TEXAS REGISTER

Volume 28 Number 16 April 18, 2003 Pages 3173-3398

T.J. Mendietta
2nd Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

***Texas Register,* (ISSN 0362-4781),** is published weekly, 52 times a year. Issues will be published by the Office of the Secretary of State, 1019 Brazos, Austin, Texas 78701. Subscription costs: printed, one year $200. First Class mail subscriptions are available at a cost of $300 per year. Single copies of most issues for the current year are available at $10 per copy in printed format.

The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Austin, Texas and additional mailing offices.

POSTMASTER: Send address changes to the ***Texas Register,*** P.O. Box 13824, Austin, TX 78711-3824.

a section of the
Office of the Secretary of State
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Austin, TX 78711-3824
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Open Meetings

A notice of a meeting filed with the Secretary of State by a state governmental body or the governing body of a water district or other district or political subdivision that extends into four or more counties is posted at the main office of the Secretary of State in the lobby of the James Earl Rudder Building, 1019 Brazos, Austin, Texas.

Notices are published in the electronic *Texas Register* and available on-line.
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To request a copy of a meeting notice by telephone, please call 463-5561 if calling in Austin. For out-of-town callers our toll-free number is (800) 226-7199. Or fax your request to (512) 463-5569.

Information about the Texas open meetings law is available from the Office of the Attorney General. The web site is http://www.oag.state.tx.us. Or phone the Attorney General's Open Government hotline, (512) 478-OPEN (478-6736).

For on-line links to information about the Texas Legislature, county governments, city governments, and other government information not available here, please refer to this on-line site. http://www.state.tx.us/Government

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Office of the Governor

Appointments

Appointments for April 2, 2003

Appointed to the San Antonio River Authority Board of Directors for a term until the next SARA General Election in February 2005, Gaylon J. Oehlke of Kenedy. Mr. Oehlke is being appointed pursuant to San Antonio River Authority Statute Section 9 and will be replacing Truett Hunt of Kenedy who resigned.

Appointed to the Texas A&M University System Board of Regents for a term to expire February 1, 2009, John David White of Houston (replacing Dionel Aviles of Houston whose term expired).

Appointed to the Texas A&M University System Board of Regents for a term to expire February 1, 2009, Erle Allen Nye of Dallas (Mr. Nye is being reappointed).

Appointed as Deputy Administrator to the State Administrator for the Interstate Agreement on Detainers, Jimmy P. Guyton of Huntsville.

Appointed as Deputy Administrator to the State Administrator for the Interstate Agreement on Detainers, Larry D. LeFlore of Huntsville.

Appointed as chairman of the Texas Structural Pest Control Board for a term at the pleasure of the Governor, John Lee Morrison of San Antonio. Mr. Morrison is replacing Jay Stone as chairman. Mr. Stone continues to serve on the board.

Rick Perry, Governor

TRD-200302320

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THE ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code, Title 4, §402.042, and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open records decisions are summarized for publication in the *Texas Register*. The attorney general responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the attorney general unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. You may view copies of opinions at http://www.oag.state.tx.us. To request copies of opinions, please fax your request to (512) 462-0548 or call (512) 936-1730. To inquire about pending requests for opinions, phone (512) 463-2110.

Office of the Attorney General

Opinions

Opinion No. GA-0055

Mr. William M. Franz

Executive Director

State Board for Educator Certification

1001 Trinity Street

Austin, Texas 78701-2603

Re: Whether the State Board for Educator Certification may have access to school districts' teacher appraisals to use in approving educator preparation programs and certifying new teachers (RQ-0622-JC)

S U M M A R Y

The State Board for Educator Certification may not have access to school districts' teacher appraisals to use in approving educator preparation programs and certifying teachers. Under sections 21.352 and 21.355 of the Education Code, a school district's appraisal of a teacher is confidential, *see* TEX. EDUC. CODE ANN. §21.355 (Vernon 1996), and may be released by the school district only to the teacher or "to another school district at which the teacher has applied for employment at the request of that district," *id.* §21.352.

Opinion No. GA-0056

The Honorable Joe Crabb

Chair, Committee on Redistricting

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Whether a local government may broadcast information about registered sex offenders on a local cable television channel (RQ-0623-JC)

S U M M A R Y

A local government may broadcast on a local cable television station all information about a registered sex offender that is contained in the registration form for sex offenders, except for information that is excepted by article 62.08(b). *See* TEX. CODE CRIM. PROC. ANN. art. 62.08(a), (b) (Vernon Supp. 2003). A registrant's numeric risk level is not public information until it first appears in a newspaper in accordance with the provisions of chapter 62 of the Code of Criminal Procedure that require notice to be published.

For further information, please access the website at www.oag.state.tx.us. *or call the Opinion Committee at 512/ 463-2110.*

TRD-200302342
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: April 9, 2003

♦ ♦ ♦

Request for Opinions

RQ-0034-GA

The Honorable Ted G. Walker

Jasper County Criminal District Attorney

Jasper County Courthouse

121 North Austin, Room 101

Jasper, Texas 75951

Re: Validity of imposing a fee on certain probationers and proper disposition of such fees (Request No. 0034-GA)

Briefs requested by May 4, 2003

RQ-0035-GA

The Honorable John F. Healey, Jr.

District Attorney, Fort Bend County

301 Jackson

309 South Fourth Street, Suite 258

Richmond, Texas 77469

Re: Whether a district attorney accrues lifetime service credit for longevity pay (Request No. 0035-GA)

Briefs requested by May 8, 2003

RQ-0036-GA

The Honorable Randall W. Reynolds

143rd Judicial District Attorney

Reeves, Ward, Loving Counties

P.O. Box 150

Pecos, Texas 79772

Re: Whether a home-rule municipality may ban the sale of glass containers of alcoholic or other beverages (Request No. 0036-GA)

Briefs requested by May 8, 2003

RQ-0037-GA

The Honorable Ray Montgomery

District Attorney, Leon County

Post Office Drawer 1010

Centerville, Texas 75833

Re: Mineral rights to land under the right-of-way of Farm Road 39 in Leon County (Request No. 0037-GA)

Briefs requested by May 8, 2003

For further information, please access the website at www.oag.state.tx.us. *or call the Opinion Committee at 512/463-2110.*

TRD-200302341

Nancy S. Fuller

Assistant Attorney General

Office of the Attorney General

Filed: April 9, 2003

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EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER T. FAIR PLAN

DIVISION 1. PLAN OF OPERATION

28 TAC §§5.9910 - 5.9929

The Texas Department of Insurance is renewing the effectiveness of the emergency adoption of new §§5.9910 - 5.9929, for a 60-day period. The text of the new sections was originally published in the December 20, 2002, issue of the *Texas Register* (27 TexReg 11879).

Filed with the Office of the Secretary of State, on April 4, 2003.

TRD-200302225
Gene Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: April 5, 2003
Expiration date: June 4, 2003
For further information, please call: (512) 463-6327

♦ ♦ ♦

PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 5. TEXAS BUILDING AND PROCUREMENT COMMISSION

CHAPTER 111. EXECUTIVE ADMINISTRATION DIVISION

SUBCHAPTER B. HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

1 TAC §111.14

The Texas Building and Procurement Commission proposes amendments to Title 1, T.A.C., Chapter 111, Subchapter B, §111.14, concerning Subcontracts.

Amendments are proposed to revise language, which references a respondent's ability to perform all of the subcontracting opportunities identified by the agency. If the respondent is able to fulfill any of the potential subcontracting opportunities identified with its own equipment, supplies, materials, and/or employees, the respondent must sign an affidavit and provide a statement explaining how the respondent intends to fulfill each subcontracting opportunity.

Amendments are proposed to add additional HUB Subcontracting Plan requirements when a state agency expands the original scope of work through a change order or contract amendment.

Amendments are proposed to require monthly HUB Subcontracting Plan monitoring and the submission of compliance reports as a condition for payment.

In addition, amendments are proposed to provide further clarification and define the good faith effort requirements in the HUB Subcontracting Plan. These amendments include: defining "reasonable time to respond" as ten (10) working days for construction related projects and five (5) working days for all other projects, expanding the advertising portion of the good faith effort requirements to include an option to provide notice to minority/women trade associations and/or development centers in lieu of advertising in general circulation, trade association or minority/women focused media, and requiring respondents to provide notice to three (3) or more HUBs per subcontracting opportunity or a minimum of nine (9) HUBs per contract.

Cindy Reed, Deputy Executive Director, determines that for the first five-year period the rule is in effect, there will be a moderate increase in the administrative costs required to respond to state contracting opportunities, as well as award state contracts when the expected value is $100,000 or more and the contracting agency has determined that subcontracting opportunities are probable.

If the expected value of a state contract is $100,000 or more and the contracting agency determines that there are no opportunities for subcontracting, there will be no additional administrative burden for respondents to state agency procurement opportunities.

Cindy Reed further determines that for each year of the first five-year period the amendments are in effect, the public benefit anticipated as a result of enforcing the rule will be in compliance with Texas Government Code, Chapter 2161, relating to the Historically Underutilized Business Program. Respondents to state contracting opportunities will experience moderate increases in administrative costs with regard to responding to state contracting opportunities where the expected contract value is $100,000 or more and the contracting agency has determined that subcontracting opportunities are probable.

Comments on the proposals may be submitted to Robert F. Moreland, Legal Counsel, Texas Building and Procurement Commission, P.O. Box 13047, Austin, TX 78711-3047. Comments must be received no later than thirty days from the date of publication of the proposal in the *Texas Register.*

The amendments are proposed under the authority of the Texas Government Code, Title 10, Subtitle D, §2152.003, §2161.002, and §2161.253, which provide the Texas Building and Procurement Commission with the authority to promulgate rules necessary to implement the section.

The following code is affected by this rule: Government Code, Title 10, Subtitle D, Chapter 2161.

§111.14. Subcontracts.

(a) Requirement for HUB subcontracting plans. In accordance with [~~the~~] Texas Government Code, Chapter 2161, Subchapter F, each state agency that considers entering into a contract with an expected value of $100,000 or more shall, before the agency solicits bids, proposals, offers, or other applicable expressions of interest, determine whether subcontracting opportunities are probable under the contract.

(1) State agencies shall use the following steps to determine if [~~in making the determination of whether~~] subcontracting opportunities are probable under the contract:

(A) Use the HUB participation goals in §111.13 of this title (relating to Annual Procurement Utilization Goals);

(B) Research the Centralized Master Bidders List, the HUB Directory, the Internet, and other directories, identified by the commission, for HUBs that may be available to perform the contract work;

(C) In addition [~~Additionally~~], determination of subcontracting opportunities may include, but is not limited to, the following:

(i) contacting other state and local agencies and institutions of higher education to obtain information regarding similar contracting and subcontracting opportunities; and

(ii) reviewing the history of similar agency purchasing transactions.

(2) If subcontracting opportunities are probable, each agency's invitation for bids or other purchase solicitation documents for construction, professional services, other services, and commodities for $100,000 or more shall state that probability and require a HUB subcontracting plan to be submitted at the same time as the response (bid, proposal, offer, or other applicable expression of interest). Responses [~~Accordingly,~~ ~~potential~~ ~~contractor/vendor~~ ~~responses~~] that do not include a completed HUB subcontracting plan in accordance with subsection (b) of this section, shall be rejected due to material failure to comply with advertised specifications in accordance with §113.6 (a) of this title (relating to Bid Evaluation and Award). The plan shall include goals established pursuant to §111.13 of this title (relating to Annual Procurement Utilization Goals). In addition, when an agency determines subcontracting opportunities are probable in the areas of equipment, supplies, materials, or services, the state agency shall identify within the contract specifications the potential areas of subcontracting opportunities.

(b) Development and evaluation of HUB subcontracting plans. A state agency shall require a respondent [~~potential contractor/vendor~~] to state whether it is a Texas certified HUB. A state agency shall also require a respondent to state overall subcontracting and overall HUB subcontracting to be provided in the contract. Respondents [~~Potential contractors/vendors~~] shall follow, but are not limited to, procedures in subsection (b) (1) of this section when developing the HUB subcontracting plan. The HUB subcontracting plan shall include the form provided by the Texas Building and Procurement Commission [~~agency~~] identifying the subcontractors that will be used during the course of the contract, the expected percentage of work to be subcontracted and the approximate dollar value of that percentage of work. The respondent [~~potential contractor/vendor~~] shall provide all additional information required by the agency.

(1) Evidence of good faith effort in developing a HUB subcontracting plan includes, but is not limited to, the following procedures:

(A) Divide the contract work into reasonable lots or portions to the extent consistent with prudent industry practices.

(B) Notify HUBs of the subcontracting opportunities [~~work~~] that the respondent [~~potential contractor/vendor~~] intends to subcontract. The preferable method of notification shall be in writing. The notice shall, in all instances, include the scope of the work, information regarding the location to review plans and specifications, information about bonding and insurance requirements, and identify a contact person. The notice shall be provided to potential HUB subcontractors prior to submission of the respondent's [~~contractor's/vendor's~~] bid. The respondent [~~potential contractor/vendor~~] shall provide potential HUB subcontractors reasonable time to respond to the respondent's [~~potential contractor's/vendor's~~] notice. "Reasonable time to respond" in this context is no less than ten [~~five~~] working days for construction related projects, including heavy construction, building construction, and special trade construction and no less than five working days for all other projects, including professional services, other services, and commodities from receipt of notice, unless circumstances require a different time period, which is determined by the agency and documented in the contract file. The respondent [~~potential contractor/vendor~~] shall effectively use the commission's Centralized Master Bidders List, the HUB Directory, Internet resources, and other directories as identified by the commission or agency when searching for HUB subcontractors. Respondents [~~Contractors/Vendors~~] may rely on [~~upon~~] the services of minority, women, and community organizations contractor groups, local, state, and federal business assistance offices, and other organizations that provide assistance in identifying qualified applicants for the HUB program who are able to provide [~~perform~~] all or select elements of the HUB subcontracting plan. The respondent [~~potential contractor/vendor~~] shall provide the notice described in this section to three or more HUBs per each subcontracting opportunity that provide [~~perform~~] the type of work required for each subcontracting opportunity identified in the contract specifications or any other subcontracting opportunity the respondent cannot complete with its own equipment, supplies, materials, and/or employees. If more than three subcontracting opportunities are identified the respondent shall contact a total minimum of nine (9) HUBs. The respondent must document the HUBs contacted on the form provided by the Texas Building and Procurement Commission and provide supporting documentation (phone logs, fax transmittals, etc.) to demonstrate compliance with this subsection. [~~Upon request, the potential contractor/vendor shall provide official written documentation (i.e. phone logs, fax transmittals, etc.) to demonstrate compliance with the notice required in this subsection.~~]

(C) Provide written justification of the selection process if a non HUB subcontractor is selected through means other than competitive bidding, or a HUB bid is the best value responsive bidder to a competitive bid invitation, but is not selected.

(D) Advertise HUB subcontracting opportunities in general circulation [,] or trade association [,] or [~~and/or~~] minority/woman focused [~~focus~~] media concerning subcontracting opportunities or provide notice to minority or women trade organizations or development centers to assist in identifying HUBs by disseminating subcontracting opportunities to their membership/participants. The notice shall, in all instances, include the scope of work, information regarding location to review plans and specifications, information about bonding and insurance requirements, and identify a contact person. Respondent must provide notice to organizations or development centers no less than ten working days for construction related projects and no less than five working days for all other projects prior to submission of response (bid, proposal, offer, or other applicable expression of interest).

(E) Encourage a selected non-certified minority or woman owned business subcontractor to apply for certification by the commission in accordance with the procedures set forth in §111.17 of this title (relating to Certification Process).

~~[(2) If the contract is a lease contract, the lessor shall comply with the requirements of this section from and after the occupancy date provided in the lease, or such other time as may be specified in the invitation for bid for the lease contract.]~~

(2) [~~(3)~~] In making a determination if [~~whether~~] a good faith effort has been made in the development of the required HUB subcontracting plan, a state agency shall require the respondent [~~potential contractor/vendor~~] to submit supporting documentation explaining how [~~in what ways~~] the respondent [~~potential contractor/vendor~~] has made a good faith effort according to each criterion listed in subsection (b)(1) of this section. The documentation shall include at least the following:

(A) if [~~whether~~] the respondent [~~potential contractor/vendor~~] divided the contract work into reasonable lots or portions consistent with prudent industry practices;

(B) if [~~whether~~] the respondent's [~~potential contractor's/vendor's~~] notices contain adequate information about bonding, insurance, the availability of plans, the specifications, scope of work,

and other requirements of the contract to three or more qualified HUBs per each subcontracting opportunity identified in the contract specifications or a minimum of nine HUBs for contracts with more than three (3) identified subcontracting opportunities per contract allowing reasonable time for HUBs to participate effectively;

(C) if [~~whether~~] the respondent [~~potential contractor/vendor~~] negotiated in good faith with qualified HUBs, not rejecting qualified HUBs who were also the best value responsive bidder;

(D) if [~~whether~~] the respondent [~~potential contractor/vendor~~] documented reasons for rejection of a HUB or met with the rejected HUB to discuss the rejection;

(E) if [~~whether~~] the respondent [~~potential contractor/vendor~~] advertised HUB subcontracting opportunities in general circulation [~~,~~] or trade association [~~,~~] or [~~and/or~~] minority/woman focused[~~focus~~] media concerning subcontracting opportunities[~~;~~] or provided notice to minority or women trade organizations or development centers to assist in identifying HUBs by disseminating subcontracting opportunities to their membership/participants and;

(F) if [~~whether~~] the respondent [~~potential contractor/vendor~~] assisted non-certified HUBs to become certified.

(3) [~~(4)~~] A respondent's [~~potential contractor's/vendor's~~] participation in a Mentor Protégé Program under the Texas Government Code §2161.065, and the submission of a protégé as a subcontractor in the HUB subcontracting plan constitutes a good faith effort for the particular area to be subcontracted with the protégé. When submitted, state agencies may accept a Mentor Protégé Agreement that has been entered into by the respondent [~~potential contractor/vendor~~] (mentor) and a certified HUB (protégé). The agency shall consider the following in determining the respondent's [~~potential contractor's/vendor's~~] good faith effort:

(A) if [~~whether~~] the respondent [~~potential contractor/vendor~~] has entered into a fully executed Mentor Protégé Agreement that has been registered with the commission prior to submitting the plan, and

(B) if [~~whether~~] the respondent's [~~potential contractor/vendor~~] HUB subcontracting plan identifies the areas of subcontracting that will be performed by the protégé.

(4) [~~(5)~~] The HUB subcontracting plan shall be reviewed and evaluated prior to contract award and, if accepted, shall become a provision of the agency's contract. No changes shall be made to an accepted HUB subcontracting plan prior to its incorporation into the contract. State agencies shall review the supporting documentation submitted by the respondent [~~potential contractor/vendor~~] to determine if a good faith effort has been made in accordance with this section and the bid specifications. If the agency determines that a submitted HUB subcontracting plan was not developed in good faith, the agency shall treat the lack of good faith as a material failure to comply with advertised specifications, and the subject bid or other response shall be rejected. The reasons for rejection shall be recorded in the procurement file.

(5) If the respondent is able to fulfill any of the potential subcontracting opportunities identified with its own equipment, supplies, materials and/or employees, respondent must sign an affidavit and provide a statement explaining how the respondent intends to fulfill each subcontracting opportunity. The respondent must:

(A) agree to produce evidence of existing staffing to meet contract objectives,

(B) agree to supply monthly payroll records showing company staff fully engaged in the contract, and

(C) agree to periodic on site reviews of company headquarters or work site where services are to be performed. Upon request, the respondent shall provide supporting documentation to substantiate the statement/affidavit. In addition, if any subcontracting opportunity the respondent intends to self perform requires a license, the respondent must submit documentation identifying the license holder as its own employee.

(6) [~~If the potential contractor/vendor can perform all the subcontracting opportunities identified by the agency, a statement of the potential contractor's/vendor's intent to complete the work with its employees and resources without any subcontractors will be submitted with the potential contractor's/vendor's bid, proposal, offer, or other expression of interest.~~] If the respondent [~~potential contractor/vendor~~] is selected and decides to subcontract any part of the contract after the award, as a provision of the contract, the contractor/vendor must comply with provisions of this section relating to developing and submitting a subcontracting plan before any modifications or performance in the awarded contract involving subcontracting can be authorized by the state agency. If the selected contractor/vendor subcontracts any of the work without prior authorization and without complying with this section, the contractor/vendor would be deemed to have breached the contract and be subject to any remedial actions provided by Texas Government Code, Chapter 2161, state law and this section. Agencies may report nonperformance relative to its contracts to the commission in accordance with Chapter 113, Subchapter F of this title (relating to the Vendor Performance and Debarment Program).

(c) Submission, review and determination of changes to an approved HUB subcontracting plan during contract performance. If at any time during the term of the contract, a contractor/vendor desires to make changes to the approved subcontracting plan, the [~~such~~] proposed changes must be received for prior review and approval by the state agency before changes will be effective under the contract. The contractor/vendor must comply with provisions of subsection (b) of this section relating to developing and submitting a subcontracting plan for substitution of work or of a subcontractor, prior to any alternatives being approved under the subcontracting plan. The state agency shall approve changes by amending the contract or by another form of written agency approval. The reasons for amendments or other written approval shall be recorded in the procurement file. If a state agency expands the original scope of work through a change order or contract amendment, the state agency shall determine if the additional scope of work contains additional probable subcontracting opportunities not identified in the initial solicitation. If the agency determines additional probable subcontracting opportunities exist, the agency will require the contractor/vendor to submit a revised subcontracting plan for the additional probable subcontracting opportunities. The revised subcontracting plan shall comply with the provisions of this section relating to development and submission of a subcontracting plan before any modifications or performance in the awarded contract involving the additional scope of work can be authorized by the agency. If the contractor/vendor subcontracts any of the additional subcontracting opportunities identified by the agency without prior authorization and without complying with this section, the contractor/vendor would be deemed to have breached the contract and be subject to any remedial actions provided by Texas Government Code, Chapter 2161, state law and this section. Agencies may report nonperformance relative to its contracts to the commission in accordance with Chapter 113, Subchapter F of this title (relating to the Vendor Performance and Debarment Program.)

(d) Determining contractor/vendor contract compliance. The contractor/vendor shall maintain business records documenting its compliance with the HUB subcontracting plan and shall submit a compliance report to the contracting agency monthly [~~periodically~~] and in the format required by the Texas Building and Procurement

Commission [~~contract documents~~]. The compliance report submission shall be required as a condition for payment. During the term of the contract, the state agency shall monitor the HUB subcontracting plan monthly to determine if [~~whether~~] the value of the subcontracts to HUBs meets or exceeds the HUB subcontracting provisions specified in the contract. Accordingly, state agencies shall audit and require a contractor/vendor to whom a contract has been awarded to report to the agency the identity and the amount paid to its subcontractors in accordance with §111.16(c) of this title (relating to State Agency Reporting Requirements). If the contractor/vendor is meeting or exceeding the provisions, the state agency shall maintain documentation of the contractor's/vendor's efforts in the contract file. If the contractor/vendor fails to meet the HUB subcontracting provisions specified in the contract, the state agency shall notify the contractor of any deficiencies. The state agency shall give the contractor/vendor an opportunity to submit documentation and explain to the state agency why the failure to fulfill the HUB subcontracting plan should not be attributed to a lack of good faith effort by the contractor/vendor.

(1) To determine if [~~In determining whether~~] the contractor/vendor made the required good faith effort, the agency may not consider the success or failure of the contractor/vendor to subcontract with HUBs in any specific quantity. The agency's determination is restricted to considering factors indicating good faith effort including, but not limited to, the following:

(A) whether the contractor gave timely notice to the subcontractor regarding the time and place of the subcontracted work;

(B) whether the contractor facilitated access to the work site, electrical power, and other necessary utilities; and

(C) whether documentation or information was provided that included potential changes in the scope of contract work.

