide variety of price points.

SIIA Recommended Change:

- (b) Based on the review specified in subsection (a) of this section, the commissioner shall make a final decision regarding the electronic textbooks and instructional materials that will be placed on the adopted list and made available for schools. Electronic textbooks and/or instructional materials may be rejected for several reasons, but only after the commissioner provides the publisher with adequate time to address the reasons for rejection as allowed in the SBOE adoption process. The reasons for rejection include, but are not limited to:

- (1) failure to meet essential knowledge and skills specified in the request for electronic textbooks and instructional materials;
- (2) failure to meet applicable manufacturing standards and specifications or, if applicable, the technical requirements of the Rehabilitation Act, §508;
- (3) failure to correct errors of fact; or
- (4) content that clearly conflicts with the stated purpose of the Texas Education Code, §28.002(h).

SIIA Explanation: SIIA recommends in §66.1031(b) that, consistent with the SBOE process, publishers be provided opportunity to make changes to their electronic textbooks to address any deficiencies identified in the commissioner's review.

§66.1033. Statewide License.

SIIA Recommended Change:

- (a) The commissioner of education will accept one or more statewide license(s) submitted by a publisher.
- (b) A statewide license grants the right to use and makes a program placed on the Commissioner's List of Electronic Textbooks and Instructional Materials available to every student in the state enrolled in the subject and/or in the grade level for which the material is intended and every teacher in the state teaching the subject and/or grade level for which the materials is intended.
- (c) The statewide license price should be the total amount for providing the materials as described in subsection (b) of this section. ~~The statewide license price should not be a per-pupil price.~~

(d) School districts and open-enrollment charter schools will have an option to consider a statewide license submission or select from other content providers.

(e) Submission of a statewide license will not prohibit the submission of a bid based on unit price, and publishers are not required to submit a statewide license.

SIIA Explanation: SIIA seeks clarification from the commissioner on the intent and expected implementation of §66.1033 with regard to statewide licenses. SIIA recommends that the commissioner further detail the process, and then subsequently seek another round of public comment once there is better public understanding of the proposed rules.

SIIA notes the challenge to publishers of determining a statewide license without knowing how many schools and students will license that material. SIIA notes that typical practice for electronic textbooks and instructional materials provides for a per-pupil price. Publisher costs depend upon the number of students, as well as other variables, for electronic textbooks purchased by license or by subscription. These include various initial set-up and installation costs, as well as ongoing hosting and support costs. SIIA therefore recommends that, at a minimum, the statewide license proposed rule be amended to allow per pupil pricing. SIIA also recommends that publishers not be required to submit a statewide license.

SIIA notes that, while the Texas adoption process typically provides for local school selection of instructional materials, this proposed rule suggests the state would select one or more materials for statewide license (i.e., purchase) that would be made available to all schools. SIIA seeks clarification on this intent? If true, publishers may be compelled to provide a statewide license prices that assumes use by all students in the subject and/or grade, which likely will not provide benefit to the state or schools. Questions SIIA would request be addressed by the commissioner prior to another round of public comment include: How would the commissioner determine which and how many statewide licenses to grant? Would schools be forced to use these electronic textbooks only, or could they choose others instead? If the latter, are state resources sufficient to pay for two electronic textbooks (i.e., one statewide license and one selected locally) for certain students?

§66.1035. Updates to Electronic Textbooks and Instructional Materials.

SIIA Recommended Change:

(a) A publisher may submit a request to the commissioner of education for approval to update the content of state-adopted electronic textbooks and instructional materials. ~~A publisher may submit a request to the commissioner to update the navigational features or management system related to the electronic textbooks or instructional materials.~~ A publisher requesting an update shall provide the request in writing, providing a comparison that includes the changes made in the update with the corresponding sections of the state-adopted electronic textbooks and instructional materials along with access to both the updated electronic textbooks and instructional materials and the adopted version. If the commissioner does not rule on the request within 45 days, the publisher may make the requested update.

SIIA Explanation: SIIA recommends in §66.1035(a) that, for consistency, updates to “navigational features or management system” be addressed instead only in paragraph (f). SIIA also recommends that, as outlined previously, the commissioner be provided 45 days to review publisher content updates to meet expectations for timely updates of electronic textbooks.

SIIA Recommended Change:

(e) The commissioner may request publishers to update electronic textbooks and instructional materials ~~at a minimum to accurately reflect current knowledge or information~~ according to the terms of their contract, and shall outline the nature and extent of the requested change. Publishers shall be required to make such changes once every 12 months, shall be provided at least 90 days to make such changes, and shall provide ~~the commissioner~~ details of the changes at least 30 days before the changes are implemented. The commissioner must review the new content within 45 days of it being provided by the publisher, and if such review is not provided, the publisher may make the update before it is included in the materials.

SIIA Explanation: SIIA recommends that §66.1035(e) be modified to place reasonable limits on the scale, scope and frequency of the commissioner's requests for publisher updates. While perhaps not the intent, the proposed rule appears limitless, potentially creating a significant burden on publishers. SIIA proposes that the commissioner's request be based upon the terms of the publisher contract, and that publishers be required to make commissioner requested changes only once per year and be provided 90 days to make such changes.

§66.1037. Delivery of Adopted Electronic Textbooks and Instructional Materials.

SIIA Recommended Change:

(b) Each publisher shall guarantee access ~~to ability of~~ adopted electronic textbooks and instructional materials at least ten business days before the opening day of school of the year for which the electronic textbooks and instructional materials are ordered if the textbooks and materials have been ordered by a date specified in the sales contract. If the publisher cannot meet this deadline, the publisher ~~(c) Each publisher with adopted electronic textbooks and instructional materials in development and otherwise inaccessible~~ shall notify affected school districts and open-enrollment charter schools of the expected accessibility dates for each title not available.