(2) If a determination is made that the contractor/vendor failed to implement the HUB subcontracting plan in good faith, the agency, in addition to any other remedies, may report nonperformance to the commission in accordance with Chapter 113, Subchapter F of this title (relating to Vendor Performance and Debarment Program). In addition, if the contractor/vendor failed to implement the subcontracting plan in good faith, the agency may revoke the contract for breach of contract and make a claim against the contractor/vendor.

(3) State agencies shall review their procurement procedures to ensure compliance with this section. In accordance with §111.26 of this title (relating to HUB coordinator responsibilities) the agency's HUB coordinator and contract administrators should facilitate institutional compliance with this section.

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

Filed with the Office of the Secretary of State on April 2, 2003.

TRD-200302160
Cynthia de Roch
Attorney
Texas Building and Procurement Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 475-2400

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TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 3. STATE PUBLICATIONS DEPOSITORY PROGRAM

13 TAC §3.9

The Texas State Library and Archives Commission proposes to amend §3.9, regarding State Publications Depository Program, Publication Reporting Form. These proposed revisions bring the rules in alignment with the reporting required to take advantage of current technology.

Beverley Shirley, Library Resource Sharing Division Director, has determined that for the first five years the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendments.

Ms. Shirley also has determined that for each of the first five years the section is in effect the public benefits anticipated as a result of enforcing the section will be to improve the efficiency of the State Publications Depository Program, and to protect the interests of the state as required under law. There are no cost implications to either small businesses or persons required to comply with the amendments.

Comments on the amendments may be submitted to Beverley Shirley, Director, Library Resource Sharing Division, Texas State Library and Archives Commission, Box 12927, Austin, Texas 78711.

The amendments are proposed under Government Code §441.102, which authorizes the commission to establish a system to allow electronic access to state publications in an electronic format.

The amendments affect Government Code, §§441.101 - 441.106.

§3.9. Publication Reporting Form.

(a) Each state agency must submit a publication reporting form that describes state publications as they become available.

(b) State publications submitted in formats other than those made available from an Internet connection must be listed on a paper form that is enclosed with each shipment.

(c) Each state publication made available by Internet connection must include descriptive information in [~~be reported on an electronic form within five working days~~]:

(1) a Title tag [~~of its initial availability by the Internet connection~~];

(2) a Description or DC.Description meta tag which includes a narrative description of the publication; [~~and as changes are made which alter its:~~]

[~~(A) Uniform Resource Locator;~~]

[~~(B) title;~~]

[~~(C) scope; or~~]

[~~(D) accessibility by new use constraints and technical prerequisites.~~]

(3) a Keyword or DC.Subject.Keyword meta tag which includes selected terms from within the publication; [~~Agencies unable to access the electronic reporting form for state publications made available on-line may request special authorization to submit a paper form.~~]

(4) a Subject or DC.Subject meta tag which includes terms from the TRAIL subject list;

(5) a Type or DC.Type meta tag which includes terms from the TRAIL publication type list. This tag may be omitted if the appropriate type for the publication is "Web documents--Undefined."

(d) State agencies are advised to review the rules in 1 TAC §206.5 (relating to Linking and Indexing State Web Sites).

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

Filed with the Office of the Secretary of State on April 3, 2003.

TRD-200302198
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 463-5459

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER F. REGULATION OF TELECOMMUNICATIONS SERVICE

16 TAC §26.133

The Public Utility Commission of Texas (commission) proposes new §26.133, relating to the Business and Marketing Code of Conduct for Certificated Telecommunications Utilities (CTUs). The proposed new rule is intended to ensure that CTUs conduct fair business practices and safeguard against fraudulent, unfair, misleading, deceptive or anticompetitive practices in order to ensure quality service and a competitive market. Project Number 26955 is assigned to this proceeding.

Randy Klaus, Policy Analyst, Telecommunications Division and Katherine Farrell, Attorney, Legal and Enforcement Division, have determined that, for each year of the first five-year period the proposed section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Farrell and Mr. Klaus have determined that, for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be to encourage a fully competitive telecommunications marketplace and promote diversity of telecommunications providers by discouraging certain activities that would tend to have an anti-competitive impact. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. It is anticipated that there may be some economic costs incurred by persons who are required to comply with the new section as proposed. The costs incurred are likely to vary from CTU to CTU, and are difficult to ascertain. The benefits accruing from implementation of these rules, however, are expected to outweigh these costs.

Ms. Farrell and Mr. Klaus have also determined that, for each year of the first five years the proposed section is in effect, there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

The commission staff will conduct a public hearing on this rulemaking, pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Thursday, May 29, 2003 at 10:00 a.m. in Hearing Room Gee.

Comments on the proposed new section (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments are due 45 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 26955.

In addition, the commission requests specific comments on the following questions:

1. What should be the proper and permissible standard of proof of a violation of any provision in this rule?

2. What proof is sufficient and allowable pursuant to PURA to meet such standards (i.e., affidavit only, valid customer complaint, live testimony, letter, etc.)?

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998, Supplement 2003) (PURA) §14.002, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and PURA §51.001 and §64.001, which grant the commission authority to make and enforce rules necessary to protect customers of telecommunications services consistent with the public interest and to encourage a fully competitive telecommunications marketplace.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 51.001 and 64.001.

§26.133. Business and Marketing Code of Conduct for Certificated Telecommunications Utilities (CTUs).

(a) Purpose. The purpose of this section is to establish a code of conduct in order to implement Public Utility Regulatory Act (PURA) §51.001 and §64.001 relating to fair business practices and safeguards against fraudulent, unfair, misleading, deceptive, or anticompetitive practices in order to ensure quality service and a competitive market.

(b) Application. This section applies to all certificated telecommunications utilities (CTUs), as defined in §26.5 of this title (relating to Definitions), and CTU employees. This section also applies to all authorized agents of the CTU.

(c) Communications.

(1) A CTU employee or authorized agent shall conduct communications with competitors and competitors' end-user

customers with the same degree of professionalism, courtesy, and efficiency as that performed on behalf of their employer and end-user customers.

(2) A CTU employee or authorized agent, while engaged in the installation of equipment or the rendering of services (including the processing of an order for the installation, repair or restoration of service, or engaged in the actual repair or restoration of service) on behalf of a competitor shall not make false or misleading statements regarding the service of any competitor and shall not promote any of the CTU's services to the competitor's end-user customers.

(d) Corporate advertising and marketing.

(1) A CTU, CTU employee or authorized agent shall not engage in false, misleading or deceptive practices, advertising or marketing with respect to the offering of any telecommunications service.

(2) A CTU, CTU employee or authorized agent shall not falsely state or falsely imply that the services provided by the CTU on behalf of a competitor are superior when purchased directly from the CTU.

(3) A CTU, CTU employee or authorized agent shall not falsely state or falsely imply that the services offered by a competitor cannot be reliably rendered, or that the quality of service provided by a competitor is of a substandard nature.

(4) A CTU, CTU employee or authorized agent shall not falsely state nor imply to any end-user customer that the continuation of any telecommunications service provided by the CTU is contingent upon ordering any other telecommunications service offered by the CTU. This section is not intended to prohibit a CTU from offering, or enforcing the terms of, any bundled or packaged service or any other form of pricing flexibility permitted by PURA and commission rules.

(e) Information sharing and disclosure.

(1) Pursuant to the federal Telecommunications Act §222(a), each CTU has a duty to protect the confidentiality of proprietary information of, and relating to, other CTUs.

(2) Pursuant to the federal Telecommunications Act §222(b), each CTU that receives or obtains proprietary information from another CTU for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts or any other unauthorized purpose.

(f) References to other Chapter 26 substantive rules. The following commission rules also affect the conduct of CTU employees and authorized agents. The applicability of each of the following sections is unaffected by the reference in this section and does not relieve any CTU of its responsibility to abide by other applicable commission rules.

(1) Section 26.21 of this title (relating to General Provisions of Customer Service and Protection Rules);

(2) Section 26.31 of this title (relating to Disclosures to Applicants and Customers);

(3) Section 26.32 of this title (relating to Protection Against Unauthorized Billing Charges ("Cramming"));

(4) Section 26.37 of this title (relating to Texas No-Call List);

(5) Section 26.122 of this title (relating to Customer Proprietary Network Information (CPNI));

(6) Section 26.126 of this title (relating to Telephone Solicitation); and

(7) Section 26.130 of this title (relating to Selection of Telecommunications Utilities).

(g) Adoption and dissemination.

(1) Every CTU or authorized agent shall formally adopt and implement all applicable provisions of this section as company policy, or modify existing company policy as needed to incorporate all applicable provisions, within 90 days of the effective date of this section. A CTU shall provide a copy of its internal code of conduct required by this section to the commission upon request.

(2) Every CTU or authorized agent shall disseminate the applicable provisions of this section to all existing and new employees and agents, and take appropriate actions to both train employees and enforce compliance with this section on an ongoing basis. Every CTU shall document every employee's and agent's receipt and acknowledgement of its internal policies required by this section, and every CTU shall make such documentation available to the commission upon request.

(h) Investigation and enforcement.

(1) Administrative penalties. If the commission finds that a CTU has violated any provision of this section, the commission shall order the utility to take corrective action, as necessary, and the utility may be subject to administrative penalties and other enforcement actions pursuant to PURA, Chapter 15.

(2) Certificate revocation. If the commission finds that a CTU is repeatedly and recklessly in violation of this section, and if consistent with the public interest, the commission may suspend, restrict, or revoke the registration or certificate of the CTU.

(3) Coordination with the Office of the Attorney General. The commission shall coordinate its enforcement efforts regarding the prosecution of fraudulent, misleading, deceptive, and anticompetitive business practices with the Office of the Attorney General in order to ensure consistent treatment of specific alleged violations.

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302224
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 936-7223

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 14. COUNTY INDIGENT HEALTH CARE PROGRAM

SUBCHAPTER F. ADVISORY COMMITTEE

25 TAC §14.501

The Texas Department of Health (department) proposes an amendment to §14.501 concerning the Indigent Health Care Advisory Committee (committee). The committee has provided advice to the Texas Board of Health (board) and the department in the area of the Indigent Health Care Program. The committee is established under the Health and Safety Code, §11.016, which allows the board to establish advisory committees. The committee is governed by the Government Code, Chapter 2110, concerning state agency advisory committees.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §14.501 and has determined that reasons for adopting the section continue to exist; however, changes were necessary as described in this preamble.

The department published a Notice of Intention to Review §14.501 in the *Texas Register* on September 4, 1998 (23 TexReg 9077). No comments were received due to publication of this notice.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules on advisory committees. The rules must state the purpose of the committee, describe the tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 1999, the board established a rule relating to the Indigent Health Care Advisory Committee. The rule states that the committee will automatically be abolished on July 1, 2003. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until July 1, 2007.

This section amends provisions relating to the operation of the committee. Specifically, language is revised to: continue the committee until July 1, 2007; include additional requirements regarding statements by members; and clarify the components that the committee must include in an annual report to the board.

Jacquelyn McDonald, Director of the Office of the Board of Health, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications for state and local government as a result of amending the section as proposed.

Ms. McDonald has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of amending the section will be to provide a continuance of the committee and continued advice to the department on this important issue. There will be no costs to small business or micro-business resulting from compliance with this section, as this section addresses only continuance of the committee and terms of office. There are no anticipated economic costs to persons who are required to comply with the section proposed. There is no anticipated impact on local employment.

Comments may be submitted to Jacquelyn McDonald, Director, Office of the Board of Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7484. Comments on the proposed section will be accepted for 30 days following publication in the *Texas Register*.

The amendment is proposed under Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner; and Government Code, §2110.005 which requires the department to adopt rules stating the purpose and tasks of its advisory committees.

The amendment affects the Health and Safety Code, Chapters 11 and 12, and the Government Code, Chapter 2110, and implements Government Code, §2001.039.

§14.501. Indigent Health Care Advisory Committee.

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

(e) Review and duration. By July 1, 2007 [~~2003~~], the board will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

(f) Composition.

[~~(1)~~] The committee shall be composed of 11 members consisting of four consumer and seven other representatives appointed by the board.

[~~(2) Since the composition of the committee as it existed on March 1, 1999, is changed under this section, existing members shall continue to serve until the board appoints members under the new composition.~~]

(g) (No change.)

(h) Officers. The committee [~~chairman of the board~~] shall select from its members the [~~appoint a~~] presiding officer and an assistant presiding officer to begin serving on July 1 of each odd-numbered year.

(1) Each officer shall serve until [~~the~~] June 30th of each odd-numbered year. Each officer may holdover until his or her replacement is elected [~~appointed by the chairman of the board~~].

(2) (No change.)

(3) The assistant presiding officer shall perform the duties of the presiding officer in case of the absence or disability of the presiding officer. In case the office of presiding officer becomes vacant, the assistant presiding officer will [~~serve until a successor is appointed to~~] complete the unexpired portion of the term of the office of presiding officer.

(4) If the office of assistant presiding officer becomes vacant, it may be filled [~~temporarily~~] by vote of the committee [~~until a successor if appointed by the chairman of the board~~].

(5)-(6) (No change.)

[~~(7) The presiding officer and assistant presiding officer serving on January 1, 1999, will continue to serve until the chairman of the board appoints their successors.~~]

(i)-(m) (No change.)

(n) Statement by members.

(1)-(2) (No change.)

(3) A committee member should not accept or solicit any benefit that might reasonably tend to influence the member in the discharge of the member's official duties.

(4) A committee member should not disclose confidential information acquired through his or her committee membership.

(5) A committee member should not knowingly solicit, accept, or agree to accept any benefit for having exercised the member's official powers or duties in favor of another person.

(6) A committee member who has a personal or private interest in a matter pending before the committee shall publicly disclose the fact in a committee meeting and may not vote or otherwise participate in the matter. The phrase "personal or private interest" means the committee member has a direct pecuniary interest in the matter but does not include the committee member's engagement in a profession, trade, or occupation when the member's interest is the same as all others similarly engaged in the profession, trade, or occupation.

(o) Reports to board. The committee shall file an annual written report with the board.

(1) (No change.)

(2) The report shall identify the costs related to the committee's existence, including the cost of agency staff time spent in support of the committee's activities and the source of funds used to support the committee's activities.

(3) (No change.)

(p) (No change.)

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302207
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 458-7236

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CHAPTER 31. NUTRITION SERVICES
SUBCHAPTER C. SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS, AND CHILDREN (WIC)

25 TAC §§31.21, 31.32 - 31.36

The Texas Department of Health (department) proposes amendments to §§31.21 and 31.32-31.36 concerning the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). The amendments to §§31.21 and 31.32-31.36 support statewide efforts to address the growing problem of theft of infant formula, comply with federal mandates on selection of and recovery of overcharges from vendors, and revise existing language to correct errors and clarify intent.

The United States Department of Agriculture (USDA) provides federal funds to the department to administer the WIC Program, provided the department does so in accordance with federal regulations. The WIC Program is 100% funded by a combination of federal grant funds and monies received from infant cereal and formula manufacturers in the form of rebates to the department. Rebate monies are considered dedicated general revenue and can be expended only as offsets to WIC food costs. Costs incurred by the state for implementing these rules will be paid by federal funds.

The proposed amendments cover definitions, selection of vendors for WIC initial authorization for participation, selection of vendors for reauthorization for participation, calculation and use of vendor competitive pricing data, vendor agreement with the state agency, and the right of a vendor to appeal.

Amendments to §31.21 add definitions of the terms "licensed wholesaler or distributor," "price region," and "WIC-only store; include characteristics such as store size, number of checkout lanes, and store type in the definition of "vendor band;" replace references to "local agency service area" with "price region" in the definition of "vendor competitive pricing;" expand the definition of "vendor outlet" to require that individual WIC-authorized stores have a minimum business area of 500 square feet, clearly identified signage, be walk-in accessible from the street, and not be used simultaneously as a residence; redesignate "vendor profile" as "WIC Vendor Application Profile;" and correct errors in the definition of "minor."

The amendments to §31.32 adds a new vendor selection criterion requiring vendors that elect to provide infant formula to WIC participants to purchase infant formula directly from licensed wholesalers and distributors or directly from the manufacturer. This amendment supports statewide efforts to address the growing problem of theft of infant formula by creating a deterrent for vendors that purchase infant formula from unlicensed sources. Requiring infant formula provided to WIC clients to be purchased from licensed distributors or wholesalers will increase the safety of the product by deterring theft for the purpose of resale and by reducing the possibility of product or label tampering. Purchases of infant formula made directly from licensed wholesalers and distributors or directly from the manufacturer will comply with Health and Safety Code, Chapter 431, the Texas Food, Drug and Cosmetic Act, and department rules concerning regulation of food and drugs. Other changes include replacement of the terms "local agency area" and "local agency" with the term "price region."

Amendments to §31.33 require a vendor's disqualification for three months, rather than the current practice of allowing the vendor agreement to expire, for unauthorized use of the WIC acronym or logo after receiving one written warning; replace the terms "local agency area" and "local agency" with the term "price region" for more flexibility; and incorporate existing program policy on the time period a vendor must wait to reapply when the vendor's contract has been allowed to expire for failure to meet the minimum monthly sales volume in WIC foods or because of a history of noncompliance.

The amendments to §31.34 regarding calculation and use of vendor competitive pricing data amends the requirement that WIC-authorized vendors continue to meet competitive price selection criteria throughout the term of the vendor agreement. The amendment incorporates federal regulations that require the state agency to collect overcharges when a vendor fails to comply with competitive pricing requirements and charges prices in excess of those allowed by the selection criteria. Vendors will receive a warning after the first assessment in order to allow them to adjust their prices. If prices continue to exceed those defined in the selection criteria at the time of the second assessment within a 12-month period, the vendor agreement will be terminated. Additional changes to §31.34 include adding "WIC-only stores" as a category if the state agency deems it necessary to reassign vendors to alternate price comparison groups; and replacing the terms "local agency service area" and "local agency" with the term "price region" for more flexibility.

The amendment to §31.35 regarding a vendor's agreement with the state agency deletes the reference to a probationary vendor agreement since probationary vendor agreements are no longer issued by WIC.

The amendment to §31.36 regarding the right of a vendor or local agency to appeal incorporates existing program policy on exceptions to the right to appeal.

Mike Montgomery, Chief, Bureau of Nutrition Services, has determined that for each year of the first five years the sections are in effect, there will be fiscal implications to state government as a result of enforcing or administering §31.34 as proposed. As a result of the proposed changes to §31.34, the state will recover money from vendors who charge the state amounts in excess of the competitive pricing criteria at the time the state agency performs an assessment. Assessments of all the approximately 2,400 WIC-authorized outlets are expected to occur two times per year. Based on data from November 2002, the state anticipates a recovery of approximately $39,240 per assessment from all vendors. If assessments occur twice annually, the state could recover an estimated total $78,480 from vendors each year of the first five years the rule is in effect. Recoveries will be made by either reducing a vendor's routine claim submission for payment by the amount of the overcharges, or by requiring the vendor to submit a third-party payment to the department. In either case, by federal regulations, the money recovered can only be used to offset WIC program costs. If some vendors change their pricing policies as a result of potential disqualification and claims against them, this amount may decrease. Additionally, increased flexibility in assigning vendors more equitably to peer groups may also reduce the amount collected in overcharges.

There will be no fiscal impact on state government as a result of the proposed changes to §31.21 defining licensed distributor or wholesaler, price region, and WIC-only store; in amending the definitions of vendor band, vendor competitive pricing, and vendor outlet; and in redesignating "vendor profile" as "WIC Vendor Profile Application" because operational changes are minimal for the program and will be performed by existing staff.

There will be no fiscal impact on state government as a result of proposed changes to §31.32 requiring vendors that elect to provide infant formula to WIC participants to purchase the product directly from licensed distributors and wholesalers or directly from the manufacturer because the state's total reimbursement cost for formula will remain the same. The state agency currently reviews all vendor applications, and incorporation of additional selection criteria will require no increase in staff.

There is no fiscal impact on state government resulting from the proposed changes to §31.33, which would terminate the vendor agreement after a warning for a WIC acronym or logo violation rather than allowing the agreement to expire because operational changes are minimal and will be performed by existing staff.

There are no fiscal implications to state government of the proposed amendment to §31.35, deleting the reference to probationary agreements because the administrative efficiencies of longer contract periods are not significant enough to cause reductions in department staff.

There are no fiscal implications to state government concerning the proposed change to §31.36 due to incorporation into rule of an existing federal regulation on actions that cannot be appealed because no changes to the regulation currently in effect were made.

There are no costs to local government because local governments do not administer or enforce the sections, nor do the sections apply to them. Similarly, there are no costs to persons who are potential program clients or current clients because the rules do not apply to them.

Mr. Mike Montgomery has also determined that for each year of the first five years the sections are in effect, there are public benefits. Requiring infant formula provided to WIC clients to be purchased from licensed distributors or wholesalers will increase the safety of the product by deterring theft for the purpose of resale and reducing the possibility of product or label tampering.

There will be a varying impact on micro-businesses, small businesses, and persons who are required to comply with the sections. There will be no fiscal impact on micro-businesses, small businesses, and persons required to comply with the sections as a result of the proposed changes to §31.21, defining "licensed distributor or wholesaler," and "WIC-only store" because the amendment incorporates for clarification the definitions already included in state law or in practice by the program without change. There is no anticipated fiscal impact on micro-businesses, small businesses, and persons required to comply with the sections as a result of the proposed changes to §31.21 amending the definitions of "vendor band," "vendor competitive pricing," and "vendor outlet" since the revised definitions provide the program with the flexibility to continue without change to current procedures. However, the program is investigating alternatives for grouping vendors more equitably with peers with similar characteristics. Until such alternatives are adopted, data does not exist for calculation of fiscal impact. Should more equitable vendor groupings be adopted, the revised definitions are anticipated to have an overall positive fiscal impact to micro-businesses, small businesses, and persons. There is no fiscal impact associated with redesignating "vendor profile" as "WIC Vendor Application Profile" because the definition has not changed. No fiscal impact is anticipated for micro-businesses, small businesses, and persons required to comply with the sections as a result of proposed changes to §31.32 requiring vendors that elect to provide infant formula to WIC participants to purchase the product directly from licensed distributors and wholesalers or directly from the manufacturer. Each of the sample vendor profiles collected by the department as part of the vendor authorization process stated that the vendor purchases infant formula only from currently licensed distributors and/or wholesalers. There is no fiscal impact on micro-businesses, small businesses, and persons required to comply with the sections as a result of the proposed definition of vendor outlet, since all currently authorized vendors meet that definition. The fiscal impact to micro-businesses, small businesses, and persons who may request authorization as a WIC-approved vendor in the future and who are required to comply with the requirement to purchase infant formula from licensed distributors and/or wholesalers cannot be determined, as no data exists. A new vendor seeking authorization may elect to provide all WIC foods except infant formula, thus exempting the vendor from the requirements of the section.

There is no anticipated fiscal impact on micro-businesses, small businesses, and persons resulting from the proposed amendment to §31.33, which would terminate the vendor agreement after a warning, rather than allowing the agreement to expire for unauthorized use of the WIC acronym or logo violation. No vendor in the past five years has failed to correct this type of violation after a warning, and the department has amended §31.33 only as a preventive measure, since WIC is transitioning to 24-month

agreement periods, which could allow a potential violation to continue for an extended period.

There are fiscal impacts on micro-businesses, small businesses, and persons required to comply with the sections as a result of the proposed amendment to §31.34, adding authorization to recover money from vendors who charge the state amounts in excess of the competitive pricing criteria at the time the state agency performs an assessment. Assessments are expected to occur two times per year. Based on data from November 2002, the micro-businesses, small businesses and chain stores would be liable for an estimated $39,240 withheld from claims for an assessment month. If assessments occur twice annually, these businesses would have an estimated $78,480 withheld each year. For 144 micro-businesses, the impact would be $20,348 per assessment month, or $40,694 per year for an average of $282.61 per outlet. For 28 small businesses, the impact would be $1,009 withheld per assessment month, or $2,018 per year for an average of $72.07 per outlet. For 176 chain store outlets the impact would be $17,883 withheld per assessment month or $35,766 per year for an average of $203.22 per outlet. It is important to note that most of the collections from micro-businesses would come from WIC-only stores that have fewer than 20 employees, but WIC sales of up to $124,000 monthly. If some vendors change pricing policies as a result of potential disqualification and claims for reimbursement, these amounts may decrease in future years. Additionally, increased flexibility in assigning vendors to peer groups may reduce the fiscal implications of the proposed amendment. There are no fiscal impacts on individuals or clients as a result of the proposed amendment to §31.34 other than on the persons described because the proposed amendment applies only to business entities that are authorized WIC vendors.

There are no fiscal implications to micro-businesses, small businesses, and persons required to comply with the sections resulting from the proposed amendment to §31.35, deleting the reference to probationary agreements because the department discontinued use of probationary agreements on October 1, 2000. The effect has been to reduce the paperwork slightly for applicant vendors or vendors with minor violations by extending the agreement expiration date in some instances.

There are no fiscal implications to micro-businesses, small businesses, and persons required to comply with the sections resulting from the proposed amendment to §31.36, adding that vendors disqualified from the WIC program due to an assessment by the Food Stamp Program of a civil money penalty cannot appeal the disqualification. The effect of the amendment is to incorporate an existing federal regulation without change for clarification.

There is no anticipated impact on local employment for any of the proposed amendments.

Comments on the proposal may be submitted to Valerie Wolfe, Policy Director, Texas Department of Health, Bureau of Nutrition Services, 1100 West 49th Street, Austin, Texas 78756 or by EMAIL to Valerie.Wolfe@tdh.state.tx.us. (Type "Rule Comment" as the subject of the message.) Comments will be accepted for 30 days after publication in the *Texas Register*. A public hearing will be held on April 22, 2003, at 9:00 a.m. at the WIC Program offices located at 4616 West Howard Lane, Suite 275, Austin, Texas 78728.

The amendments are proposed under Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, or the commissioner of health; the Texas Omnibus Hunger Act of 1985, Acts 1985, 69th Legislature, Chapter 150, Title II; Human Resources Code, Chapter 33; the Child Nutrition Act of 1966, 42 USC §1786, as amended; and 7 CFR Part 246.

The amendments affect the Texas Omnibus Hunger Act of 1985, Acts 1985, 69th Legislature, Chapter 150, Title II; and Human Resources Code, Chapter 33.

§31.21. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1)-(23) (No change.)

(24) Licensed wholesaler or distributor - A business licensed in accordance with the Health and Safety Code, Chapter 431, the Texas Food, Drug, and Cosmetic Act, and Chapter 229 of this title (relating to Food and Drug).

(25) [~~(24)~~] Local agency - An entity under contract to the State agency to provide WIC Program nutrition services.

(26) [~~(25)~~] Migrant farmworker - An individual whose principle employment is in agriculture on a seasonal basis, who has been so employed within the last 24 months, and who establishes, for the purpose of such employment, a temporary abode.

(27) [~~(26)~~] Minor - A person under [~~over~~] 18 years of age who is not [~~no~~] and has not been married or who has not had the disabilities of minority removed for general purposes.

(28) [~~(27)~~] Newborn infant - An infant less than one month of age.

(29) [~~(28)~~] Nonprofit agency - A private agency which is exempt from income tax under the Internal Revenue Code of 1954, as amended.

(30) [~~(29)~~] Nutrition education - A benefit offered to WIC Program participants which consists of individual or group education sessions and the provision of information and educational materials designed to improve health status, achieve positive change in dietary habits, and emphasize the relationships between nutrition and health, all in keeping with the individual's personal, cultural, and socioeconomic preferences.

(31) [~~(30)~~] Nutritional risk conditions - Detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements; other documented nutritionally- related medical conditions; dietary deficiencies that impair or endanger health; conditions that directly affect the nutritional health of a person; or conditions that predispose persons to inadequate nutritional patterns or nutritionally-related medical conditions, including, but not limited to, homelessness and migrancy.

(32) [~~(31)~~] Nutritional risk priorities - A system of priorities based on the participant's eligibility category (pregnant, postpartum, breastfeeding, infant, or child) and specific nutritional risk conditions with indices for identifying these conditions.

(33) [~~(32)~~] Nutritional risk priority system - A priority system which ranks participants according to the degree of need for supplemental foods represented by the nutritional risk conditions which the participant has. This system shall be used to prioritize new applicants and participants for eligibility for services when a local agency has reached its maximum participation level.

(34) [~~(33)~~] Parent - An individual's mother or father.

(35) [~~(34)~~] Participant - A pregnant woman, breastfeeding woman, postpartum woman, infant, or child who is receiving supplemental foods or food instruments under the WIC Program, and the breastfed infant of a participating breastfeeding woman.

(36) [~~(35)~~] Postpartum woman - A woman up to six months after termination of pregnancy.

(37) [~~(36)~~] Poverty income guidelines - The poverty income guidelines prescribed and adjusted annually by the United States Department of Health and Human Services, effective July 1 of each year.

(38) [~~(37)~~] Pregnant woman - A woman determined to have one or more embryos or fetuses in utero.

(39) Price region - One or more geographic areas such as counties or zip codes with reasonably similar pricing of WIC-authorized foods grouped together for establishing vendor comparison groupings. Such areas may or may not be contiguous.

(40) [~~(38)~~] Proxy - Any person 16 years of age or older designated by a woman participant, or by a parent, guardian, or caretaker of an infant or child participant, to obtain and transact food instruments or to obtain supplemental foods on behalf of a participant. In certain circumstances, a proxy may be appointed by the state agency to transact food instruments for an infant, child, or participant under age 18 who is subject to disqualification but who would be at nutritional risk if benefits were terminated.

(41) [~~(39)~~] Regulations - United States Department of Agriculture regulations, 7 CFR Part 246.

(42) [~~(40)~~] Separate economic unit - A group of individuals who indicate that they have a source of income adequate to sustain the unit and usually purchase and prepare food separately from other individuals dwelling in the same household, or a group of individuals who intend to purchase and prepare food separately from other individuals dwelling in the same household after being certified as eligible to receive benefits from the WIC Program.

(43) [~~(41)~~] Shelf price - The price normally charged all customers by a vendor for an item sold by the vendor.

(44) [~~(42)~~] State agency - The Texas Department of Health in its role as administrator of the WIC Program.

(45) [~~(43)~~] Supplemental foods - Those foods containing nutrients determined to be beneficial for pregnant, breastfeeding, or postpartum women, infants, and children as prescribed by the United States Secretary of Agriculture.

(46) [~~(44)~~] United States Department of Agriculture (USDA) - The federal agency which funds the WIC Program.

(47) [~~(45)~~] Vendor account - A vendor approved by the state agency with one or more outlets.

(48) [~~(46)~~] Vendor agreement - The formal and legally binding agreement between the Texas Department of Health and a vendor authorized to accept and redeem WIC Program food instruments.

(49) [~~(47)~~] Vendor band - A comparison group of WIC Program vendors based on similar characteristics such as monthly WIC sales volume for each account or outlet, store size, location, number of checkout lanes, or store type.

(50) [~~(48)~~] Vendor competitive pricing - The process of comparing the cost of a standard WIC Program food package for a woman, infant, or child at an outlet to the cost of an average standard food package for the price region [~~local agency service area~~] where the vendor is located. Vendor accounts or outlets with similar characteristics [~~of a similar WIC dollar volume~~] are compared within the same price region [~~local agency service area~~].

(51) [~~(49)~~] Vendor interactive training - A training session for vendors that includes a contemporaneous opportunity for questions and answers.

(52) [~~(50)~~] Vendor outlet - An individual store which operates and transacts WIC food instruments at a fixed location recognized by the U.S. postal system as an address, has an electric utility hook-up, [~~and~~] is a store structure situated on a cement or pier-and-beam foundation, is not used simultaneously as a residence, has a minimum business area of 500 square feet, has clearly identifying signage, and is walk-in accessible directly from the street.

~~[(51) Vendor profile - A form which includes demographic, financial, and other descriptive information for each vendor outlet.]~~

(53) [~~(52)~~] Verbal abuse - The verbal threat of physical abuse of local agency, state agency or vendor staff by a participant or a parent, guardian, client-designated proxy, state agency-appointed proxy, or caretaker of a participant. Rude, vulgar, or generally abusive language is not verbal abuse.

(54) WIC-only store - A vendor outlet that primarily transacts WIC food instruments or transacts WIC food instruments totaling a sales volume greater than its Food Stamp Program sales volume or is not authorized by the Food Stamp Program.

(55) [~~(53)~~] WIC program - The Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) authorized by the Child Nutrition Act of 1966, §17, as amended.

(56) WIC Vendor Profile Application - A form which includes demographic, financial, and other descriptive information for each vendor outlet.

§31.32. Selection of Vendors for WIC Initial Authorization for Participation.

(a) (No change.)

(b) The state agency shall base its decision to authorize a vendor on the following criteria:

(1) The vendor's shelf prices for approved WIC foods in stock are competitive for the price region [~~local agency area~~].

(2) The vendor has sufficient quantities of authorized milk, evaporated milk, cheese, cereal, contract infant formula, contract infant cereal, eggs, peanut butter, and dried beans.

(A) A pharmacy may elect to provide only the designated contract milk and soy formulas and special formulas.

(B) (No change.)

(C) A vendor, if it elects to provide infant formula, shall purchase all formula directly from licensed wholesalers and distributors or directly from the manufacturer in accordance with the Health and Safety Code, Chapter 431, the Texas Food, Drug, and Cosmetic Act, and Chapter 229 of this title (relating to Food and Drug).

(D) [~~(C)~~] For vendors who elect to provide all authorized foods, the following amounts of each food type shall constitute sufficient quantities:

(i) a total of at least 108 ounces of adult cereal, including 36 ounces each of at least three of the following types of cereal: oat, corn, wheat, rice, and multi-grain;

(ii) at least six dozen Grade A or AA large, medium, or small size eggs;

(iii) a total of at least 18 containers of juice, including at least two varieties of juice in 46-ounce fluid cans and/or 12-ounce frozen cans;

(iv) a total of at least six pounds of cheese;

(v) a total of at least nine gallons of milk, some of which must be available in one-half gallon containers;

(vi) at least three one-pound bags of dry beans;

(vii) at least three 18-ounce jars of peanut butter;

(viii) at least eight 12-ounce cans of evaporated milk;

(ix) at least 31 cans of milk or soy concentrate infant formula (contract brand) and either eight cans of milk-based powder formula or nine cans of soy powder formula (contract brand); and

(x) at least two 8-ounce boxes or one 16-ounce box of infant cereal.

(3)-(14) (No change.)

(c)-(e) (No change.)

(f) If the state agency has disqualified the [~~allowed the vendor agreement for a~~] previous owner of a store location or business [~~to expire~~] for noncompliance or notified the previous owner that [~~the vendor agreement for~~] the store location or business has been disqualified due to [~~will be allowed to expire for~~] noncompliance, a new owner's application for that store location or business shall not be considered until at least six months from the expiration date of the previous owner's last vendor agreement unless the state agency makes an earlier determination that the sale was a bona fide arms-length transaction.

(g) (No change.)

(h) Upon request, the state agency may provide an applicant vendor with tentative authorization to redeem WIC food instruments starting the day the store opens.

(1) To obtain tentative authorization, the vendor shall comply with all of the following criteria:

(A) (No change.)

(B) For the six month period prior to application for authorization, fewer than 20% of the applicant's participating stores' authorizations have been terminated for exceeding the competitive pricing criteria for either the woman/child package or the infant food package for their respective price regions [~~local agency~~] and vendor bands.

(C)-(F) (No change.)

(2) (No change.)

(i)-(l) (No change.)

§31.33. Selection of Vendors for Reauthorization for Participation.

(a) (No change.)

(b) Prior to reauthorization, the state agency shall assess and review the qualifications of all vendors to assure that each continues to meet the WIC Program's goals. Criteria utilized in assessment and determination of qualifications for reauthorization include, but are not limited to.

(1) Competitive prices for the price region [~~local agency area~~]. A vendor's prices shall be considered competitive if the combined prices for the items included in the standard woman/child and/or infant food package do not exceed 108% of the price region [~~local agency~~] food package averages for the vendor's band.

(2) Volume of WIC sales. The vendor's volume of WIC sales exceeds $300 a month. If monthly sales fall below $300 a month for three consecutive months prior to the time of the vendor agreement reauthorization evaluation, the vendor agreement may not be renewed. If the state agency allows the Vendor Agreement to expire, the state agency will not consider the vendor's application to participate for six months after the expiration of the vendor's prior Vendor Agreement.

(3) (No change.)

(4) Continuing to meet selection criteria. The vendor continues to meet the selection criteria as stated in 7 CFR Part 246, this section, and in §31.32 of this title (relating [~~related~~] to Selection of Vendors for WIC Initial Authorization for Participation).

(5) Use of the WIC acronym or WIC logo. If the state agency determines that the vendor failed to comply with the prohibitions on the use of the WIC acronym or WIC logo, after having received a written warning, the state agency will disqualify the vendor for three months. The state agency will accept a civil money penalty in lieu of disqualification [~~shall allow the vendor agreement to expire without renewal~~].

(6) (No change.)

(c)-(e) (No change.)

§31.34. Calculation and Use of Vendor Competitive Pricing Data.

(a) The state agency shall use the following calculation to determine whether a vendor's prices are competitive with those of similar vendors in the price region [~~local agency service area~~].

(1) (No change.)

(2) Authorized vendor outlets within a price region [~~local agency service area~~] are grouped into [~~volume~~] vendor bands based on similar characteristics.

(3) Utilizing food-type averages for each vendor outlet within a vendor band, the state agency determines the price region [~~local agency~~] average standard food package costs for an infant and/or a woman/child participant for each vendor band.

(4) (No change.)

(5) The state agency compares the vendor outlet's standard food package costs to the price region's [~~local agency's~~] average standard food package costs for that vendor band. Price region [~~Local agency~~] averages for a prior period will be used. An outlet's standard food package costs are considered competitive if they are less than or equal to 108% of the price region's [~~local agency's~~] average standard food package costs for that vendor band.

(6) The state agency may make adjustments to the price region [~~local agency~~] averages due to anomalies, such as those caused by sharp wholesale price increases or crop failures since the prior period in which the averages were calculated.

(7) The state agency may reassign a vendor to an alternative comparison group when the vendor, such as a high-volume, national discount superstore, or a primarily WIC-only store, is not characteristic of other vendors in the band; when the vendor is the only store in a rural area within the price region [~~local agency~~]; or when the vendor is the sole occupant of a band.

(b) The state agency may perform a preliminary review of the vendor's compliance with competitive pricing at any time during the

term of the vendor agreement. The state agency shall provide a noncompliant vendor with written notification of noncompliance determined from the preliminary review. If[,] on a subsequent assessment within a 12-month period [the term of the vendor agreement,] the noncompliant vendor fails to comply with competitive pricing, the state agency will terminate the vendor agreement. If at the time of the assessment the vendor charges prices in excess of those allowed by the selection criteria, the vendor shall repay the excess charges to the state agency [shall provide a vendor with written notification of noncompliance with competitive pricing and the vendor agreement shall be terminated].

§31.35. Vendor Agreement with the State Agency.

(a) (No change.)

[(b) Any vendor that has not previously been authorized by the WIC Program shall receive a probationary vendor agreement that expires March 31 or September 30 of the current federal fiscal year.]

(b) [(c)] A change of ownership of an authorized outlet or account terminates the agreement between the state agency and the vendor. A change of ownership occurs when all, or substantially all, of the property or assets of a vendor are acquired by a purchaser in a bona fide arms-length transaction.

(1) In the event a store location/business under previous ownership was disqualified or is in the process of being disqualified at the time of acquisition, the new owner's application for that store location/business shall not be considered until the state agency makes a determination that the sale was a bona fide arms-length transaction. The state agency will make this determination no later than six months from the date of application. If the state agency determines that the transfer was not a bona fide arms-length transaction, the application shall not be considered until the disqualification has been served.

(2) If the state agency has notified the previous owner that the vendor's agreement for a store location/business shall be allowed to expire, the new vendor's application for that store location/outlet shall not be considered until at least six months from the expiration date of the previous vendor's last agreement unless the state agency makes an earlier determination that the sale was a bona fide arms-length transaction.

(3) If a store/location under previous ownership is not disqualified or is not in the process of being disqualified at the time of acquisition, and/or the previous owner has not been notified that the vendor agreement for that store location/business will be allowed to expire, and the acquiring party is in compliance with the rules, regulations, and vendor qualification criteria of the WIC Program, the acquiring party may, upon request, be authorized as a WIC Program vendor.

(A) The applicant vendor must submit a written affidavit stating that a change of ownership has been effected and duly executed by the seller and purchaser or their duly authorized officers or other agents.

(B) The affidavit shall include, at a minimum, the following information and any other information the state agency deems necessary: name and business address of the seller; name and business address of the purchaser; WIC vendor account number and outlet number, if applicable; name(s) and street address(es) of the outlet location(s); effective date of ownership change; and State of Texas Comptroller tax number of new owner.

(c) [(d)] WIC food instruments redeemed at an applicant store shall not be paid until the store has been duly authorized, including completion of an on-site evaluation, approval by the local agency, execution of the vendor agreement and vendor profile, and assignment of an account/outlet number by the state agency.

(d) [(e)] A vendor's unilateral termination of a vendor agreement after receipt of notification by the state agency of a violation shall not deprive the state agency of jurisdiction to impose sanctions for WIC Program violations.

(e) [(f)] The vendor agreement does not constitute a license, since a vendor does not require the state agency's approval to engage in the retail grocery business in Texas and the vendor would not effectively be deprived of this right in the absence of WIC Program authorization.

(1) The vendor agreement conveys no property interest since federal law does not give rise to a legitimate claim of entitlement for vendors.

(2) The terms of authorization are established in the vendor agreement between the state agency and the vendor, and the contractual relationship ends with the expiration of the vendor agreement.

(3) The state agency as well as officers, agents, and employees of the state agency are not responsible for losses incurred by a vendor as a result of the expiration of the vendor agreement.

§31.36. The Right of a Vendor or Local Agency to Appeal.

(a) A local agency or vendor has the right to appeal when an application for participation is denied and/or any other adverse action affecting participation is taken. The only exceptions to this rule are:

(1) (No change.)

(2) disqualification of a vendor as a result of disqualification or civil money penalty imposed by [from] the Food Stamp Program; and

(3) (No change.)

(b)-(k) (No change.)

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302208
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 458-7236

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CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES
SUBCHAPTER P. SURVEILLANCE AND CONTROL OF BIRTH DEFECTS

25 TAC §§37.301 - 37.306

The Texas Department of Health (department) proposes amendments to §§37.301-37.306 concerning the surveillance and control of birth defects.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 37.301-37.306 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed; however, revisions were necessary.

The department published a Notice of Intention to Review §§37.301-37.306 in the *Texas Register* on April 28, 2000 (25 TexReg 3799). No comments were received as a result of the publication of the notice.

Mark Canfield, Ph.D., Director, Texas Birth Defects Monitoring Division, has determined that for the first five-year period the sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the sections as proposed, because there is no cost impact to state or local government.

Dr. Canfield has also determined that for each year of the first five years the sections as proposed are in effect, the public will benefit from an increase in clarity of purpose and responsibility for the birth defects monitoring program as a result of enforcing or administering the amendments. There will be no cost effects on micro-businesses or small businesses since the amendments are only clarifying or updating wording to the original rules. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Mark Canfield, Ph.D., Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7232, fax (512) 458-7330. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under Health and Safety Code, §87.021 which requires the Texas Board of Health (board) to adopt rules on the operation of the birth defects program; §87.022 which requires the board to adopt rules on how information will be collected and made available; §87.063 which requires the board to establish criteria to be used in deciding how research proposals will be approved; and §12.001 which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the Commissioner of Health.

The amendments affect Health and Safety Code, Chapters 87 and 12; and implement Government Code, §2001.039.

§37.301. Purpose.

These sections implement the provisions of Chapter 602, §1 [~~Senate Bill 89~~], 73rd Legislature, adding Chapter 87 to the Health and Safety Code. Chapter 87 provides the Texas Board of Health with the authority to adopt rules relating to the surveillance and control of birth defects. The legislation directs the Texas Department of Health (department) to develop a statewide surveillance program [~~, but permits the department to implement a pilot program limited to part of the state, depending on resources available to the department~~].

§37.302. Policy.

(a) The department [~~Texas Department of Health (department)~~], recognizing the sensitive and confidential nature of information collected regarding birth defects and their possible causes, shall expect all staff to carry out all duties in a professional, compassionate, and culturally sensitive manner.

(b) (No change.)

(c) It is also the policy of the Texas Birth Defects Monitoring Division to protect patient information from disclosure through the legal process and Government Code, Chapter 552.

§37.303. Definitions.

The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise.

(1)-(7) (No change.)

[~~(8) Director-The executive director of the department who is the Commissioner of the Texas Department of Health.~~]

(8) [~~(9)~~] Environmental cause-The sum total of all the conditions and elements that make up the surroundings and influence the development of an individual.

(9) [~~(10)~~] Harmful physical agent-A physical phenomenon, other than a toxic substance, that has or may have carcinogenic, mutagenic, teratogenic, or other harmful effects on humans, and includes ionizing radiation, X-rays, gamma rays, ultraviolet light, or other electromagnetic radiation; and acoustical, thermal, or mechanical vibration.

(10) [~~(11)~~] Health facility- Any of the following types of facility: [~~A facility which includes:~~]

(A) a general or special hospital licensed by the department under Health and Safety Code, Chapter 241;

(B) a physician-owned or physician-operated clinic;

(C) a publicly or privately funded medical school;

(D) a state hospital or state school maintained and managed by the Texas Department of Mental Health and Mental Retardation;

(E) a genetic evaluation and counseling center;

(F) a public health clinic conducted by a local health unit, health department, or public health district organized and recognized under Health and Safety Code, Chapter 121;

(G) a physician peer review organization; or [~~and~~]

(H) a birthing center.

(11) [~~(12)~~] Health professional-An individual whose:

(A) vocation or profession is directly or indirectly related to the maintenance of health in another individual; and

(B) duties require a specified amount of formal education or training and may require a special examination, certificate, [~~or~~] license, or membership in a regional or national association.

(12) [~~(13)~~] Local health unit-A division of municipal or county government that provides public health services but does not provide each service required of a local health department under Health and Safety Code, §121.032(a), or of a public health district under Health and Safety Code, §121.043(a).

(13) [~~(14)~~] Midwife-A person who practices midwifery and has met the requirements of the standards of the midwifery board.

[~~(15) Pilot program-The birth defects surveillance program with coverage limited to the counties of Health and Human Services Regions 6 and 11.~~]

(14) [~~(16)~~] Toxic substance-A substance that has or may have toxic, carcinogenic, mutagenic, teratogenic, or other harmful effects on humans, and includes a product that contains a toxic substance that poses or may pose a substantial hazard to human health.

§37.304. Confidentiality of Information Provided to the Department.

(a) (No change.)

(b) The department may release demographic, medical, epidemiological, or toxicological information:

(1)-(6) (No change.)

(7) to medical researchers conducting bona fide medical research under the conditions described in §37.306 of this title (relating to Access to Information in the Central Registry), and Health and Safety Code, §87.063.

§37.305. Surveillance of Birth Defects: Central Registry.