SIIA Explanation: SIIA recommends that §66.1037(b) and (c) be combined and modified. As proposed, the two paragraphs appear contradictory, and so combining the two in this proposed manner may provide more clarity that: publishers are expected to have materials available by a date certain, but if they cannot, then they must announce the expected date.

§66.1039. Sample Copies of Electronic Textbooks and Instructional Materials for School Districts.

SIIA Recommended Change:

(b) Upon request by the textbook coordinator of a school district or open-enrollment charter school, a publisher shall provide one complete sample of adopted electronic textbooks and instructional materials, including that such sample may be delivered as a web-based or online material as determined by the publisher. Samples of learning systems and electronic, visual, or auditory media may be provided in demonstrations or representative format, provided that identical samples are provided to each school district or open-enrollment charter school. A school district or open-enrollment charter school receiving a sample shall not make a copy of that sample without the explicit permission of the publisher.

(c) Samples supplied to school districts or open-enrollment charter schools shall be provided and distributed at the expense of the publisher. No state or local funds shall be expended to purchase, distribute, or ship sample materials. Publishers may make arrangements with school districts or open-enrollment charter schools to retrieve samples after local selections are completed, and the publisher may make supply of the sample contingent upon the school district or open-enrollment charter school agreement to allow retrieval of the sample~~but the state does not guarantee return of sample electronic textbooks or instructional materials.~~

SIIA Explanation: SIIA recommends that §66.1039(b) and (c) be modified with regard to sample copies. Management of software and online content is a challenge to the publishing industry, and limitations on copying is critical, especially in this case where schools receiving a sample copy may not have legal agreement with the publisher (i.e., a legal agreement may only come later if/when the school purchases that electronic textbook). Unlike a printed textbook that requires extensive physical actions to photocopy pages and distribute book copies, illegal copies of electronic textbooks can be distributed an infinite number of times with just one push of a button. Digital rights management, including through retrieval of sample copies, is therefore critical for publishers.

Subchapter BB. Commissioner's Rules Concerning State-Developed Open-Source Textbooks

§66.1111. Request, Public Notice, and Schedule for the Adoption of State-Developed Open-Source Textbooks.

SIIA Recommended Change:

(a) The commissioner of education shall develop a schedule for the adoption of state-developed open-source textbooks under this subchapter. In developing the adoption schedule under this section, the commissioner shall consider:

- (1) the availability of funds;
- (2) the existing textbook adoption cycles under the Texas Education Code, Chapter 31, Subchapter B; and
- (3) the curriculum areas and grade levels where there is otherwise insufficient availability of textbooks and instructional materials for adoption and development~~or purchase~~ by the state.

(b) The commissioner may issue a request calling for state-developed open-source textbooks after determining the insufficient availability of textbooks and instructional materials according to the review and adoption cycle for subjects in the foundation curriculum and enrichment curriculum in a given grade level adopted by the State Board of Education or at any other time the commissioner determines that a need exists for additional textbook options. The request shall serve as notice to all publishers and to the public that bids to furnish new materials to the state are being invited.

SIIA Explanation: SIIA recommends that §66.1111(a) and (b) be modified to focus limited state resources on open-source textbooks in those subjects and/or grade levels where there is otherwise a lack of materials available from either the commissioner's list or the SBOE adoption list.

§66.1115. Cost of State-Developed Open-Source Textbooks.

(b) Textbook credits shall be accredited and used in accordance with the Texas Education Code (TEC), §31.073.

(c) For a school district or open-enrollment charter school that chooses a state-developed open-source textbook instead of another textbook adopted under the TEC, Chapter 31, Subchapter B, the difference between the cost determined by the commissioner under subsection (a) of this section and the maximum price for a textbook in the same subject area, as determined by the State Board of Education under the TEC, §31.025, shall be allocated as follows:

- (1) 50% of the amount shall be credited to the state textbook fund under the TEC, §31.021, to be used for purposes of this subchapter; and
- (2) 50% of the amount shall be credited to the school district or open-enrollment charter school for use as provided by the TEC, §31.1011(c).

SIIA Explanation: SIIA inquires in §66.1115 whether Texas law includes state-developed open-source textbooks under the definition of the set of SBOE adopted textbooks required in each classroom? Depending upon the answer to that question, SIIA recommends that this and other sections of these rules be reviewed and clarified accordingly.

Subchapter CC. Commissioner's Rules Concerning Acceptable Condition of Public School Textbooks, Electronic Textbooks, and Technological Equipment

§66.1203. Electronic Textbooks.

An electronic textbook is considered to be in acceptable condition if:

- (1) all components or applications that are a part of the electronic textbook are returned;
- (2) the electronic textbook does not contain computer code (bug, virus, worm, or similar malicious software) that has been designed to self-replicate, damage, change, or otherwise hinder the performance of any computer's memory, file system, or software; and
- (3) the electronic textbook has not been installed with plug-ins, snap-ins, or add-ins without the prior approval of the school district.

SIIA Explanation: SIIA seeks clarification on the intent of §66.1203. What is the purpose of defining the “acceptable condition” of an electronic textbook. If it assumes that electronic textbooks can be returned or resold as used, as is often the practice with printed textbooks, SIIA recommends that this and related rules be revised to explicitly prohibit this practice. Unless explicitly included in the software license or online subscription agreement, electronic textbooks purchased through such license or subscription do not generally allow for the resale or reuse of the material in such a manner.