(a) The central registry shall use a birth defects coding scheme used by the Centers for Disease Control and Prevention (CDC) of the United States Public Health Service in their birth defects monitoring programs [, which is titled "Birth Defects and Genetic Branch 6-Digit Code for Reportable Congenital Anomalies" dated June 1993].

[(b) The central registry will cover only the pilot project area until resources necessary to expand statewide are allocated.]

(b) [(c)] In order for information related to a child to be included in the central registry, the following conditions must be met.

(1) The county of occurrence of birth or the mother's residence at the time of birth must have been in [a] Texas [county covered by the central registry].

(2) The child must have a structural or genetic birth defect or other specified outcome that can adversely affect his or her health and development as defined in subsection (a) of this section.

(3) The defect must be diagnosed prenatally or [its signs and symptoms must be recognized] within one year after delivery [the first year of life]. In certain circumstances (e.g., the diagnosis [surveillance] of fetal alcohol syndrome, special studies and childhood genetic disorders diagnosed after infancy), the upper age limit will be extended to age six.

(c) [(d)] A reportable defect as defined in subsection (a) of this section occurring in a fetal death or pregnancy termination shall be included in the central registry.

(d) [(e)] Interaction between department staff and staff at facilities is detailed below: [Each health care facility midwife's office, birthing center, pregnancy termination center and physician likely to have knowledge of a birth defect case and located in a county covered by the registry shall receive an introductory letter from the Texas Department of Health's director of the Texas Birth Defects Monitoring Division, providing materials about Chapter 87 of the Health and Safety Code, relating to birth defects and the rules in this section relating to their participation in the surveillance system. Additional information shall be available upon request.]

(1) The chief operating officer, administrator, manager, director, and/or person in charge of each facility or office or center shall appoint one staff member as the contact person for the central registry surveillance activities. That staff member will coordinate scheduled visits by central registry staff to review logs, discharge indices and other case-finding sources, and will be responsible for arranging medical records review visits and providing the needed records at the time of the scheduled visit [record management].

(2) Potential cases are obtained by department staff through review of medical and health records, logs, indices, appointment rosters, and other records.

(3) Central registry staff and the contact individual shall establish a general schedule of case-finding and record review visits. This schedule shall take into account the capabilities of the health care facility in responding to requests, as well as the expected needs of the central registry workload.

(e) [(f)] The medical records and other materials provided by the health care facility shall not be removed from that facility. If copies are made, [central] registry staff must abide by procedures regarding copier use agreed upon with each health care facility. All information, either on paper or in electronic form, which is removed from the health care facility shall be transported by secure means at all times. Forms, notes, and other information will be carried in locked brief cases and will be stored in locked offices or locked [lockable] file cabinets.

[(g) The following general skills and qualifications shall be required for employment in the Texas Birth Defects Monitoring Division.]

[(1) The Director of the Texas Birth Defects Monitoring Division shall possess doctoral level training in the medical or public health sciences and experience in public health surveillance or birth defects. He/she shall conduct himself/herself in a professional manner and shall have signed an agreement to actively protect the confidentiality of patient information.]

[(2) Persons who will conduct case-finding and data abstraction shall possess knowledge of basic medical terminology, be able to interpret complex medical record information, conduct themselves in a professional manner, and shall have signed an agreement to actively protect the confidentiality of the patient information they collect and process.]

[(3) All other employees shall conduct themselves in a professional manner, and shall have signed an agreement to actively protect the confidentiality of all patient information.]

§37.306. Access to Information in the Central Registry.

(a) (No change.)

(b) After the director of the Texas Birth Defects Monitoring Division receives the completed request for information, the protocol will be reviewed by a divisional review panel. The panel shall consist of the director of the Texas Birth Defects Monitoring Program, the chief of the Bureau of Epidemiology, and a [senior] departmental epidemiologist. Upon approval by the divisional panel, the protocol shall be evaluated and judged by the department's institutional review board. Final approval of the protocol shall require the approval of both the divisional panel and the institutional review board and shall be based on an evaluation of the criteria listed in subsection (c) of this section.

(c) The evaluation criteria for approval by the divisional review panel shall include the following.

(1)-(10) (No change.)

(d)-(e) (No change.)

(f) If the protocol is approved by both the divisional panel and the institutional review board, then the researcher shall be considered to have established a valid scientific interest as required. The Director of the Texas Birth Defects Monitoring Division shall so advise the Commissioner [of the Texas Department of Health (Commissioner)]. The researcher will be required to comply with the conditions of subsections (g) and (h) of this section before any data will be released.

(g) If permission is granted, the applicant shall be responsible for [all reasonable and necessary] costs incurred by the Texas Birth Defects Division in making the data available in compliance with §1.251 of this title (relating to Procedures for Handling Requests for Public Information) and Texas Department of Health Operating Procedure OP 1355. The applicant shall incur the cost of the Texas Birth Defects Monitoring Division to monitor all contact with human subjects. The date of delivery of data shall be determined by the Director of the Texas Birth Defects Monitoring Division based on workload and the nature of the request.

(h)-(i) (No change.)

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302205
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 458-7236

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CHAPTER 97. COMMUNICABLE DISEASES
SUBCHAPTER E. PROVISION OF ANTI-RABIES BIOLOGICALS

25 TAC §§97.121, 97.123 - 97.125

The Texas Department of Health (department) proposes amendments to §97.121, and §§97.123 - 97.125 concerning the provision of anti-rabies biologicals. Specifically, the sections cover the purpose, the stocking and issuing of biologicals, payment for anti-rabies biologicals, and designation of depots. The amended language correlates with current state law and adds clarity to portions of the rules.

The rules are being amended in accordance with Government Code, §2001.039, which requires that each state agency conduct a review of its rules every four years and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedures Act). Sections 97.121, 97.123 - 97.125 have been reviewed and the department has determined that reasons for adopting the sections continue to exist in that rules on these subjects are needed.

The department published a Notice of Intention to Review for §97.121, and §§97.123 - 97.125 as required by Government Code, §2001.039 in the *Texas Register* on January 14, 2000 (25 TexReg 275). The department received no comments due to the publication of the notice.

Jane C. Mahlow, DVM, MS, Director of Zoonosis Control Division, has determined that for each year of the first five years that the sections will be in effect there will be no fiscal implications to state or local governments as a result of enforcing or administering the sections as proposed.

Dr. Mahlow has also determined that for each year of the first five years the proposed sections are in effect the public health benefit anticipated as a result of these amendments will be that, in addition to physicians, non-physician health care providers will be able to order rabies biologicals for their patients. There is no anticipated cost to small businesses or micro-businesses nor to persons who are required to comply with the sections as proposed because the amendment does not affect the cost to purchase or administer rabies vaccines. There is no anticipated effect on local employment.

Comments on the proposal may be submitted to Jane C. Mahlow, DVM, MS, Texas Department of Health, Zoonosis Control Division, 1100 West 49th Street, Austin, Texas 78756, telephone (512) 458-7255, or jane.mahlow@tdh.state.tx.us. Comments will be accepted for 30 days after publication of the proposal in the *Texas Register*.

The amendments are proposed under the Health and Safety Code, §12.033, which provides for fees for the distribution and administration of certain vaccines and sera; §826.025, which provides for vaccine and hyperimmune serum to be dispensed to persons at risk of being exposed to rabies; §826.011, which requires the Texas Board of Health (board) to adopt rules necessary to effectively administer Chapter 826; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed amendments affect Health and Safety Code, Chapters 12 and 826.

§97.121. Purpose.

The purpose of these sections is to provide anti-rabies biologicals (vaccines and hyper-immune sera) for the use and benefit of persons exposed, or suspected of having been exposed, [~~at risk of exposure,~~] to rabies.

§97.123. Stocking and Issuing.

(a) Stocking. Anti-rabies biologicals may [~~will~~] be procured and distributed by the Texas Department of Health (department). Anti-rabies biologicals may be stocked in depots located throughout the state. The products in each depot will remain under the control of the appropriate regional director of this department until issued.

(b) Issuing.

(1) Anti-rabies biologicals may be issued for [~~pre-or~~] post-exposure treatment for any person upon the signed order of a medical professional [~~physician~~] licensed to practice [~~medicine~~] in Texas.

(2) The department has the right to refuse to provide anti-rabies biologicals if the incident in question does not warrant rabies post-exposure prophylaxis. The guidelines established by the Advisory Committee on Immunization Practices of the U.S. Public Health Service will be used as guidelines for assessing rabies exposure. In event the department elects not to supply biologicals for post-exposure prophylaxis, the department will provide the medical professional [~~physician~~] the name of a source from which anti-rabies biologicals may be purchased.

(3) The following will be accomplished at time of issue.

(A) (No change.)

(B) An information sheet about rabies and rabies biologicals will be provided by the department to the attending medical professional [~~physician~~] for informing the patient of the risks and benefits of the anti-rabies treatment.

(C) The most recent guidelines [~~edition of the recommendations~~] for treatment for the prevention of rabies as recommended [~~published~~] by the Advisory Committee on Immunization Practices of the U.S. Public Health Service will be provided by the department [~~accompany all issues~~] to the attending medical professional [~~physician~~].

(c) (No change.)

(d) Administration of anti-rabies biologicals. Anti-rabies biologicals issued by the Texas Department of Health may be administered to humans only by or under the supervision of a medical professional [~~physician~~] licensed to practice [~~medicine~~] in Texas. Anti-rabies biologicals may be issued at the depot to the bearer of the medical professional's [~~physician's~~] order for transport to a medical professional [~~physician~~] and subsequent administration to the patient by or under the supervision of a medical professional [~~physician~~].

(e) (No change.)

§97.124. Payment for Anti-Rabies Biologicals.

The department is specifically authorized by law to distribute anti-rabies biologicals and to receive reimbursement for the cost of the distribution.

(1) Options for reimbursement will be in accordance with policies set by the Immunizations Division, Texas Department of Health, and are as follows:

(A) (No change.)

(B) Inability to pay. The regional director will accept, in lieu of payment, a statement [~~certificate~~] signed by the patient that the patient is unable to pay in whole or part the cost of the biologicals and has no third party or other alternate source to provide payment.

(2) (No change.)

§97.125. Designation of Depots for Anti-Rabies Biologicals.

The department may [~~will~~] procure off-site facilities for the storage and dispensing of department-owned anti-rabies biologicals.

(1)-(2) (No change.)

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302209
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 458-7236

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CHAPTER 130. CODE ENFORCEMENT REGISTRY

25 TAC §130.1 - 130.18, 130.20

The Texas Department of Health (department) proposes amendments to §§130.1-130.18, and 130.20 concerning the registration of code enforcement officers.

Government Code, §2001.039, requires that each state agency conduct a review of its rules every four years and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 130.1-130.18 and 130.20 have been reviewed and the board has determined that the reasons for adopting the sections continue to exist; however, revisions were necessary as described in this preamble.

A Notice of Intent to Review in regards to Government Code, §2001.039, agency review of rules was published in the February 12, 1999, issue of the *Texas Register* (24 TexReg 1003). No comments were received due to the publication of this notice.

The proposed amendments update references to the Act as codified in Texas Occupations Code, Chapter 1952; update references to other codified laws; clarify existing language; and remove obsolete language. Minor amendments to wording in several sections for which no substantive change is indicated are also being proposed to allow the sections to be published in their entirety. Amendments to §130.20 expand the list of activities approved for continuing education to include initial certification in related disciplines.

Nance Stearman, Acting Chief, Bureau of Licensing and Compliance, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implication to state or local government as a result of enforcing or administering the sections as proposed.

Ms. Stearman has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be to assure the registration and regulation of code enforcement officers in Texas. There will be no effect on small businesses or micro-businesses because this registration as a code enforcement office registry is a voluntary registry. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Yvonne Feinleib, Program Administrator, Texas Department of Health Code Enforcement Officer Registration Program, 1100 West 49th Street, Austin, Texas 78756, (512) 834-4512. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Occupations Code, Chapter 1952; and the Health and Safety Code, §12.001, which provides the Board of Health (board) with authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendments affect the Occupations Code, Title 12, Chapter 1952; and implement Government Code, §2001.039.

§130.1. Purpose and Scope.

(a) (No change.)

(b) Scope. These sections cover definitions; the advisory committee; fees; application procedures; registration qualification requirements; [~~and examination~~] educational requirements; examinations; determination of eligibility; registration and registration renewal; grounds for suspension or revocation; [~~unprofessional conduct;~~] registration of persons with criminal backgrounds; violations, complaints, investigations, and disciplinary actions; processing applications; exemptions; advertising; and continuing education [~~transition period~~].

§130.2. Definitions.

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

(1) Act - Occupations Code, Chapter 1952 [~~Texas Civil Statutes, Article 4447bb~~], concerning the registration of code enforcement officers.

(2)-(10) (No change.)

§130.3. Code Enforcement Officers' Advisory Committee.

(a)- (e) (No change.)

(f) Composition. The committee shall be composed of seven members appointed by the board. The composition of the committee shall include:

(1) (No change.)

(2) one structural engineer or licensed architect;

(3)- (4) (No change.)

(g)-(p) (No change.)

§130.4. Fees.

(a) The schedule of fees is as follows:

(1)-(4) (No change.)

(5) certificate [~~and/~~]or identification card replacement fee--$20 each;

(6)-(7) (No change.)

(b)-(c) (No change.)

§130.5. Application Procedures.

(a) (No change.)

(b) Purpose. General.

(1) Unless otherwise indicated, an applicant must submit all required information and documentation of credentials on official department [~~Texas Department of Health (department)~~] forms.

(2)-(5) (No change.)

(c) General application materials. The application contains the following items:

(1)-(3) (No change.)

(4) a statement that the applicant has read Occupations Code, Chapter 1952 [~~Texas Civil Statutes, Article 4447bb (Act)~~] and this chapter and agrees to abide by them;

(5)-(9) (No change.)

(d) (No change.)

§130.6. Registration Qualification Requirements.

(a) (No change.)

(b) An applicant who qualifies under Occupations Code, §1952.102 [~~Texas Civil Statutes, Article 4447bb, §6(a) (Act)~~] must have:

(1)-(4) (No change.)

(c) An applicant who qualifies under the Occupations Code, §1952.103 [~~Act, §6(d)~~], must have:

(1)-(4) (No change.)

(d) On proper application, the department [~~Texas Department of Health~~] shall grant a certificate of registration to a licensee or registrant of another state, commonwealth, or territory of the United States that has requirements equivalent to or higher than those in effect in this state for the registration of a code enforcement officer or code enforcement officer in training.

§130.7. Educational Requirements.

(a) Purpose. This [~~The purpose of this~~] section sets [~~is to set~~] out the educational requirements for examination and registration as a code enforcement officer or code enforcement officer in training.

(b)-(c) (No change.)

§130.8. Examinations.

(a)-(b) (No change.)

(c) Application for examination.

(1) (No change.)

(2) An applicant meeting the requirements of §130.6 of this title (relating to Registration Qualification Requirements) and §130.7 of this title (relating to Educational Requirements) shall be approved to take the exam. The department [~~Texas Department of Health (department)~~] will notify the applicant of his or her eligibility for examination. Applications which are received incomplete or late may cause the applicant to miss the examination deadline. The notice shall include the examination registration form.

(3)-(5) (No change.)

(d)-(g) (No change.)

(h) Failure to apply. Any applicant who fails to apply for and take the examination at least once within a period of one year after an examination approval notice is mailed to him or her by the department may have such approval voided by the department.

(i) (No change.)

(j) Examination review. Each applicant who fails the examination may request, in writing, within 21 days from the date of the notification of failure, a written breakdown of the examination scores for each section of the examination [~~an examination review~~].

[~~(1) All reviews are subject to department security requirements.~~]

[~~(2) Textbooks and other references may not be used and persons other than the applicant and department representatives may not be present during the review.~~]

[~~(3) The department will set a date and hour within a reasonable time when the examination will be available for review. The appointment will be scheduled in the office of the Code Enforcement Registration Program during regular business hours.~~]

§130.9. Determination of Eligibility.

(a) The department [~~Texas Department of Health (department)~~] shall receive and approve or disapprove all applications for registration as a code enforcement officer and code enforcement officer in training.

(b) (No change.)

(c) An application for a registration shall be disapproved if the person has:

(1)-(3) (No change.)

(4) violated any provisions of Occupations Code, Chapter 1952 [~~Texas Civil Statutes, Article 4447bb (Act)~~] or this chapter;

(5)-(6) (No change.)

(d) (No change.)

§130.10. Code Enforcement Officer in Training.

(a) Supervision. The purpose of this section is to set out the nature and the scope of the supervision provided for code enforcement officers in training.

(1) Supervision contract. A code enforcement officer in training must have a contract on department forms on file with the department [~~Texas Department of Health (department)~~].

(2)-(5) (No change.)

(b)-(c) (No change.)

(d) Time limits. A code enforcement officer in training registration is valid for one year from the date the registration is issued and may be renewed not more than once [~~after September 1, 1994,~~] by the procedures set out in §130.12 of this title (relating to Code Enforcement Registration Renewal).

§130.11. Code Enforcement Officer Registration.

(a) Purpose. The purpose of this section is to set out the code enforcement registration procedures of the department [~~Texas Department of Health (department)~~].

(b)-(d) (No change.)

§130.12. Code Enforcement Registration Renewal.

(a) (No change.)

(b) General.

(1) (No change.)

(2) Each registrant is responsible for renewing the registration before the expiration date and shall not be excused from paying the reinstatement fee. Failure to receive notification from the department [~~Texas Department of Health (department)~~] prior to the expiration date of the registration will not excuse failure to file for renewal or late renewal.

(3)-(5) (No change.)

(c)-(e) (No change.)

(f) Active duty. If a registrant fails to timely renew his or her registration because the registrant is or was on active duty with the armed forces of the United States of America serving outside the State of Texas, the registrant may renew the registration in accordance with this subsection.

(1)-(5) (No change.)

(6) A registrant renewing under this subsection shall not be required to complete continuing education for the period of the active duty service.

§130.13. Grounds for Suspension or Revocation.

A certificate of registration may be suspended or revoked for the following reasons:

(1)-(3) (No change.)

(4) misconduct in the practice of code enforcement including:

(A)-(D) (No change.)

(E) aiding or abetting the practice of an unregistered person when that person is required to be registered under Occupations Code, Chapter 1952 [~~the Texas Civil Statutes, Article 4447bb~~];

(F)-(J) (No change.)

§130.14. Registration of Persons with Criminal Backgrounds.

(a) (No change.)

(b) Criminal convictions which directly relate to the occupation of code enforcement shall be considered by the department as follows.

(1) (No change.)

(2) In considering whether a criminal conviction directly relates, the department shall consider:

(A)-(C) (No change.)

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of a code enforcement officer or code enforcement officer in training. In determining the present fitness of a person, the department shall consider the evidence described in Occupations Code, §53.023 [~~Texas Civil Statutes, Article 6252-13c, §4(c)~~].

(c) The following felonies and misdemeanors directly relate because these criminal offenses indicate an inability or a tendency for the person to be unable to perform or to be unfit for registration:

(1) the misdemeanor of violating Occupations Code, Chapter 1952 [~~Texas Civil Statutes, Article 4447bb~~];

(2)-(7) (No change.)

(8) other misdemeanors and felonies which indicate an inability or tendency for the person to be unable to perform as a registrant or to be unfit for registration if action by the department will promote the intent of the Act, this chapter, and Occupations Code, Chapter 53 [~~Texas Civil Statutes, Article 6252-13c~~].

(d) (No change.)

§130.15. Violations, Complaints, Investigations, and Disciplinary Actions.

(a) Purpose. The purpose of this section is to set out:

(1) violations and prohibited actions under Occupations Code, Chapter 1952 [~~Texas Civil Statutes, Article 4447bb~~], and this chapter;

(2)-(3) (No change.)

(b)-(f) (No change.)

§130.16. Processing Applications.

(a) Time periods. The department shall comply with the following procedures in processing applications for initial registration and registration renewal.

(1)-(2) (No change.)

(b)-(d) (No change.)

§130.17. Exemptions.

(a) A person who is licensed or registered under another law of this state and who under the license or registration engages in code enforcement is not required to be registered under Occupations Code, Chapter 1952 [~~Texas Civil Statutes, Article 4447bb~~].

(b) (No change.)

§130.18. Advertising.

(a)-(c) (No change.)

(d) A registrant shall be subject to disciplinary action by the department if under the Crime Victims Compensation Act, Code of Criminal Procedure, Art. 56.31 [~~Texas Civil Statutes, Article 8309-1~~], the registrant is issued a public letter of reprimand, is assessed a civil penalty by a court, or has an administrative penalty imposed by the attorney general's office.

§130.20. Continuing Education.

(a) (No change.)

(b) Code enforcement officers in training who apply to upgrade prior to the department's issuance of notice regarding the expiration of their registration as required by §130.12(c)(1) of this title (relating to Code Enforcement Registration Renewal are not required to submit continuing education hours in order to upgrade.

(c)-(p) (No change.)

(q) Initial certification in the 12 months preceding renewal will be accepted as proof of the continuing education required by subsection (c) of this section if the certification is listed as follows.

(1) International Code Council (ICC):

(A) residential building inspector;

(B) residential electrical inspector;

(C) residential mechanical inspector;

(D) residential plumbing inspector;

(E) commercial building inspector;

(F) commercial electrical inspector;

(G) commercial mechanical inspector;

(H) commercial plumbing inspector;

(I) fire inspector I;

(J) fire inspector II;

(K) residential combination inspector;

(L) commercial combination inspector;

(M) certified building official;

(N) accessibility inspector;

(O) zoning inspector;

(P) property maintenance and housing inspector; or

(Q) housing code official; or

(2) International Association of Plumbing and Mechanical Officials (IAPMO):

(A) voluntary plumbing inspector; or

(B) voluntary mechanical inspector; or

(3) National Fire Protection Association (NFPA):

(A) certified fire protection specialist;

(B) fire inspector I;

(C) fire inspector II;

(D) certified building inspector;

(E) certified residential electrical inspector; or

(F) certified master electrical inspector; or

(4) International Association of Electrical Inspectors (IAEI):

(A) building 1 & 2 family dwelling;

(B) building general;

(C) electrical 1 & 2 family dwelling;

(D) electrical general;

(E) fire protection general;

(F) fire protection plan review;

(G) mechanical 1 & 2 family dwelling;

(H) mechanical general;

(I) plumbing 1 & 2 family dwelling; or

(J) plumbing general.

~~[(q) Transition.]~~

~~[(1) Any course taught between September 1, 2001, and the effective date of these rules will be accepted by the Code Enforcement Officer Registration Program for renewals between September 1, 2002, and August 31, 2003, provided that the course:]~~

~~[(A) covers one or more of the subjects listed in subsection (j) of this section;]~~

~~[(B) is taught in Texas by an organization listed in subsection (g)(2) of this section; and]~~

~~[(C) provides each attendee with a certificate listing the number of contact hours earned.]~~

~~[(2) A continuing education course approved for registration renewal under this section must be taken in the 12 months immediately preceding renewal to be considered acceptable.]~~

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302204
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 458-7236

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CHAPTER 229. FOOD AND DRUG
SUBCHAPTER H. SEAFOOD HACCP

25 TAC §§229.121 - 229.129

The Texas Department of Health (department) proposes amendments to §§229.121 - 229.129 concerning seafood safety.

Amendments to §§229.121 - 229.122 add references to §§229.211 - 229.222 of this title (relating to Current Good Manufacturing Practice and Good Warehousing Practice in Manufacturing, Packing, or Holding Human Food). An amendment to §229.123 updates a mailing address for the U.S. Food and Drug Administration. An amendment to §129.124 updates verbiage for consistency within the sections. An amendment to §229.125 inserts language for clarification. Amendments to §§229.126 - 229.127 move one section to a more appropriate location. Amendments to §§229.128 - 229.129 update verbiage for consistency within the sections.

Government Code, §2001.39, requires each state agency to conduct a review of its rules every four years and consider for readoption each rule adopted by that agency. Sections 229.121 - 229.129 have been reviewed and the department has determined that reasons for adopting the sections continue to exist; however the rules need revisions as described in this preamble.

The department published a Notice of Intention to Review §§229.121 - 229.129 in the *Texas Register* on March 2, 2001 (26 TexReg 1876). No comments were received as a result of the publication of this notice.

Robert D. Sowards, Jr., Director, Manufactured Foods Division, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implication to state or local government as a result of enforcing or administering the sections as proposed.

Mr. Sowards has also determined that for each year of the first five years the sections are in effect, the public health benefits anticipated as a result of enforcing or administering the sections

will be to protect the public health by requiring facilities to assess potential hazards in the production of their product and establish controls to manage those hazards. There are no anticipated economic costs to small businesses and micro-businesses or persons as §§229.121 - 229.129 have been in effect for several years and the proposed amendments are only administrative changes. No new requirements are proposed. There will be no impact on local employment.

Comments on the proposal may be submitted to Robert D. Sowards, Jr., Director, Manufactured Foods Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0243. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health; and implements Government Code, §2001.039.

The proposed amendments affect the Health and Safety Code, Chapter 431, and Chapter 12.

§229.121. Definitions.

The following words and terms when used in these sections shall have the following meanings unless the context clearly indicates otherwise. The definitions and interpretations of terms in the Health and Safety Code, Chapter 431, §431.002, and §229.211 of this title (relating to Definitions) are applicable to such terms when used in the sections [~~this section~~], except where they are herein redefined. The following definitions shall also apply:

(1)-(18) (No change.)

§229.122. Current Good Manufacturing Practice.

(a) Current good manufacturing practice in the manufacturing, processing, packing, or holding of human food. Sections 229.211 - 229.222 of this title (relating to Current Good Manufacturing Practice and Good Warehousing Practice in Manufacturing, Packing, or Holding Human Food) apply in determining whether the facilities, methods, practices, and controls used to process fish and fishery products have been processed under sanitary conditions. Copies are available via the internet at http://www.tdh.state.tx.us/bfds/foods/RULES/rulelinks.html and in the office of the Manufactured Foods Division, Texas Department of Health, 2201 Donley Drive Suite 200, Austin, Texas 78758, and are available for inspection during normal working hours. [~~Current good manufacturing practice in manufacturing, processing, packing, or holding human food. The Texas Department of Health adopts by reference the Code of Federal Regulations (CFR), Title 21, Part 110, §§110.3-110.110, Current Good Manufacturing Practice in Manufacturing, Processing, Packing, or Holding Human Food. Copies are indexed and filed in the office of the Division of Manufactured Foods, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3182, and are available for inspection during normal working hours.~~]

(b)-(c) (No change.)

§229.123. Hazard Analysis and Hazard Analysis Critical Control Point (HACCP) Plan.

(a) Hazard analysis. Every processor shall conduct, or have conducted for it, a hazard analysis to determine whether there are food safety hazards that are reasonably likely to occur for each kind of fish and fishery product processed by that processor and to identify the preventive measures that the processor can apply to control those hazards. Such food safety hazards can be introduced both within and outside the processing plant environment, including food safety hazards that can occur before, during, and after harvest. A food safety hazard that is reasonably likely to occur is one for which a prudent processor would establish controls because experience, illness data, scientific reports, or other information provide a basis to conclude that there is a reasonable possibility that it will occur in the particular type of fish or fishery product being processed in the absence of those controls. Hazards for each kind of fish and fishery product may be found in the "Fish and Fishery Products Hazards and Controls Guide" which may be obtained from: U.S. Food and Drug Administration, Office of Seafood, HFS-415, 5100 Paint Branch Parkway, College Park, Maryland 20740-3835, (301) 436-2301 [~~200 C Street, S.W., Washington, D.C. 20204, (202) 418-3133~~].

(b)-(d) (No change.)

(e) Product subject to other regulations. For fish and fishery products that are subject to the Code of Federal Regulations (CFR), Title 21, Part 113 (Processing of Low Acid Canned Foods) and CFR, Title 21, Part 114 (Processing of Acidified Foods), [~~processed low acid foods or acidified foods~~] the HACCP plan need not list the food safety hazard associated with the formation of Clostridium botulinum toxin in the finished, hermetically sealed container, nor list the controls to prevent that food safety hazard. A HACCP plan for such fish and fishery products shall address any other food safety hazards that are reasonably likely to occur.

(f)-(g) (No change.)

§229.124. Corrective Actions.

(a) (No change.)

(b) Processors may develop written corrective action plans, which become part of their HACCP [~~Hazard Analysis Critical Control Point~~] plan in accordance with §229.123(c)(5) of this title (relating to Hazard Analysis and Hazard Analysis Critical Control Point (HACCP) Plan), by which they predetermine the corrective actions that they will take whenever there is a deviation from a critical limit. A corrective action plan that is appropriate for a particular deviation is one that describes the steps to be taken and assigns responsibility for taking those steps, to ensure that:

(1)-(2) (No change.)

(c) When a deviation from a critical limit occurs and the processor does not have a corrective action plan that is appropriate for that deviation, the processor shall:

(1) (No change.)

(2) perform or obtain a review to determine the acceptability of the affected product for distribution. The review shall be performed by an individual or individuals who have adequate training or experience in the affected product to perform such a review. [~~Adequate training may or may not include training in accordance with §229.127 of this title (relating to Training)~~];

(3)-(5) (No change.)

(d) (No change.)

§229.125. Verification.

(a) Overall verification. Every processor shall verify that the [~~Hazard Analysis Critical Control Point (~~] HACCP [~~)~~] plan is adequate to control food safety hazards that are reasonably likely to occur, and that the plan is being effectively implemented. Verification shall include, at a minimum:

(1)-(3) (No change.)

(b)-(c) (No change.)

(d) Record keeping. The calibration of process-monitoring instruments[,] and the performing of any periodic end-product and in-process testing, in accordance with subsection (a)(2)(B)-(C) of this section, shall be documented in records that are subject to the record keeping requirements of §229.126 of this title (relating to Records).

§229.126. Records.

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

(e) Public Information. All plans and records required by these sections are public information unless excepted from disclosure pursuant to the Government Code, Chapter 552, Texas Public Information Act.

§229.127. Training.

(a)-(b) (No change.)

[(c) Public Information. All plans and records required by these sections are public information unless excepted from disclosure pursuant to the Texas Public Information Act, Chapter 552 of the Government Code.]

§229.128. Sanitation Control Procedures.

(a) (No change.)

(b) Sanitation monitoring. Each processor shall monitor the conditions and practices during processing with sufficient frequency to ensure, at a minimum, conformance with those conditions and practices specified in §§229.211 - 229.222 of this title (relating to Current Good Manufacturing Practice and Good Warehousing Practice in Manufacturing, Packing, or Holding Human Food) [the Good Manufacturing Practices adopted by reference in §229.122 of this title (relating to Current Good Manufacturing Practice)], that are both appropriate to the plant and the food being processed and relate to the following:

(1)-(8) (No change.)

(c)-(d) (No change.)

§229.129. Smoked and Smoked-Flavored Fishery Products.

(a)-(b) (No change.)

(c) This section does not apply to processors of smoked and smoked-flavored fishery products that are subject to the requirements of CFR [Code of Federal Regulations], Title 21, Part 113 (Processing of Low Acid Foods), and CFR [Code of Federal Regulations], Title 21, Part 114 (Processing of Acidified Foods).

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302206
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 458-7236

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CHAPTER 265 GENERAL SANITATION
SUBCHAPTER K. REGISTRATION OF SANITARIANS

The Texas Department of Health (department) proposes amendments to §§265.141-265.149, 265.151-265.158, new §265.159, and the repeal of §265.150 concerning the registration of sanitarians.

Government Code, §2001.039, requires that each state agency conduct a review of its rules every four years and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 265.141-265.149 and 265.151-265.158 have been reviewed and the board has determined that the reasons for adopting the sections continue to exist. Section 265.150 has been reviewed and the board has determined that the reason for adopting the section no longer exists, and the section should therefore be repealed.

A Notice of Intent to Review in regards to Government Code, §2001.039, agency review of rules was published in the March 14, 2003 issue of the *Texas Register* (28 TexReg 2638). No comments were received due to the publication of this notice.

The proposed amendments update references to the Act as codified in Texas Occupations Code, Chapter 1953 (the Act); update references to other codified laws; clarify existing language; and remove obsolete language. Minor amendments to wording in several sections for which no substantive change is indicated are also being proposed to allow the sections to be published in their entirety.

Amendments to §265.142 and §265.145 and the repeal of §265.150 eliminate an obsolete and unworkable requirement for preceptorship for persons not required by the Act.

Amendments to §265.143 (related to Fees) and new section §265.159 (related to Exemption from Renewal and Continuing Education for Retired Professional Sanitarians) provide a voluntary status for retired professional sanitarians.

Nance Stearman, Acting Chief, Bureau of Licensing and Compliance, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implication to state or local government as a result of enforcing or administering the sections as proposed.

Ms. Stearman has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be to assure the registration and regulation of sanitarians in Texas. There will be no effect on small businesses or micro-businesses because registration as a professional sanitarian is voluntary. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Yvonne Feinleib, Program Administrator, Texas Department of Health Sanitarian Registration Program, 1100 West 49th Street, Austin, Texas 78756, (512) 834-4517. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

25 TAC §§265.141 - 265.149, 265.151 - 265.159

The amendments and new section are proposed under the Government Code, §2001.03, which requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act); Occupations Code, Chapter 1953; and the Health and Safety Code, §12.001, which provides the

Board of Health (board) with authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendments and new section affect the Occupations Code, Title 12, Chapter 1953; and implement Government Code, §2001.039.

§265.141. Purpose and Scope.

(a) Purpose. This subchapter implements the Sanitarian Registration Act, Occupations Code, Chapter 1953 [~~Article 4477-3, Vernon's Texas Civil Statutes~~], which requires the Texas Department of Health to adopt rules to implement a program for the registration of sanitarians under the authority of the Texas Board of Health.

(b) (No change.)

[~~(c) Transition.~~]

[~~(1) Effective September 1, 1999, registered sanitarians presently licensed by the department must obtain no less than twelve continuing education contact hours related to the fields of consumer health, environmental health or sanitation within the twelve months preceding renewal of their license after final adoption of these rules and after the department establishes an anniversary date for each registered sanitarian. The requirement of two years of full-time experience, effective September 1, 1999, does not apply to sanitarians already licensed by the department unless the sanitarians allow their licenses to lapse. The educational requirement concerning 30 semester hours or its equivalent in basic or applied science, effective September 1, 2001, does not apply to sanitarians already licensed by the department unless the sanitarians allow their licenses to lapse.~~]

[~~(2) The requirement of two years of full-time experience, effective September 1, 1999, does not apply to sanitarians-in-training already licensed by the department unless the sanitarians-in-training allow their license to lapse. The continuing education contact hours requirement, effective September 1, 1999, does not apply to sanitarians-in-training already licensed with the department. The continuing education contact hours requirement will apply only after the sanitarians-in-training upgrade to sanitarian status. For all sanitarians, the hours must be accrued in the twelve months preceding renewal of their sanitarian license based on their anniversary date. The educational requirement concerning 30 semester hours or its equivalent in basic or applied science, effective September 1, 2001, does not apply to sanitarians-in-training already licensed with the department unless the sanitarians-in-training allow their license to lapse.~~]

[~~(3) Effective September 1, 1999, applicants for registration as a sanitarian must have graduated from an accredited college or university with no less that fifteen semester hours or its equivalent in basic or natural science; have not less than two years of full-experience in consumer health, environmental health or sanitation; have completed all required department application forms; have paid all required fees; and have successfully completed an examination prescribed by the department. An applicant with less than two years of full-time experience will be registered as a sanitarian-in-training and be issued a license remaining in effect for a period not to exceed two years after date of issue.~~]

[~~(4) Effective September 1, 2001, the educational requirements for registration as a sanitarian will require graduation with a bachelor's degree from an accredited college or university with not less than thirty semester hours or its equivalent in a basic or applied science.~~]

§265.142. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings.

(1) Act--Occupations Code, Chapter 1953 [~~Article 4477-3, Vernon's Civil Statutes~~], concerning the registration of sanitarians.

(2)-(10) (No change.)

(11) Education--The [~~Until September 1, 2001, bachelor's degree from an accredited college or university that includes not less than fifteen semester hours or its equivalent in basic or natural science or any combination of basic or natural science. Effective September 1, 2001, the~~] educational requirements for registration as a sanitarian [~~will~~] require a bachelor's degree from an accredited college or university with not less than thirty semester hours or its equivalent in basic or applied science.

(12)-(16) (No change.)

[~~(17) Preceptor--A teacher or tutor.~~]

[~~(18) Preceptorship--An arrangement where a novice is taught or tutored by an experienced person.~~]

(17) [~~(19)~~] Registered sanitarian--A department registered [~~licensed~~] public health professional qualified by specific education, specialized training and field experience to protect the health, safety and general welfare of the public from adverse environmental determinants.

(18) [~~(20)~~] Registrant--A person registered [~~licensed~~] under the Act.

(19) [~~(21)~~] Registration--The procedure by which the department accepts, processes, and approves applications for registration of sanitarians including the furnishing, replacement or duplication of certificates.

(20) [~~(22)~~] Sanitarian-in-Training--A person registered in accordance §265.145(c) of this title (relating to Qualifications for Registration as a Sanitarian or Sanitarian-in-Training) [~~meeting all the requirements for registration as a sanitarian except for the required experience~~].

(21) [~~(23)~~] Scope of professional practice--Includes, but not limited to, evaluating, planning, designing, managing, organizing, enforcing, or implementing programs, facilities, or services that protect public health and the environment. The scope of practice also includes educating, communicating, and warning communities of factors that may adversely affect the general health and welfare. The scope of practice may be in the areas of food quality and safety, on-site wastewater treatment and disposal, solid and hazardous waste management, ambient and indoor air quality, drinking and bathing water quality, insect and animal vector control, recreational and institutional facility inspections, consumer health and occupational health and safety.

§265.143. Fees.

(a) (No change.)

(b) The schedule of fees is as follows:

(1) (No change.)

(2) initial registration [~~license~~] fee:

(A)-(B) (No change.)

(3) annual registration [~~Annual license~~] renewal fee:

(A)-(B) (No change.)

(4)-(5) (No change.)

(6) certificate of registration [~~license~~] (framing size) or identification card (billfold size) replacement fee - $20;

(7)-(8) (No change.)

(9) continuing education sponsor approval fee - $100 per sponsor. Pre-approved providers [~~Government agencies and accredited institutions of higher education~~] are exempt from this fee; or [~~,~~]

(10) exemption fee for retired sanitarians - $150.

(c) The month the initial registration [~~license~~] is issued will establish the anniversary date for future annual registration [~~license~~] renewal.

[~~(d) Registered sanitarians failing to renew their licenses after final adoption of these rules must pay the reinstatement fee. The month the renewal license is issued will establish the anniversary date for future renewal license.~~]

§265.144. Application Procedures.

(a) (No change.)

(b) General.

(1) (No change.)

(2) The department must receive all required application materials at least 30 [~~45~~] days prior to the date the applicant wishes to take the examination, including the application fee.

(3) (No change.)

[~~(4) An application is not considered complete until the required prescribed examination has been taken by the applicant.~~]

(c) General application materials. The application packet must contain the following items to be complete:

(1)-(2) (No change.)

(3) the educational qualifications of the applicant (graduation with a bachelor's degree from an accredited college or university that included not less than [~~fifteen semester hours or its equivalent in basic or natural science or any combination of basic or natural science. Effective September 1, 2001, the educational requirements for registration as a sanitarian will require graduation with a bachelor's degree from an accredited college or university with not less than~~] thirty semester hours or its equivalent in a basic or applied science);

(4) qualifying experience [~~(not less than two years of full-time experience in the fields of consumer health, environmental health or sanitation including training in the basic sciences and/or public health to the extent deemed necessary by the Board in order to effectively serve as a registered sanitarian)~~];

(5) a statement that the applicant has read Occupations Code, Chapter 1953 [~~Texas Civil Statutes, Article 4477-3 (Act)~~], and these rules and agrees to abide by them;

(6) a statement that the applicant shall return to the department any registration [~~license~~] upon the expiration and nonrenewal, revocation, or suspension of the registration [~~license~~];

(7)-(8) (No change.)

(9) a statement that the information in the application is truthful and that the applicant understands that providing false and misleading information on items which are material in determining the applicant's qualifications may result in the voiding of the application, or denial or the revocation of any registration [~~license~~] issued; and

(10) (No change.)

(d) Documents. The following documents shall be submitted:

(1) (No change.)

(2) an official transcript from an accredited college or university (sealed as a true and exact copy of an unaltered original) showing graduation with a bachelor's degree from an accredited college or university that included not less than [~~fifteen semester hours or its equivalent in basic or natural science or any combination of basic or natural science. Effective September 1, 2001, the educational requirements for registration as a sanitarian will require graduation with a bachelor's degree from an accredited college or university with not less than~~] 30 [~~thirty~~] semester hours or its equivalent in a basic or applied science. [~~; and~~]

[~~(3) proof of the successful completion of the prescribed examination if administered by the department's designee.~~]

§265.145. Qualifications for Registration as a Sanitarian or Sanitarian-in-Training.

(a) The purpose of this section is to set out the qualifications of applicants for examination[~~,~~] and registration[~~, and licensing~~] as a sanitarian or sanitarian-in-training.

(b) An applicant for registration as a Professional Sanitarian who qualifies under Occupations Code, §1953.102(a) [~~Texas Civil Statutes, Article 4477-3, §5(a) (Act)~~], must have:

(1) graduated with a bachelor's degree from an accredited college or university that included not less than [~~fifteen semester hours or its equivalent in basic or natural science or any combination of basic or natural science. Effective September 1, 2001, the educational requirements for registration as a sanitarian will require graduation with a bachelor's degree from an accredited college or university with not less than~~] 30 [~~thirty~~] semester hours or its equivalent in a basic or applied science;

(2) not less than two years of full-time experience in the fields of consumer health, environmental health or sanitation which may include the following:

(A) (No change.)

(B) site evaluation and design of on-site sewage system facilities as specified in Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~] rules;

(C)-(G) (No change.)

(3) (No change.)

[~~(4) not less than two years of experience gained under the preceptorship of a department registered sanitarian or a person possessing equal qualifications, as determined by the department. This preceptor is required to verify and affirm the experience of the applicant;~~]

(4) [~~(5)~~] passed the prescribed examination as set forth in §265.148 of this title (relating to Examinations);

(5) [~~(6)~~] filed the documents and application required by §265.144 of this title (relating to Application Procedures); and

(6) [~~(7)~~] paid the appropriate fees.

(c) An applicant for registration as a Sanitarian in Training who qualifies under Occupations Code, §1953.102(b) [~~Texas Civil Statutes, Article 4477-3, §5(b) (Act)~~], must have:

(1) graduated with a bachelor's degree from an accredited college or university that included not less than [~~fifteen semester hours or its equivalent in basic or natural science or any combination of basic or natural science. Effective September 1, 2001, the educational requirements for registration as a sanitarian will require graduation with a bachelor's degree from an accredited college or university with not less than~~] 30 [~~thirty~~] semester hours or its equivalent in a basic or applied science;

(2) (No change.)

[(3) completed a preceptor contract on department forms that includes:]

[(A) the name and signature of each preceptor and the name and signature of the sanitarian-in-training;]

[(B) the registration number of each preceptor;]

[(C) the primary location and address where consumer health, environmental health or sanitation services are provided;]

[(D) a description of consumer health, environmental health or sanitation duties to be rendered by the sanitarian-in-training;]

[(E) a statement that each preceptor and the sanitarian-in-training have read and agree to adhere to the Act and this subchapter; and]

[(F) the date the preceptor and sanitarian-in-training signed the department's preceptor contract;]

(3) [(4)] filed the documents and application required by §265.144 of this title; and

(4) [(5)] paid the appropriate fees.

(d) On proper application, the department may grant a certificate [license] of registration to a licensee or registrant of another state, commonwealth, or territory of the United States that has requirements equivalent to or higher than those in effect in this state for the registration of a sanitarian or sanitarian-in-training.

§265.146. Educational Requirements.

(a) (No change.)

(b) Core educational requirements for initial registration include the following.

(1) Acceptable courses are air pollution; anatomy; animal science; bacteriology; biochemistry; biology; biomedical science; biophysics (no more than six semester hours or its equivalent); biostatistics; botany; cell physiology; chemical engineering; chemistry; community health; computer science (no more than six semester hours or its equivalent); dairy science; ecology; embryology (no more than six semester hours or its equivalent); entomology; environmental health; environmental science; environmental diseases; environmental law; epidemiology; food bacteriology; food science; food technology; genetics; geophysics; geology; hazardous waste; histology; [histolgy;] hydrogeology; hydrology; industrial hygiene; infectious diseases; limnology; mathematics (beyond algebra - no more than six semester hours or its equivalent); courses taken in an accredited allopathic or osteopathic school of medicine (no more than six semester hours or its equivalent); meteorology (no more than six semester hours or its equivalent); microbiology; molecular biology; occupational health; occupational safety; parasitology; pathology; physics (no more than six semester hours or its equivalent); physiology; plant taxonomy; [toxonomy;] public health; public health education (no more than six semester hours or its equivalent); public health law; radiological health; sanitary engineering; [sewage sanitation] soil science; statistics (no more than six semester hours or its equivalent); toxicology; vector control; veterinary medical courses (no more than six semester hours or its equivalent); veterinary public health; virology; wastewater treatment; water quality; and zoology.

(2) (No change.)

(3) Courses not listed may be submitted for consideration for acceptance by the department [or the Sanitarian/Code Enforcement Officers' Advisory Committee].

§265.147. Continuing Education Requirements.

(a) (No change.)

(b) Each registered sanitarian must obtain and show proof of not less than twelve continuing education contact hours related to the fields of consumer health, environmental health or sanitation as defined in §256.142 of this title (relating to Definitions) within the 12 [twelve] months preceding renewal of their registration [license].

(c)-(l) (No change.)

[(m) Documentation of continuing education activity shall be on a roster form that includes the name, address, phone number, registered sanitarian license number, social security number (used to coordinate continuing education activity information with the department's records), and signature of the department registered sanitarian.]

(m) [(n)] Sponsors of approved continuing education activities shall:

(1) at the conclusion of the activity distribute to those registered sanitarians who have successfully completed the activity a certificate of completion which shall include the name of the sponsor, the date and name of the activity, and the continuing education units earned;

(2) maintain a copy of the register [roster] for two years and provide it to the department upon request.

(n) [(o)] Each registered sanitarian shall collect and keep certificates of completion from all courses completed. These certificates of completion will be used to document a registered sanitarian's attendance at approved courses. Transcripts showing coursework in environmental or consumer health from an accredited college or university , or written verification of hours approved by the National Environmental Health Association (NEHA) will also be accepted. The department will conduct random audits for compliance with this requirement.

(o) [(p)] The department may deny, revoke, or refuse to renew approval if the sponsor fails to maintain or provide records related to the provision of continuing education to the department, or fails to comply with any other requirements that are a basis for approval or that are a part of this subchapter.

(p) [(q)] A registered sanitarian or sponsor may file a written request for an extension of time for compliance with any deadline in this subsection. Such request for extension, not to exceed 90 days, shall be granted by the department if the registered sanitarian or sponsor files appropriate documentation to show good cause for failure to comply timely with the requirements of this subsection. Good cause includes, but is not limited to, extended illness, extended medical disability, or other extraordinary hardship which is beyond the control of the person seeking the extension.

(q) [(r)] Transition. Course sponsors who submitted one or more activities to the department and received approval between September 1, 2000, and September 1, 2002, will be approved for one year without payment of a fee upon completion and submission of the sponsor approval form within 90 days of the effective date of these rules.

§265.148. Examinations.

(a)-(b) (No change.)

(c) Application for examination.

(1) (No change.)

(2) An applicant meeting the requirements of §265.145 of this title (relating to Qualifications for Registration as a Sanitarian or

Sanitarian-in-Training) shall be approved to take the exam. The department will notify the applicant of his or her eligibility for examination. Applications that are incomplete or late may cause the applicant to miss the examination deadline. The notice shall include instructions for scheduling to take the examination [~~registration form~~]. The notice of eligibility for examination must be presented at the examination station prior to taking the examination.

(3) The notice of eligibility to take the examination [~~registration form~~] must be submitted [~~completed and returned~~] to the department or the department's designee by the applicant with the required examination fee on or before the deadline set by the department.

(4)-(5) (No change.)

(d)-(f) (No change.)

(g) Failures.

(1) (No change.)

[~~(2) If requested in writing by a person who fails the examination administered under the Act, the department shall allow the person to review the examination under the supervision of a department appointed proctor. The written request must be submitted within 21 days from the date of the notification of failure. All reviews are subject to the department's security requirements. Textbooks and other references may not be used and persons other than the applicant and department personnel may not be present during the review. The department shall set a date and hour within a reasonable time when the examination may be reviewed. The appointment shall be scheduled during regular business hours and in the office of the Sanitarian Registration Program. The department will respond to the request within 30 working days.~~]

(2) [~~(3)~~] A person who fails the examination may retest after 90 [~~ninety~~] days and after paying another examination fee. All retests must be completed not later than one year after the initial date of examination eligibility or the person's application will be voided.

(h)-(i) (No change.)

§265.149. Application Approval or Disapproval.

(a)-(b) (No change.).

(c) An application for registration shall be disapproved if the person has:

(1)-(3) (No change.)

(4) violated any provisions of the Occupations Code, Chapter 1953 [~~Texas Civil Statutes, Article 4477-3 (Act)~~] or this subchapter;

(5) (No change.)

(6) had a certificate or license to engage in a profession in this state or elsewhere revoked for unprofessional conduct, fraud, deceit, negligence, or misconduct in the practice of the profession; or

(7) satisfactory proof is presented to the board establishing that the person has been found guilty of unprofessional conduct, fraud, deceit, negligence, or misconduct in the practice of a profession.

[~~(6) had a certification or registration to engage in sanitation or a related profession revoked by another licensing entity in this state or another state, commonwealth, or territory of the United States for any of the following reasons:~~]

[~~(A) unprofessional conduct;~~]

[~~(B) fraud, deceit, or negligence; or~~]

[~~(C) misconduct in the practice of sanitation or a related profession.~~]

(d) If after review, the department determines that the application should not be approved, the administrator shall give the applicant written notice of the reason for the decision and provide notice and an opportunity for a [~~fair~~] hearing in accordance with the provisions of the Administrative Procedure Act (APA), Government Code, Chapter 2001, applicable state and federal statutes, the Rules of Practice and Procedures of the State Office of Administrative Hearings (SOAH) and this chapter [~~under 25 TAC §1.51 et seq~~].

§265.151. Sanitarian Registration Procedures.

(a) (No change.)

(b) Issuance of certificates of registration [~~licenses~~].

(1) The department will send each applicant whose application has been approved and who has passed the examination a sanitarian registration [~~license~~] and an identification card containing the registration [~~license~~] number.

(2) A certificate of registration [~~license~~] issued under this Act is valid for one year and may be renewed annually on payment of the required renewal fee and documentation of the required continuing education contact hours [~~units~~].

(3) Any registration [~~license~~] or identification card remains the property of the department and must be surrendered on demand by the department.

(c) Replacement registration [~~license~~]. The department will replace a lost, damaged, or destroyed registration [~~license~~] or identification card upon written request from a registrant and payment of the registration [~~license~~] or identification card replacement fee. The request shall include a statement describing the loss or destruction of the original registration [~~license~~] or identification card or be accompanied by the damaged registration [~~license~~] or card.

(d) Name change. Before another registration [~~license~~] or identification card will be issued by the department due to a name change, the registrant must document the name change with a duly executed affidavit provided by the department and a notarized copy of a marriage license, court decree evidencing such change, or a copy of a Social Security card reflecting the new name. The registrant shall return any previously issued registration [~~license~~] or identification card and remit the registration [~~license~~] or identification card replacement fee as set out in §265.143 of this title (relating to Fees).

§265.152. Sanitarian Registration [~~License~~] Renewal.

(a) Purpose. The purpose of this section is to set forth the rules governing registration [~~license~~] renewal for sanitarians.

(b) General.

(1) A registrant must renew the registration [~~license~~] annually.

(2) Each registrant is responsible for renewing the registration [~~license~~] before the expiration date and shall not be excused from paying the renewal fee. Failure to receive notification from the department prior to the expiration date of the registration [~~license~~] will not excuse the sanitarian from renewing.

(3) The department will not renew the registration [~~license~~] of a registrant who is in violation of the Act or this subchapter at the time of application for renewal.

(4) (No change.)

(5) The department shall deny renewal of the registration [~~license~~] of the registrant if renewal is prohibited by the Education Code, §57.491.

(c) Registration [~~License~~] renewal.

(1) At least 45 days prior to the expiration date of a person's registration [~~license~~], the department will send notice to the registrant at the address in the department's records of the expiration date of the registration [~~license~~], the amount of the renewal fee due, and a renewal form which the registrant must complete and return to the department with the required renewal fee.

(2) The renewal form shall require the provision of the preferred mailing address, primary employment address and telephone number, [~~category of employment,~~] and a statement of all misdemeanor and felony offenses for which the registrant has been convicted.

(3) (No change.)

(4) The department shall issue a registrant who has met all requirements for renewal a registration [~~license~~] and identification card.

(d) Late Renewal Reinstatement.

(1) The department shall inform a person who has not renewed a registration within 30 working days following the expiration of the registration [~~license~~] of the amount of the renewal fee and reinstatement fee required for renewal and the date the registration [~~license~~] expired.

(2) A registered sanitarian whose registration [~~license~~] has expired for not more than one year may renew the registration [~~license~~] by submitting to the department the registration [~~license~~] renewal form, the renewal fee, proof of completion of continuing education units, and the reinstatement fee. The renewal must be mailed to the department not more than one year after the expiration date of registration. The postmark date shall be considered as the date the renewal was filed.

(3) A person whose registration [~~license~~] has been expired for more than one year may not renew. The person may apply for a new registration [~~license~~] by meeting the then current requirements and procedures for registration as a sanitarian.

(e) Registration [~~License~~] Expiration.

(1) A registered sanitarian whose registration [~~license~~] has expired may not claim to be a sanitarian or sanitarian-in-training or use the titles "sanitarian" or "sanitarian-in-training".

(2) A registered sanitarian who fails to renew a registration [~~license~~] is required to surrender the certificate of registration [~~license~~] to the department not later than after 90 days from expiration of the registration [~~license~~] or prior to that date at the request of the department.

(f) Military duty. If a registrant fails to timely renew a registration because the registrant is or was on active duty with the uniformed services of the United States of America serving outside the State of Texas, the registrant may renew the registration [~~license~~] in accordance with this subsection.

(1) Renewal of the registration [~~license~~] may be requested by the registrant, the registrant's spouse, or an individual having power of attorney from the registrant. The renewal form shall include a current address and telephone number for the individual requesting the renewal.

(2) Renewal may be requested before or after the expiration of the registration [~~license~~].

(3)-(5) (No change.)

(6) A registrant renewing under this subsection shall not be required to complete continuing education for the period of the active duty service.

§265.153. Grounds for Suspension or Revocation.

A registration or license may be suspended or revoked if the certificate holder: [~~for the following reasons:~~]

(1) practiced fraud or deceit in obtaining the certificate; or

(2) acted in a manner constituting gross negligence, incompetency, or misconduct in the practice of sanitation.

[~~(1) fraud or deceit in obtaining registration or a license including:~~]

[~~(A) presenting false information to the department on any initial application or document; or~~]

[~~(B) presenting false information to the department on any renewal document;~~]

[~~(2) gross negligence:~~]

[~~(A) as determined by the final judgment of a civil or criminal lawsuit; or~~]

[~~(B) as defined by case law;~~]

[~~(3) incompetency including:~~]

[~~(A) a determination of mental incompetency by a court;~~]

[~~(B) commitment, emergency detention, or admission to a mental health facility under the Texas Mental Health Code; or~~]

[~~(C) any mental or physical condition which does not allow performance with reasonable skill or safety; or~~]

[~~(4) misconduct in the practice of professional sanitation including:~~]

[~~(A) presenting false information to the department in any investigation or disciplinary proceeding of the department;~~]

[~~(B) making deceptive, false, or misleading statements concerning:~~]

~~*(i)* qualifications or credentials;~~]

~~*(ii)* advertising for the registrant's services; or~~]

~~*(iii)* the registrant's practice;~~]

[~~(C) failing to comply with an order issued by the department;~~]

[~~(D) consuming alcohol or taking controlled substances not prescribed by a licensed physician while on active duty as a sanitarian;~~]

[~~(E) aiding or abetting the practice of an unlicensed person when that person is required to be registered under the Texas Civil Statutes, Article 4477-3;~~]

[~~(F) verbally, physically, or sexually abusing or attempting to abuse an individual while on active duty as a sanitarian;~~]

[~~(G) falsifying reports made as a sanitarian;~~]

[~~(H) accepting or offering to accept any form of compensation for:~~]

~~*(i)* not reporting a hazard as required; or~~]

~~*(ii)* allowing a person not to correct a hazard found by the sanitarian while on duty; or~~]

[~~(I) while on duty as a sanitarian failing to report a crime when the report is required by law.~~]

§265.154. Registration of Persons with Criminal Backgrounds.

(a) (No change.)

(b) Criminal convictions which directly relate to the occupation of sanitarian shall be considered by the department as follows.

(1) The department may suspend or revoke an existing registration, disqualify a person from receiving a registration [~~license~~], or deny a person the opportunity to be examined for a registration [~~license~~] because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities under that registration in accordance with Occupations Code, §53.022 [~~Texas Civil Statutes, Article 6252-13c, §4~~].

(2) In considering whether a criminal conviction directly relates, the department shall consider:

(A) (No change.)

(B) the relationship of the crime to the purposes for requiring a registration [~~license~~] as a sanitarian;

(C) the extent to which a registration [~~license~~] might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of a sanitarian or sanitarian-in-training. In determining the present fitness of a person, the department shall consider the evidence described in Occupations Code, §53.023 [~~Texas Civil Statutes, Article 6252-13c, §4(c)~~].

(c) The following felonies and misdemeanors directly relate because these criminal offenses indicate an inability or a tendency for the person to be unable to perform or to be unfit for registration [~~license~~]:

(1) the misdemeanor of violating the Occupations Code, Chapter 1953 [~~Texas Civil Statutes, Article 4477-3~~];

(2)-(8) (No change.)

(d) Procedures for revoking, suspending, or denying a license to persons with criminal backgrounds shall be as follows.

(1) (No change.)

(2) In accordance with Occupations Code, §53.051, the administrator shall notify the person in writing of: [~~Texas Civil Statutes, Article 6252-13d, if the department denies, suspends, or revokes an application or registration under this section, the administrator shall give the person written notice:~~]

(A) the reason for the suspension, revocation, denial, or disqualification;

(B) the review procedure provided by §53.052; and

(C) the earliest date the person may appeal the action of the licensing authority.

[~~(A) of the reasons for the decision; ~~]

[~~(B) that the person, after exhausting administrative appeals, may file an action in a district court of Travis County, for review of the evidence presented to the department and its decision; ~~]

[~~(C) that the person must begin the judicial review by filing a petition with the court within 30 days after the department's action is final and appealable; and ~~]

[~~(D) of the earliest date that the person may appeal. ~~]

§265.155. Violations, Complaints, Investigations, and Disciplinary Actions.

(a) Purpose. The purpose of this section is to set out:

(1) violations and prohibited actions under the Occupations Code, Chapter 1953 [~~Texas Civil Statutes, Article 4477-3~~], and this chapter;

(2)-(3) (No change.)

(b)-(c) (No change.)

(d) Investigation of complaints.

(1)-(4) (No change.)

(5) If the administrator determines that there are sufficient grounds to support the complaint, the administrator may propose to deny, suspend, revoke, or not renew a registration [~~license~~].

(e) Disciplinary actions.

(1) The department may deny an application or registration [~~license~~] renewal or suspend or revoke a registration [~~license~~].

(2) Prior to institution of formal proceedings to revoke or suspend a registration [~~license~~], the department shall give written notice to the registrant of the facts or conduct alleged to warrant revocation or suspension, and the registrant shall be given an opportunity, as described in the notice, to show compliance with all requirements of the Act and this chapter, including the opportunity to request an informal conference.

(3) If denial, revocation, or suspension of a registration [~~license~~] is proposed, the department shall give written notice to the applicant or registrant that the applicant or registrant must request, in writing, a [~~fair~~] hearing within 20 days of receipt of the notice. The notice shall state the basis for the proposed action. Receipt of the notice is presumed to occur on the 5th day after the notice is mailed to the last address known to the department unless another date is reflected on a United States Postal Service return receipt.

(4) (No change.)

(5) If the applicant or registrant fails to appear or be represented at the scheduled hearing or informal conference, the person is deemed to be in agreement with the allegations and proposed action and to have waived the right to a hearing.

(6) (No change.)

(7) The [~~fair~~] hearing shall be conducted according to the hearing procedures in §265.154 of this title (relating to Registration of Persons with Criminal Backgrounds), if applicable and in accordance with the provisions of the Administrative Procedure Act (APA), Government Code, Chapter 2001, applicable state and federal statutes, the Rules of Practice and Procedures of the State Office of Administrative Hearings (SOAH) and this chapter [~~the department's fair hearing procedures in 25 TAC §1.51 et seq~~].

(f) Denial, suspension, or revocation.

[~~(1) The department shall suspend or revoke a license issued under this Act if the department determines that the license holder engaged in fraud or deceit in obtaining a license or is grossly negligent, incompetent, or has engaged in misconduct in professional practice. ~~]

(1) [~~(2)~~] If the department suspends or revokes a registration [~~license~~], the suspension or revocation shall remain in effect until the administrator or the department determines that the reason for suspension or revocation no longer exists unless an order specifies a time period. The administrator or the department shall investigate prior to making a determination.

(2) [~~(3)~~] During the time of suspension, the suspended registration [~~license~~] holder shall return his or her certificate of registration [~~license~~] and identification card to the department.

(3) [~~(4)~~] If the suspension overlaps a registration [~~license~~] renewal date, the suspended registration [~~license~~] holder may comply with the renewal procedures in this chapter; however, the department may not renew the registration [~~license~~] until the administrator determines that the reason for suspension no longer exists or the period of suspension is completed.

(4) [~~(5)~~] If the department suspends or revokes a registration [~~license~~], a person may not reapply for a period of one year after suspension or three years after revocation. The department may refuse to issue a registration [~~license~~] if the reason for suspension or revocation continues to exist.

(5) [~~(6)~~] Upon revocation, a registration [~~license~~] holder shall return the certificate of registration [~~license~~] and identification card to the department.

§265.156. Processing Applications.

(a) Time periods. The department shall comply with the following procedures in processing applications for initial registration and registration renewal.

(1) The following periods of time shall apply from the date of receipt of an application until the date of issuance of a written notice that the application is complete and accepted for filing or that the application is deficient and additional specific information is required. A written notice stating that the application has been approved may be sent in lieu of the notice of acceptance of a complete application. The time periods are as follows:

(A) letter of acceptance of application for [~~license of~~] registration or sanitarian- in-training registration [~~license~~] - 30 working days;

(B)-(C) (No change.)

(2) (No change.)

(b)-(d) (No change.)

§265.157. Exemptions.

(a) In accordance with Occupations Code, §§1953.002 - 1953.003, those [~~Those~~] persons such as physicians, dentists, engineers, and doctors of veterinary medicine, who are duly licensed by another official state licensing agency, who by nature of their employment or duties might be construed to come under the provisions of this Act, shall be exempt from the provision of this Act.

(b) (No change.)

§265.158. Advertising.

(a) A registrant shall not use advertising that is false, misleading, or deceptive or advertising that is not readily subject to verification.

(b)-(c) (No change.)

§265.159. Exemption from Renewal and Continuing Education for Retired Professional Sanitarians.

(a) An individual who has been continuously registered for at least five years as a professional sanitarian in Texas may use the titles "Retired Professional Sanitarian" and "R.S. (retired)" in accordance with the following conditions:

(1) the individual must have applied to the department and been approved for the exemption in accordance with subsection (c) of this section;

(2) the individual may not be employed in the field of environmental health, consumer health, or sanitation; and

(3) the individual may not represent him or herself to be currently registered as a sanitarian in Texas by the Texas Department of Health.

(b) Once an individual is approved for the exemption under this subsection, he or she must submit a new application for registration which meets the then current requirements for registration, including passing the examination, and receive a new, current registration card, prior to using the title "Professional Sanitarian" or "RS" again.

(c) An individual who wishes to request an exemption under this subsection must

(1) submit a request form specified by the department;

(2) submit the required fee; and

(3) hold a current registration on the date the request is postmarked.

(d) No renewal form, renewal fee or continuing education is required for individuals approved under this subsection.

(e) Transition. An individual who meets the following requirements is automatically approved under this subsection and may use the titles "Retired Professional Sanitarian" and "R.S. (retired)" without submission of a form or a fee to the department:

(1) meets the requirements of both subsection (a)(2) and (a)(3) of this section;

(2) was continuously registered for at least five years as a professional sanitarian in Texas prior to September 1, 2000; and

(3) his or her registration lapsed prior to the effective date of these rules.

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302202
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 458-7236

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25 TAC §265.150

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Health or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Government Code, §2001.03, which requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act); Occupations Code, Chapter 1953; and the Health and Safety Code, §12.001, which provides the Board of Health (board) with authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeal affects the Occupations Code, Title 12, Chapter 1953; and implement Government Code, §2001.039.

§265.150. Sanitarian-in-Training Preceptorship.

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302203
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 458-7236

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TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 41. HEALTH CARE AND INSURANCE PROGRAMS
SUBCHAPTER C. TEXAS SCHOOL EMPLOYEES GROUP HEALTH (TRS-ACTIVECARE)

34 TAC §41.30

The Teacher Retirement System of Texas (TRS) proposes amendments to §41.30, concerning participation in the Texas School Employees Uniform Group Health Coverage Program ("TRS-ActiveCare") by school districts, other educational districts, charter schools, and regional education service centers.

In addition to proposed changes to improve administrative efficiency and technical revision, the proposed amendments extend deadlines for certain entities to elect to participate in TRS-ActiveCare under certain circumstances. The proposed amendments would allow certain larger school districts to elect to participate in TRS-ActiveCare under certain circumstances. In addition, the proposed amendments provide certain entities that elected not to participate in the program with the opportunity to change that election if certain criteria are met.

Tony Galaviz, Chief Financial Officer, has determined that for each year of the first five year period the proposal is in effect there will be no foreseeable fiscal implication to state and local governments as a result of enforcing or administering the section. There is no foreseeable effect on local employment or local economies as a result of the proposed section. There is no anticipated adverse economic effect on small businesses or micro-businesses as a result of compliance with the proposed amendments.

Mr. Galaviz has also determined that for each year of the first five years the proposal is in effect the public benefit anticipated as a result of the section will be the orderly election of participation in the school and educational employees group coverage programs. Mr. Galaviz has determined that there are no anticipated economic costs to persons required to comply with the proposed section.

Comments on the proposal may be submitted to Charles L. Dunlap, Executive Director, 1000 Red River, Austin, Texas 78701.

The amendments are proposed under the Government Code, Chapter 825, §825.102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for, among other things, the transaction of business of the board. The amendments are also proposed under House Bill 3343, which was passed by the 77th Legislature, 2001, including Insurance Code article 3.50-7, which authorizes TRS to adopt rules to administer the Program. Insurance Code article 3.50-7, §3(c) further authorizes TRS, as trustee, to "adopt rules relating to the program as considered necessary by the trustee.

There are no other laws affected by this proposed amendment.

§41.30. Participation in the Texas School Employees Uniform Group Health Coverage Act (TRS-ActiveCare) by School Districts, Other Educational Districts, Charter Schools, and Regional Education Service Centers.

(a) Manner, form and effect of election. All elections to opt in or opt out of participation in the uniform group coverage under the Texas School Employees Uniform Group Health Coverage Act (the "Act") (TRS-ActiveCare) pursuant to the provisions of Insurance Code, Article 3.50-7, [~~§§5 or 6,~~] as added by the 77th Legislature, 2001 in House Bill 3343 and as permitted by the Teacher Retirement System of Texas (TRS), as trustee of the program, shall be in writing, in a[~~on an election~~] form prescribed by TRS[~~by the Teacher Retirement System of Texas ("TRS"),~~] and received by TRS no later than 5:00 p.m. on or before the applicable election deadline date specified in this section. A notice of[~~An~~] election [~~form~~] otherwise valid received by facsimile before the applicable deadline is acceptable if TRS receives the original, signed notice of election [~~form~~] within seven calendar days after the applicable deadline. An incomplete or unsigned notice of election [~~form~~] will not be deemed received by TRS for purposes of determining whether a valid election has been exercised. A valid election filed with TRS is irrevocable once the election deadline passes, unless TRS is authorized to extend a deadline and does so by resolution of the TRS Board of Trustees. Entities electing to participate in the TRS-ActiveCare program [~~the uniform group coverage under the Act~~] may not discontinue participation unless authorized by Insurance Code, Article 3.50-7, and by appropriate rule or resolution adopted by the TRS Board of Trustees. Entities opting out of participation in the TRS-ActiveCare program[~~uniform group coverage under the Act~~] have no further opportunity to elect to participate except as authorized by Insurance Code, Article 3.50-7, and by appropriate rule or resolution adopted by the TRS Board of Trustees. If an entity has an option to opt in and thereby participate in the TRS-ActiveCare program,[~~coverage under the Act,~~] a failure to properly or timely file a notice of [~~the~~] election [~~form~~] shall have the effect of the entity electing not to participate. Likewise, if an entity has an option to opt out and thereby not participate in the TRS-ActiveCare program, [~~coverage under the Act,~~] a failure to properly or timely file a notice of [~~the~~] election [~~form~~] shall have the effect of the entity electing to participate.

(b) School districts with 500 or fewer employees. Pursuant to Insurance Code, Article 3.50-7 §5(a), school districts with 500 or fewer employees as of January 1, 2001 are required to participate effective September 1, 2002 in the TRS-ActiveCare program,[~~uniform group coverage under the Act,~~] except that certain of these school districts may delay or opt out of participation by specified election deadlines as provided in paragraphs (1) through (3) of this subsection. [~~On or before September 1, 2001, all school districts must furnish information and verifications requested by TRS on the form prescribed by TRS, regardless of whether an election to delay or opt out of participation applies to such district or is being exercised by such school district.~~]

(1) Pursuant to Insurance Code, Article 3.50-7 §5(g), a school district with 500 or fewer employees as of January 1, 2001 that, on January 1, 2001, was individually self-funded for the provision of health care coverage to its employees may elect to opt out of the mandatory participation in the TRS-ActiveCare program [~~coverage~~] effective September 1, 2002, by filing its notice of election [~~form~~] with TRS on or before September 1, 2001. Subsection (h) of this section provides the method for a school district to change its election.

(2) Pursuant to Insurance Code, Article 3.50-7 §5(e), a school district with 500 or fewer employees as of January 1, 2001 that was a member on January 1, 2001 of a risk pool established under the authority of Local Government Code, Chapter 172, may opt out of the mandatory participation in the TRS-ActiveCare program [~~coverage~~] effective September 1, 2002 by filing its notice of election [~~form~~] with TRS on or before September 1, 2001 and electing thereby to continue in the risk pool that the district participated in on January 1, 2001. Subsection (h) of this section provides the method for a school district to change its election.

(3) Pursuant to Insurance Code, Article 3.50-7 §5(h), a school district with 500 or fewer employees as of January 1, 2001, other than a qualifying district as defined in subsection (b)(3)(B) of this section, that is a party to a contract for the provision of health insurance coverage to the employees of the district that is in effect on September 1, 2002 may delay mandatory participation in the TRS-ActiveCare program [~~coverage~~] effective September 1, 2002, by filing its notice of election with TRS on or before September 1, 2001.

(A) A qualifying school district, as defined in subsection (b)(3)(B) of this section, may delay mandatory participation in the TRS-ActiveCare program effective September 1, 2002, by filing its notice of election with TRS on or before 5:00 p.m., Central Time, on August 15, 2002.

(B) A qualifying school district is one that meets the following criteria:

(i) had 500 or fewer employees as of January 1, 2001;

(ii) made available to its employees in the 2001-2002 school year one or more plans of comparable coverage as determined by the TRS comparability report for the 2001-2002 school year; and

(iii) reflected in its comparability compliance report to TRS that at least 50% of the district's aggregate employees covered by plans offered by the district in the 2001-2002 school year were participating in the comparable plan(s) made available by the district.

(C) At the time of an election under subsection (b)(3) of this section, [~~such election,~~] such a school district must provide the expiration date of the contract to TRS and shall begin mandatory participation in the TRS-ActiveCare program [~~uniform group coverage under the Act~~] on the first day of the month immediately following the month in which termination or expiration of the contract occurs.

(c) School districts with 501 or more employees but not more than 1000 employees. School [~~Pursuant to Insurance Code, Article 3.50-7 §5(b), school~~] districts with 501 or more employees but not more than 1000 employees at any time during the 2001 school year, as reflected on any report received by TRS for a reporting period during that school year [~~on January 1, 2001~~] may elect to participate in the TRS-ActiveCare program in the manner prescribed in subsection (h) of this section. [~~uniform group coverage under the Act, with coverage effective September 1, 2005. January 1, 2005 is the deadline for such a school district to file its election with TRS to participate in the uniform group coverage under the Act. Notwithstanding the preceding two sentences, school districts with 501 or more employees may elect to participate prior to September 1, 2005 as set forth in paragraphs (1) and (2) of this subsection. All school districts must furnish information and verifications to TRS on or before September 30, 2001 on a form prescribed by TRS, regardless of whether an election to participate prior to September 1, 2005 applies to such district or is being exercised by such district.~~]

[~~(1) Pursuant to Insurance Code, Article 3.50-7 §5(b-1), school districts may elect to participate prior to September 1, 2005 if TRS determines that participation prior to September 1, 2005 by school districts with more than 500 employees on January 1, 2001 would be administratively feasible and cost-effective. TRS will set the election deadline from time to time by rule or resolution of the TRS Board of Trustees, as applicable.~~]

[~~(2) Pursuant to Insurance Code, Article 3.50-7 §5(a-1), September 30, 2001 is the deadline for a school district with at least 501 but not more than 1,000 employees on January 1, 2001 to file its election to commence participation effective September 1, 2002. A school district that does not elect to opt in early and participate effective September 1, 2002, may elect in the future to opt in if otherwise permitted under this subsection.~~]

(d) School districts with 1001 or more employees. A school district with 1001 or more employees at any time during the 2001 school year, as reflected on any report received by TRS for a reporting period during that school year, may elect to participate in the TRS-ActiveCare program, provided that notice of its election shall be in a form prescribed by TRS and shall be received by TRS at its offices on or after November 22, 2002, in which event the school district will become a participating entity on the later of the first day of the month following (6) months after the date on which TRS receives the notice or a preferred date specified by the school district in its notice. Alternatively, the district will become a participating entity effective on the date approved by the Executive Director, if applicable, as described in subsection (i) of this section.

(e) [~~(d)~~] Educational districts. Pursuant to Insurance Code, Article 3.50-7 §5(i), educational districts whose employees are members of TRS are required to participate effective September 1, 2002 in the TRS-ActiveCare program, [~~uniform group coverage under the Act,~~] except that educational districts with 500 or fewer employees on January 1, 2001 may opt out of participation. September 1, 2001 is the deadline for such an educational district to file its notice of election with TRS to opt out of participation in the TRS-ActiveCare program. [~~uniform group coverage under the Act. Regardless of whether an educational district elects to opt out of participation and file an election form, information and verifications requested by TRS must be furnished by all educational districts on the form prescribed by TRS and returned to TRS on or before September 1, 2001.~~] Subsection (h) of this section provides a method for an educational district to change its election.

(f) [~~(e)~~] Charter schools. Pursuant to Insurance Code, Article 3.50-7 §6, an open-enrollment charter school established under Education Code, Chapter 12, Subchapter D, ("charter school") may elect to participate in the TRS-ActiveCare program. [~~uniform group coverage under the Act.~~] Only an eligible charter school under the Act may elect to participate. [~~A charter school that received funding in accordance with Education Code, Chapter 12, prior to June 1, 2001, must furnish information and verifications requested by TRS, on the form prescribed by TRS, on or before September 1, 2001, whether or not the charter school elects to participate in the uniform group coverage.~~]

(1) Pursuant to Insurance Code, Article 3.50-7 §6(a), to be eligible, a charter school must agree to inspection of all records of the

school relating to its participation in the TRS-ActiveCare program [~~uniform group coverage under the Act~~] by TRS, by the administering firm as defined in Insurance Code, Article 3.50-7 §2(1), by the commissioner of education, or by a designee of any of those entities, and further must agree to have its accounts relating to participation in the TRS-ActiveCare program [~~uniform group coverage under the Act~~]annually audited by a certified public accountant at the school's expense. The agreement of the charter school shall be evidenced in writing and shall constitute a part of a notice of [~~the~~] election [~~form~~] prescribed by TRS pursuant to subsection (a) of this section.

[~~(2) Pursuant to Insurance Code, Article 3.50-7 §6(b), an eligible charter school shall elect to participate in the uniform group coverage under the Act effective September 1, 2002, by filing its election form with TRS on or before September 1, 2001 if the charter school received any state funding in accordance with Education Code, Chapter 12, prior to June 1, 2001.~~]

[~~(3) Pursuant to Insurance Code, Article 3.50-7 §6(b), an eligible charter school that did not receive any state funding in accordance with Education Code, Chapter 12, prior to June 1, 2001, shall elect, if at all, to participate in the uniform group coverage under the Act by filing its election form with TRS on or before the later of September 1, 2001 or the ninetieth calendar day following the date the Texas Education Agency authorized the Comptroller to issue the first payment of state funds to such charter school. Participation in coverage for such eligible charter school shall be effective on the later of September 1, 2002 or the first day of the month following the month in which a valid election to participate is filed with TRS.~~]

(2) This paragraph applies only to charter schools eligible to participate in the TRS-ActiveCare program that either received state funding in accordance with Education Code, Chapter 12, prior to June 1, 2001, and did not file a notice of election to participate on or before September 1, 2001, or received or will receive state funding in accordance with Education Code, Chapter 12, on or after June 1, 2001, and did not or do not file a notice of election to participate on or before the later of September 1, 2001 or the ninetieth calendar day following the date the Texas Education Agency authorized the Comptroller to issue the first payment of funds to such charter school, so long as the ninetieth calendar day is no later than June 30, 2003. Those eligible charter schools may elect to opt into and participate in the TRS-ActiveCare program by filing a notice of election in a form prescribed by TRS and received by TRS in its offices no later than 5:00 p.m., Central Time, on July 1, 2003, in which event the charter school will become a participating entity no later than the first day of the month following sixty (60) days after the date on which TRS receives the notice.

(3) Eligible charter schools that do not elect to participate in the TRS-ActiveCare program pursuant to subsection (f)(2) of this section may opt into and participate in the TRS-ActiveCare program by filing a notice of election in a form prescribed by TRS and received by TRS in its offices at any time or date after 5:00 p.m., Central Time, on July 1, 2003, in which event the charter school will become a participating entity on the later of the first day of the month following six (6) months from the date on which TRS receives the notice or a preferred date specified by the charter school. Alternatively, the eligible charter school will become a participating entity effective on the date approved by the Executive Director, if applicable, as described in subsection (i) of this section.

(g) [~~(f)~~] Regional education service centers. Pursuant to Insurance Code, Article 3.50-7 §5(a), each regional education service center established under Education Code, Chapter 8, is required to participate effective September 1, 2002 in the TRS-ActiveCare program. [~~uniform group coverage under the Act. Information and verifications requested by TRS must be furnished by each regional education service center on the form prescribed by TRS and returned to TRS on or before September 1, 2001.~~]

(h) School districts described in subsection (b)(1), (b)(2), or (c) of this section, and educational districts described in subsection (e) of this section may opt into and participate in the TRS-ActiveCare program as follows:

(1) By filing a notice of election in a form prescribed by TRS and received by TRS in its offices no later than 5:00 p.m., Central Time, on July 1, 2003, in which event the district will become a participating entity no later than the first day of the month following sixty (60) days from the date that TRS receives the notice; or

(2) By filing a notice of election in a form prescribed by TRS and received by TRS in its offices at any time or date after 5:00 p.m., Central Time, on July 1, 2003, in which event the district will become a participating entity on the later of the first day of the month following six (6) months from the date on which TRS receives the notice or a preferred date specified by the school district; or

(3) By complying with subsection (i) of this section.

(i) An entity that will become a participating entity in the TRS-ActiveCare program on the first day of the month following six (6) months after the date on which TRS receives the entity's notice of election but desires to become a participating entity on an earlier date may include in its notice a request that the Executive Director consider an exception to the notice requirement. The notice must include the earlier date on which the entity desires its coverage to begin. The Executive Director will grant the exception if, in his or her sole discretion, upon considering the following criteria, he or she finds that an exception is in the best interest of the TRS-ActiveCare program:

(1) the impact on the requesting entity's employees and dependents;

(2) the impact on the TRS-ActiveCare program's third-party administrator;

(3) the impact on the TRS-ActiveCare program's provider network;

(4) the number of potential enrollees that would be coming into the TRS-ActiveCare program for the first time on the same date; and

(5) the impact on the TRS-ActiveCare program as a whole, taking into account any recommendations and observations of TRS's health care consultant.

[~~(g) This section becomes effective at the earliest date permitted by law, but not later than September 1, 2001.~~]

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

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302283
Charles L. Dunlap
Executive Director
Teacher Retirement System of Texas
Proposed date of adoption: May 23, 2003
For further information, please call: (512) 542-6115

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34 TAC §41.45

The Teacher Retirement System of Texas (TRS) proposes new §41.45, concerning required information from school districts with more than 1,000 employees that elect to participate in the Texas School Employees Uniform Group Health Coverage Program (TRS-ActiveCare").

Proposed new §41.45 would require school districts that had more than 1,000 employees as reflected on any report submitted to TRS during the 2001 school year to submit certain information to TRS when the district submits its notice of election to participate in TRS-ActiveCare or within fifteen calendar days after receiving notification from TRS. The proposal would require that such a school district submit aggregate information for each medical and prescription drug plan that the school district had for the plan year to date for the year in which the school district submits its notice of election, as well as for the prior two complete plan years. Alternatively, if a school district cannot obtain this information from its insurer or third-party administrator, the proposal would require that it submit a letter from the insurer or third-party administrator in which the insurer or third-party administrator represents that it cannot legally provide the information to the district. The proposal indicates that TRS will not deny a school district's request to participate in TRS-ActiveCare based on any information provided. However, it will permit TRS to delay the effective date of a district's participation in TRS-ActiveCare if the district fails to submit the required information. Finally, the proposed rule would allow TRS to specify the format in which the school district must submit the required information.

Tony Galaviz, Chief Financial Officer, has determined that for each year of the first five year period the proposed rule is in effect there will be no foreseeable fiscal implications to state and local governments as a result of enforcing or administering the rule. There is no foreseeable effect on local employment or local economies as a result of the proposed rule. There is no anticipated adverse economic effect on small businesses or micro-businesses as a result of compliance with the proposed new rule.

Mr. Galaviz has also determined that for each year of the first five years the proposed rule is in effect the public benefit anticipated as a result of the rule will be that affected school districts will have notice of these requirements and that TRS will be able to set appropriate premium rates for TRS-ActiveCare. Mr. Galaviz has determined that there are no anticipated economic costs to persons required to comply with the proposed rule.

Comments on the proposal may be submitted to Charles L. Dunlap, Executive Director, 1000 Red River, Austin, Texas 78701.

The new section is proposed under the Government Code, Chapter 825, §825.102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for, among other things, the transaction of business of the board. The new section is also proposed under House Bill 3343, which was passed by the 77th Legislature, 2001, including Insurance Code article 3.50-7, which authorizes TRS to adopt rules to administer the Program. Insurance Code article 3.50-7, §3(c) further authorizes TRS, as trustee, to "adopt rules relating to the program as considered necessary by the trustee.

There are no other laws affected by the new rule.

§41.45. Required Information from School Districts with More than 1,000 Employees

(a) When a large school district, as defined in subsection (b) of this section, submits its notice of election or within 15 calendar days after receiving notice from TRS staff, the large school district must submit to TRS the information listed in the following paragraphs for each medical and prescription drug plan that the large school district offered to its employees during the designated time period. Large school districts must include this information for the year to date for the plan year in which the large school district submits its notice of election (current year) and for the two complete plan years immediately preceding the current year. The required information is:

(1) Plan type (PPO, POS, HMO, etc.), including the effective date of each plan;

(2) Average number of employees participating in each plan;

(3) Average number of covered lives in each plan;

(4) Description of all medical and prescription drug benefits, including effective dates of any changes in each plan;

(5) Total premium rates by family tier for each insured plan, including effective dates of any changes;

(6) Total COBRA rates by family tier for each self-funded plan, including effective dates of any changes;

(7) Required employee contribution rates by family tier for each plan, including effective dates of any changes;

(8) Funding arrangement (fully insured, self-funded, etc.) for each plan;

(9) Total premiums paid by year for each plan, if insured; and

(10) Total claims paid by year for each plan.

(b) For purposes of this section, a large school district means a school district that had 1001 or more employees at any time during the 2001 school year, as reflected on any report received by TRS from that school district for a reporting period in that school year.

(c) If a large school district cannot obtain the information required under subsection (a) of this section, the large school district must obtain a letter from the insurer or third-party administrator stating that the insurer or third-party administrator cannot legally provide that information to the large school district. The large school district must submit that letter to TRS in lieu of the requested information in subsection (a) of this section.

(d) TRS will not deny a large school district's request to participate in TRS-ActiveCare based on any information provided to TRS in accordance with the requirements of this section.

(e) TRS may delay a large school district's effective date of participation in TRS-ActiveCare if the school district does not provide the information required by this section within the time frames prescribed in subsection (a) of this section.

(f) TRS may prescribe the form in which large school districts must submit the information required by this section.

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

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302282

Charles L. Dunlap
Executive Director
Teacher Retirement System of Texas
Proposed date of adoption: May 23, 2003
For further information, please call: (512) 542-6115

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER A. OBJECTIVE, MISSION, AND PROGRAM

37 TAC §§1.3 - 1.5

The Texas Department of Public Safety proposes amendments to §1.3, §1.4, and new §1.5, relating to Objective, Mission, and Program. Amendment to §1.3(b)(1)(F) is necessary due to a name change of that particular service within the department. Subparagraphs (B) and (C) of paragraph (b)(2) are deleted as they are encompassed within subparagraph (A). Amendment to §1.4 is necessary to delete subsection (c) which is no longer a program within the Traffic Law Enforcement Division. New §1.5 is necessary as the Driver License Division, having been deleted from §1.4(c), is now a separate program within the department.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rules are in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be current and updated rules which list the various department programs. There is no anticipated adverse economic effect on individuals, small businesses, or micro- businesses.

Comments on the proposal may be submitted to Mary Ann Courter, General Counsel, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0140, (512) 424-2890.

The amendments and new section are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Government Code, §2001.039. Texas Government Code, §411.004(3) and §2001.039 are affected by this proposal.

§1.3. Programs.

(a) The programs of the Department of Public Safety fall into three general classes:

(1) street and highway traffic management;

(2) crime suppression and control; and

(3) emergency management.

(b) The three major classes of functional departmental programs within the department are as follows:

(1) police law enforcement function:

(A) highway patrol service;

(B) drivers license service;

(C) vehicle inspection service;

(D) license and weight service;

(E) narcotics service;

(F) special crimes[~~criminal intelligence~~] service;

(G) Texas Ranger service;

(H) motor vehicle theft service;

(2) administrative and regulatory function:

(A) drivers license service (primary responsibility);

[~~(B) driver and vehicle records;~~]

[~~(C) statistical services of driver and vehicle records (accident records function only);~~]

(B) [~~(D)~~] vehicle inspection service, parameter vehicle emission and vehicle idle emission inspection and maintenance (primary responsibility);

(C) [~~(E)~~] motorcycle operator training and all- terrain vehicle certification;

(D) [~~(F)~~] controlled substance registration;

(E) [~~(G)~~] alcohol testing program;

(3) staff support and supplemental functions:

(A) inspection and planning;

(B) staff services;

(C) crime records services;

(D) safety education service;

(E) accounting and budget control;

(F) motor carrier lease;

(G) public information;

(H) emergency management;

(I) administrative and legal services;

(J) communications service;

(K) crime laboratory services statewide;

(L) missing children/persons clearinghouse;

(M) automated data processing.

§1.4. Programs under Traffic Law Enforcement Division.

(a) Highway Patrol Service. The program of the Highway Patrol Service is "Police Traffic Supervision and General Law Enforcement on Rural Highways." This program consists of the following major activities:

(1) Police traffic supervision on rural highways:

(A) police traffic direction;

(B) police traffic accident investigation; and

(C) police traffic law enforcement and patrol.

(2) General police work--primarily on rural highways:

(A) criminal law enforcement;

(B) emergencies and disasters; and

(C) security activities.

(b) License and Weight Service. The program of the License and Weight Service is "The Supervision of Commercial Vehicles, Police Traffic Supervision, and General Law Enforcement on Rural Highways." This program includes the following major activities:

(1) Supervision of commercial vehicle traffic:

(A) assistance to commercial vehicle owners and operators on technical matters;

(B) supervision of motor carrier operations; and

(C) traffic law enforcement on commercial vehicles.

(2) Traffic and criminal law enforcement on rural highways.

~~[(c) Drivers License Service. The program of the Drivers License Service is "The Licensing and Postlicense Control of Drivers, Police Traffic Supervision, and General Law Enforcement." This program consists of the following major activities:]~~

~~[(1) examination of new drivers;]~~

~~[(2) improvement and control of problem drivers; and]~~

~~[(3) traffic and criminal law enforcement.]~~

(c) [~~(d)~~] Vehicle Inspection Service. The program of the Vehicle Inspection Service is "Vehicle Inspection Station Supervision, Police Traffic Supervision, and General Law Enforcement." This program includes the following major activities:

(1) Inspection station supervision:

(A) station qualification;

(B) station inspection;

(C) station control; and

(D) supervision of emissions testing.

(2) Traffic and criminal law enforcement by vehicle inspection commissioned officers.

(d) [~~(e)~~] Safety Education Service. The program of the Safety Education Service is "Public Safety Education." This program consists of the following major activities:

(1) Public traffic safety education;

(2) Public education in crime prevention and safety related matters;

(3) Public information;

(4) Cooperation with and assistance to other agencies; and

(5) Traffic and criminal law enforcement.

(e) [~~(f)~~] Communications Service. The program of the Communications Service is "Police Communication." This program consists of the following activities:

(1) Transmission and receipt of department messages;

(2) Transmission and receipt of emergency-type messages for other police agencies; and

(3) Other special assistance to other departments and agencies.

(f) [~~(g)~~] General Obligations. Personnel of all services, agencies, and units in the department are subject to assignment by the director to perform in any program or activity when he deems such assignments necessary.

(g) [~~(h)~~] Motor Carrier Bureau. The program of the Motor Carrier Bureau is to provide administrative support applicable to the License and Weight Service relative to motor carrier safety issues. This program consists of the following sections.

(1) The Motor Carrier Safety Section will provide the support to administer the Motor Carrier Safety Requirements.

(2) The Motor Carrier Records Section maintains all activity reports submitted by the License and Weight Service.

(3) The Motor Carrier Compliance Audit Section performs the administrative function of the enforcement of the Motor Carrier Safety and Hazardous Materials Regulations.

§1.5. Programs under the Driver License Division.

The mission of the Driver License Division is to provide exceptional customer service, promote public safety and enhance safe driving on Texas roadways. The Driver License Program consists of the following major activities:

(1) examination of new drivers and renewal of licensed drivers;

(2) issuance of driver license and identification cards;

(3) improvement and control of problem drivers;

(4) maintenance of driver and accident records;

(5) administration of safety responsibility regulations;

(6) operation of the Administrative License Revocation (ALR) program;

(7) dissemination of driver license information and customer service; and

(8) traffic and criminal law enforcement.

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

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302142
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-2135

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CHAPTER 18. DRIVER EDUCATION
SUBCHAPTER A. COMMERCIAL DRIVER TRAINING SCHOOL TESTING AND ISSUANCE OF INSTRUCTION PERMITS

37 TAC §18.3

The Texas Department of Public Safety proposes an amendment to §18.3, concerning Driver Education. The title of the subchapter is changed to better reflect content. The amendment further

requires that commercial driver training schools obtain an original transaction from a local driver license office in order to have a driver license number to assign to the student when the commercial driver training school issues that student an instruction permit. The department has experienced cases in the past where commercial driver training schools have administered written examinations for the issuance of an instruction permit to students 14 years of age. Since these students are not eligible, due to their age, to be issued the original transaction for the assignment of a driver license number, the department feels that examinations for the issuance of the instruction permit should not be given until the student qualifies for the issuance of the original transaction assigning a driver license number.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to place commercial driver training schools on an equal level for those that issue instruction permits and those that do not. Further, it causes the applicant/student to meet the same criteria in both instances and eliminates confusion. There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Frank Elder, Assistant Chief of Driver License, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0300, (512) 424-2768.

The amendment is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Transportation Code, §521.005.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

§18.3. Tests Administered by a Commercial Driver Training [~~Driving~~] School Prior to Issuing Instruction Permits.

(a) Prior to the issuance of an instruction permit by the commercial driver training school, the school must have obtained the driver license number from the department and must have administered a vision exam, the Class C-Road Signs test, and the Class C--Road Rules test [~~tests~~] to each student . Each [~~and the~~] student issued an Instruction Permit must have passed the Class C--Road Signs and Class C--Road Rules tests with a score of at least 70% on each. The tests will be administered by the commercial driver training school in accordance with the following guidelines:

(1) Vision. The student's distant visual acuity must be checked by the commercial driver training [~~education~~] school utilizing a device suitable for accurately measuring a person's visual acuity and in a manner which is consistent with the procedures prescribed by the manufacturer of the device. The results of the student's visual acuity will be recorded on the Texas Driver Education Certificate, form DE-964. If the student normally wears corrective lenses and/or has no objection to being restricted to wearing corrective lenses while driving, the student must be tested with corrective lenses. Record the uncorrected vision test results on the DE-964 certificate in the spaces provided. If the vision is checked with corrective lenses, the corrected vision test results will also be recorded. The test results will be evaluated upon presentation of the DE-964 certificate to the Driver License office after issuance of the instruction permit by the commercial driver training [~~driving~~] school. If a license restriction is required due to vision limitations, an instruction permit will be issued by the department which indicates the proper restriction(s). Students with obvious visual problems should be referred to the Driver License office where the instruction permit will be issued after testing and any necessary referrals to vision specialists. A student with obvious vision problems should not be issued an instruction permit by a commercial driver training [~~driving~~] school nor should behind-the-wheel instruction be given until the student is issued a permit.

(2) Class C--Road Signs and Class C--Road Rules Tests. The student will be tested by the commercial driver training school using the Class C--Road Signs and Class C-- Road Rules examinations obtained from the Texas Department of Public Safety, General Services Bureau. The tests will be available in English and Spanish. Other languages and oral tests must be referred to a Driver License office. Each student must score a minimum of 70% correct on each exam in order to pass. These results will be recorded on the DE-964 certificate.NO STUDENT MAY BE TESTED PRIOR TO THEIR 15TH BIRTHDAY.

(b) A commercial driver training [~~education~~] school may administer the vision, Class C--Road Signs, and Class C--Road Rules parts of the driver examination only to a student enrolled in the school for purposes of satisfying the examination requirements of the Driver License Law and only when the commercial driver training [~~driving~~] school is going to issue the instruction permit as prescribed herein. Tests may be reviewed with a student after completion of the exam, but students may not be given copies of the tests. The tests may not be reviewed with students prior to testing.

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

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302143
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-2135

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CHAPTER 19. BREATH ALCOHOL TESTING REGULATIONS

SUBCHAPTER A. BREATH ALCOHOL TESTING REGULATIONS

37 TAC §19.7

The Texas Department of Public Safety proposes an amendment to §19.7, concerning Breath Alcohol Testing Regulations. Amendment to subsection (h) is necessary in order to correct a reference to statute.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be current and updated rules. There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses

Comments on the proposal may be submitted to Richard Baxter, Manager, Breath Alcohol Testing, Texas Department of Public

Safety, P.O. Box 4087, Austin, Texas 78773-0570, (512) 424-5201.

The amendment is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Transportation Code, §724.003, which authorizes the department and the State Office of Administrative Hearings to adopt rules to administer this chapter, and Texas Transportation Code, §724.016. Texas Government Code, §411.004(3), Texas Transportation Code, §724.003 and §724.016 are affected by this proposal.

§19.7. Explanation of Terms and Actions.

(a) Alcohol. As used in these regulations alcohol refers to ethyl alcohol (sometimes referred to as grain alcohol or ethanol).

(b) Breath alcohol test (breath alcohol analysis). Refers to the actual analysis of a specimen of the subject's breath to determine the alcohol concentrations thereof. Analyses must be performed by certified individuals on certified instruments which are supervised by a certified technical supervisor in accordance with provisions stated in these regulations.

(c) Certification.

(1) Certification refers to meeting and maintaining the requirements set forth in these regulations. Under the provisions of these regulations, certification is granted to:

(A) operators;

(B) technical supervisors;

(C) breath alcohol test instruments;

(D) techniques, methods and programs (breath alcohol test programs, agencies); and

(E) courses of instruction.

(2) Certification is granted only by the scientific director when minimum requirements of certification have been met. All breath alcohol testing for evidential purposes must be performed under certification in order to be admissible for court purposes.

(3) Certificates are issued to operators, technical supervisors, breath alcohol test instruments, courses of instruction and breath alcohol test programs. Certificates are not issued for reference sample devices.

(d) Certified breath alcohol testing program (techniques and methods). Refers to any breath alcohol testing program meeting and maintaining the provisions stated in §19.3 of this title (relating to Certification of Techniques, Methods, and Programs). This certification is referred to as a total breath alcohol testing program, or total local program. Usually a total testing program refers to an agency or laboratory which meets the minimum requirements of having a certified breath alcohol testing instrument, approved reference sample device, certified technical supervisor, certified operators, and techniques, methods, and programs which have been inspected and certified by the scientific director. In order to obtain certification as a total program, the applying agency or laboratory should first contact the office of the scientific director to determine the criteria and regulations regarding certification. After original contact, the applying agency, laboratory, or school will be given an application with instructions setting forth the necessary requirements for certification. When all requirements for certification are met, including the acquisition of certified personnel, the scientific director will make an on-site inspection prior to the issuance of certification. Issuance of a certificate shall be evidence that the agency, laboratory, or school possesses certified instruments and approved reference sample devices.

(e) Certified course of instruction. Refers to any school, college, agency, institution, or laboratory which meets the requirements stated in §19.6 of this title (relating to Certification of Courses of Instructions) for certification of courses of training. Operator schools will be certified for instruction on specific instrument(s). Applications for school certification must be approved by the scientific director prior to the school's commencement. Certification of operators successfully completing a certified school can only be made by the office of the scientific director through the administration of appropriate examinations. The scientific director has the authority to limit enrollment of any school or deny individual enrollment if, in the opinion of the scientific director, such enrollment would not be in the best interest of the scientific integrity of the breath alcohol test program; for example, if enrollment in a certified operator school would produce more operators than could be supervised by the number of available technical supervisors.

(f) Certified operator. Certified operator refers to an individual who has successfully completed the requirements stated in these regulations and has received certification from the scientific director to operate a specific instrument(s). Operator certification is contingent upon compliance with all provisions stated in §19.4 of this title (relating to Operator Certification).

(g) Inactivation.

(1) Inactivation refers to the voluntary or temporary discontinuance of certification. Unless specifically stated otherwise, this loss of certification will be an administrative program control as opposed to suspension or revocation for violation of these regulations or for unreliability or incompetence. Inactivation may be initiated by anyone having authority to suspend or revoke, by the certified operator in case of voluntary surrender of certification, or by the technical supervisor in case of voluntary surrender of technical supervisor certification. In questionable cases, the decision to accept inactivation or invoke suspension or revocation will be determined by the scientific director. Recertification of an inactivated certificate will require a written request from the applicant to the scientific director and successful completion of the requirements outlined in §19.4(e) of this title (relating to Operator Certification) for recertification and/or other requirements determined by the scientific director. Inactivation will be used in, but not limited to, the following situations:

(A) an operator or technical supervisor transfers to a position where certification as a breath test operator or technical supervisor is no longer needed;

(B) an operator temporarily becomes physically incapable to perform tests for either medical or administrative reasons;

(C) an operator fails to renew current certification and reverts to an inactive status;

(D) an operator terminates employment under which certification was acquired and new employment does not require certification as an operator, or the new location of the operator cannot be ascertained; or

(E) a technical supervisor resigns from an approved or certified program, or is no longer supervising a certified program.

(2) Inactivation will not be considered by the office of the scientific director as a disciplinary action. It is for administrative program control to safeguard the scientific integrity of the breath alcohol test program.

(h) Instruments. Instruments are defined as the device(s) which measure or quantitate the breath alcohol concentration pursuant to §19.1 of this title (relating to Instrument Certification). Certification of instruments is only in conjunction with breath alcohol analysis for evidential purposes as stated in Texas Transportation Code, Chapter 724[~~§724~~]. Approval of breath alcohol test instruments will be made by brand and/or model by the scientific director.

(i) Office of the scientific director. Refers to the scientific director or his staff.

(j) Practice test. Practice test refers to a properly conducted reference analysis by the operator on a certified breath alcohol test instrument using an approved reference sample device. Analyses must be conducted in accordance with provisions stated in §19.3(c)(4) of this title (relating to Certification of Techniques, Methods, and Programs).

(k) Predicted value. The predicted value refers to the known value of the reference sample. It is the result, within plus or minus 0.01g/210 Liters, which should be obtained in analyzing the reference sample.

(l) Proficiency test. A test administered by, and in the presence of, a technical supervisor to establish and/or ascertain the competency of an operator to obtain valid results on breath testing instrumentation.

(m) Public information and demonstration. Public information and demonstration refers to public demonstrations of certified evidential breath testing equipment. Certified evidential instruments should not ordinarily be used for public information programs and/or demonstrations. To utilize the equipment in this manner could violate the scientific integrity and validity of the analytical result in evidential subject analyses. When necessary, public information programs and demonstrations of certified equipment should only be performed by a certified technical supervisor.

(n) Recertification. Recertification refers to the renewal of lost certification; for example, certification loss by inactivation, suspension, or revocation. Unless provided for by specific provision in these regulations, application for recertification requires a written request from the applicant to the scientific director. Upon receipt of the request, the applicant will be advised of the necessary procedure to regain certification. Recertification requires the successful completion of requirements stated in §19.4(e) of this title (relating to Operator Certification) and/or additional requirements as stated by the scientific director.

(o) Reference Sample Device (simulator). A device that contains and delivers a temperature controlled headspace alcohol/water gas sample to a breath testing instrument, a device that artificially simulates the alveolar breath of a human being.

(p) Renewal of current certification. Renewal of current certification is referred to as certification renewal. Renewal of certification refers to the continuance of active certification by meeting the requirements stated in §19.4(b) of this title (relating to Operator Certification). Operator certificates have an expiration date and in order to be kept current require renewal. Failure or inability to renew current certification will result in inactivation or suspension. It is the responsibility of the certificate holder to renew certification. The scientific director, through the technical supervisor, will make available opportunities for certification renewal on a mass basis but cannot accept responsibility for individual renewal.

(q) Reports and records. Reports and records refer to all documents and reports required in breath alcohol testing. The scientific director, through the technical supervisor, supervises all reports and records of analyses conducted and/or documents relating to instruments and reference sample devices. Each specific brand and/or model of instrument requires specific records and forms which are explained in detail in the basic course of instruction for the specific instrument and which should be approved by the scientific director. Certification of a breath alcohol test program requires the completion and proper filing of certain documents relating to arrest. The scientific director, through the technical supervisor, is responsible to see that such documents are completed and filed but does not supervise these documents in regard to content. In addition to any forms, records, or documents required in the breath alcohol test program, the scientific director may require additional specific reports from the technical supervisors or other reports and records in regard to certifications and compliance with program regulations.

(r) Revisions. The changes which are adopted with the revision of these regulations apply only to breath tests that are done after the date of this revision. Previous revisions of these regulations are not nullified and nothing herein should be construed as limiting or canceling the effect of old regulations on tests done under these previous regulations.

(s) Revocation.

(1) Revocation is an action taken only by the scientific director. To regain certification after revocation requires a written request from the applicant to the office of the scientific director and successful completion of the requirements for certification and/or recertification and/or any additional requirements determined by the scientific director. Revocation invalidates any current program, course of instruction, instrument, operator, or technical supervisor certification issued to the revoked entity for the period of revocation and until recertification. Unless provided for by specific provision in these regulations revocation will apply in cases such as, but not limited to, the following:

(A) a certified instrument that is found to be unreliable, inaccurate, or unserviceable, and continued use of which, in the opinion of the scientific director, would not maintain the scientific integrity of the breath alcohol test program;

(B) a certified breath alcohol test program, or course of instruction which can no longer maintain the provisions of these regulations; or

(C) an operator or technical supervisor certificate not in compliance with the provisions stated in these regulations or when continuance of such certification in the opinion of the scientific director would not uphold the scientific integrity of the breath alcohol test program.

(2) Revocation will not be considered by the scientific director as a disciplinary action. Revocation will be for the purpose of enforcing these regulations and maintaining the scientific integrity of the breath alcohol test program.

(t) Scientific director. Denotes the title of the individual responsible for the implementation, administration, and enforcement of the Texas breath alcohol testing regulations. For the purpose of these regulations it shall also denote those as specified in §19.1(a) of this title (relating to Instrument Certification).

(u) Security. Refers to the safeguard of certified instruments at testing locations. Only certified operators, technical supervisors, and individuals defined in §19.3(c)(2) of this title (relating to Certification of Techniques, Methods, and Programs) shall have access to certified breath alcohol testing instruments. The technical supervisor has the responsibility and authority to maintain security at all times.

(v) Site location. Refers to the physical site where the breath alcohol testing instrument and reference sample device is located, and

where testing is conducted pursuant to §19.3(b) of this title (relating to Certification of Techniques, Methods, and Programs). Relocation of certified breath alcohol test equipment requires the approval of the technical supervisor(s) and documentation of this fact. The technical supervisor has the authority to approve the site with regards to technical acceptability for breath alcohol testing and pursuant to subsection (u) of this section.

(w) Suspension. Suspension refers to the immediate cancellation of certification. A suspension can be initiated by the scientific director, technical supervisor, or designated representative of the scientific director. Prior to appeal to the director of the Department of Public Safety, suspensions may be set aside or sustained only after investigation by the scientific director. The minimum period of suspension as determined by the scientific director will be for a period of time not less than 30 days. The technical supervisor or a designated representative of the scientific director may recommend a specific period of suspension to the scientific director. Usually, suspensions will be immediate action taken by the suspending authority when there is reason to believe that unreliable or incompetent operations have occurred or there has been some violation of these regulations. Due to the immediate nature and the procedure for appeal, the individual initiating the suspension shall not be required to confer, consult, or obtain permission or approval from anyone prior to the initiation of the suspension. However, all suspensions must be consistent with procedures outlined in these regulations. A suspension invalidates any certification issued to the suspended entity for a period of suspension until recertification. To regain certification after the period of suspension requires a written request from the applicant to the scientific director. Upon receipt of the written request, the applicant will be advised of the necessary steps to be taken in order to regain certification. Suspension will not be considered by the scientific director as a disciplinary action but shall be for the purpose of maintaining the scientific integrity of the breath alcohol test program and upholding these regulations.

(x) System blank analysis (Sample Chamber Purge). An analysis of ambient air, free of alcohol and other interfering substances, that yields a result of 0.00.

(y) Technical supervisor and technical supervision. This term refers to an individual meeting the minimum requirements set forth in §19.5 of this title (relating to Technical Supervisor Certification) and certified by the scientific director. Technical supervisor certification, like operator certification, is limited to specific instrumentation. Technical supervisors have the responsibility and the authority to inactivate, suspend, or recommend revocation of any certification under their supervision. Inactivation, suspension, or recommended revocation by the technical supervisor will not be considered a disciplinary action, but a means to enforce these regulations and safeguard the scientific integrity of the breath alcohol testing program. Certification as a technical supervisor does not in itself imply disciplinary control or administrative in-line supervision over certified operators. However, technical supervisors must exercise complete technical supervisory authority over all operators in their assigned areas in all matters pertaining to breath alcohol testing and in enforcement of all provisions stated in these regulations. Certification of the technical supervisor and the program in which the technical supervisor operates is contingent upon the technical supervisor's ability to communicate directly with the office of the scientific director in accordance with the provisions stated in these regulations and by directives issued by the scientific director. The primary function of the technical supervisor is to provide the technical, administrative, and supervisory expertise in safeguarding the scientific integrity of the breath alcohol testing program and to assure the breath alcohol testing program's acceptability for evidential purposes. The technical supervisor, in matters pertaining to breath alcohol testing, is the field agent of the scientific director. Supervision by the technical supervisor in accordance with the provisions stated in these regulations shall include, but not be limited to:

(1) supervision of certified operators in performance of breath alcohol test operations, including the proper completion of forms and records, and operator's compliance with the provisions stated in these regulations;

(2) supervision of data gathered for initial certification and/or approval of individual instruments and reference sample devices in an assigned area;

(3) supervision of techniques of testing, maintaining scientific integrity and upholding these regulations as they apply to the certification of a total testing program;

(4) selection and supervision of a testing location as it applies to security and technical suitability for testing;

(5) supervision of compliance with the policy of public information and/or demonstrations of breath alcohol testing instruments and equipment;

(6) all technical, administrative, and regulatory aspects of breath alcohol testing within a designated area; and

(7) expert testimony by direct testimony or by written affidavit concerning all aspects of breath alcohol testing within an assigned area.

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

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302144
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-2135

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CHAPTER 23. VEHICLE INSPECTION
SUBCHAPTER G. VEHICLE EMISSIONS INSPECTION AND MAINTENANCE PROGRAM

37 TAC §23.93

The Texas Department of Public Safety proposes amendments to §23.93, concerning vehicle emissions inspection requirements. The section defines commonly used terms; provides for control procedures; testing waivers and extensions; prohibitions; recognition requirements for recognized emissions repair technicians and recognized repair facilities; requirements for certified emissions inspection stations and inspectors; audit authority; and the adoption of department manuals for operation of certified emissions inspection stations.

The primary reason for this proposed rulemaking is the adoption by the Texas Commission on Environmental Quality (TCEQ) of amendments to 30 TAC §114.50, Vehicle Inspection and Maintenance, and corresponding revisions to the Texas Inspection and Maintenance State Implementation Plan (Texas I/M SIP), adopted on December 4, 2002 and published in the December 20, 2002 issue of the *Texas Register* (27 TexReg 11996). The significant amendment revises the I/M program in El Paso

County, converting the on-board diagnostic (OBD) testing requirement beginning January 1, 2003 into a contingency measure effective 12 months after publication in the *Texas Register* of the determination by TCEQ that the contingency measure will be implemented. The proposed amendments by the department incorporate these changes in its implementation of the vehicle emissions inspection and maintenance program.

The department also proposes amendments clarifying administration of the I/M program. These amendments include clarifying the definition of a "designated vehicle," adding the definition of an "excepted vehicle," clarifying the definition of the term "primarily operated," and clarifying the term "two years old." The proposed amendments also clarify department control requirements regarding inspection in non-I/M counties by use of an affidavit. Finally, the department clarifies the prerequisites for granting an individual vehicle waiver.

On February 4, 2003, the Vehicle Emissions Inspection and Maintenance Advisory Committee reviewed the proposed amendment. Members of the Advisory Committee provided comments concerning the "two years old" definition recommending use of the vehicle's date of manufacture. The department revised the proposed amendment based on this comment.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the section as proposed will be in effect, there will not be significant fiscal implications to state or local governments as a result of enforcing and administering the section.

Mr. Haas also determined that for each year of the first five-year period the section as proposed will be in effect, the public benefit anticipated will be the continued use of the existing Two-Speed Idle (TSI) test in the El Paso program area, without broadening the scope of vehicle emissions testing by incorporating OBD testing. The section as proposed also provides the public with a clearer understanding of the requirements in obtaining an individual vehicle waiver. There is no significant anticipated economic cost to persons required to comply with the section as proposed.

Mr. Haas has also determined there will be no significant fiscal implications to small and micro-businesses engaged in the business of state vehicle inspections resulting from the implementation of the section as proposed because the current OBD requirement would not have become effective until January 1, 2003. The department estimates there have been no expenditures by affected individuals and businesses to upgrade existing equipment or purchase new equipment in order to incorporate the OBD testing. The suspension deletion of the OBD testing requirement in El Paso County would eliminate a potential cost of $7,000 to $16,000 for each new or upgraded emission test analyzer.

Comments on the proposal may be submitted to E. Eugene Summerford, Legal Counsel, Vehicle Inspections and Emissions, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0543; or by fax at (512) 424-2774. All comments must be received no later than 20 days after publication in the *Texas Register* and should reference "Proposed Rule 37 TAC §23.93" in the subject line or in the beginning of the text.

The amendment is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission (commission) to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §548.301, which authorizes the commission to adopt rules establishing a motor vehicle emission inspection and maintenance program.

Texas Government Code, §411.004(3) and Texas Transportation Code, §548.301 are affected by this proposal.

§23.93. Vehicle Emissions Inspection Requirements.

(a) General. The rules of the Texas Department of Public Safety set out herein are to maintain compliance with the Texas Clean Air Act. The department is authorized to establish and implement a vehicle emissions testing program that is a part of the annual vehicle safety inspection program, in accordance with Texas Transportation Code, Chapter 548, the Health and Safety Code, Chapter 382, and rules adopted thereunder.

(b) Terms and/or Definitions. Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the Texas Department of Public Safety (DPS), the terms used by the DPS have the meanings commonly ascribed to them in the fields of air pollution control and vehicle inspection. In addition to the terms [~~which are~~] defined by the TCAA, the following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Affected county--refers to any county with a motor vehicle emissions inspection and maintenance program under Texas Transportation Code, §548.301 and Health and Safety Code, §382.037. The Texas Commission on Environmental Quality (TCEQ) specifies these [~~These~~] counties [~~are specified in Texas Natural Resource Conversation Commission (TNRCC) rules,~~] in 30 TAC §114.50.

(2) Acceleration Simulation Mode (ASM-2) I/M test--the Acceleration Simulation Mode (ASM-2) test is an emissions test using a dynamometer (a set of rollers on which a test vehicle's tires rest) which applies an increasing load or resistance to the drive train of a vehicle thereby simulating actual tailpipe emissions of vehicle as it is moving and accelerating. The ASM-2 vehicle emissions test is comprised of two phases:

(A) the 50/15 mode--in which the vehicle is tested on the dynamometer simulating the use of 50% of the vehicle available horsepower to accelerate at a rate of 3.3 miles per hour (mph) per second to a constant speed of 15 mph; and

(B) the 25/25 mode--in which the vehicle is tested on the dynamometer simulating the use of 25% of the vehicle available horsepower to accelerate at a rate of 3.3 mph per second to a constant speed of 25 mph.

(3) Department--refers to the Texas Department of Public Safety.

(4) Designated Vehicles--refers to all motor vehicles, as defined in the Texas Transportation Code, §541.201, unless otherwise exempted or excepted, that are:

(A) capable of being powered by gasoline;

(B) [~~from~~] two years old through [~~to~~] and including 24 years old; and

(C) registered, [~~in or~~] required to be registered, [~~in and~~] primarily operated, or [~~in a designated county; and~~]

[~~(D)~~] subject to the"Emissions Test on Resale" requirement in an affected county.

(5) Director--refers to the director of the Texas Department of Public Safety or the designee of the director.

(6) Emissions control component--refers to a device designed to control or reduce the emissions of substances from a motor

vehicle or motor vehicle engine installed on or incorporated in a motor vehicle or motor vehicle engine in compliance with requirements imposed by the Motor Vehicle Air Pollution Control Act (42 United States Code, §1857 et seq) or other applicable law. This term shall include, but not be limited to the following components: air injection system (AIS); catalytic converter; coil; distributor; evaporative canister; exhaust gas recirculation (EGR) valve; fuel filler cap/gas cap; ignition wires; oxygen sensor; positive crank case ventilation (PCV) valve; spark plugs; thermal reactor/thermostatic air cleaner; and hoses, gaskets, belts, clamps, brackets, filters or other accessories and maintenance items related to these emissions control components and systems.

(7) Emissions Test on Resale--refers to an emissions test performed on a vehicle coming into an affected county from another county within the state which does not have an I/M program (non-affected county); the ownership has changed as the result of a retail sale; and a registration and/or titling change is necessary. This test is not required on model year 1996 and newer vehicles if it has less than 50,000 "actual" miles.

(8) EPA--refers to the United States Environmental Protection Agency; the federal agency that monitors and protects air and water resources.

(9) Exempt vehicles--refers to vehicles otherwise considered "designated vehicles" that are:

(A) antique vehicles, as defined by Texas Transportation Code, §502.275;

(B) slow-moving vehicles, as defined by Texas Transportation Code, §547.001; or

(C) motorcycles, as defined by Texas Transportation Code, §502.001.

(10) Excepted vehicle-refers to [~~(D)~~] motor vehicles registered in an affected county but not primarily operated in an affected county.

(11) [~~(10)~~] I/M--refers to Inspection and Maintenance.

(12) [~~(11)~~] Inspection station--refers to an inspection station/facility as defined in the Texas Transportation Code, §548.001.

(13) [~~(12)~~] Inspector--refers to an inspector as defined in the Texas Transportation Code, §548.001.

(14) [~~(13)~~] Motorist--refers to a person or other entity responsible for the inspection, repair, maintenance or operation of a motor vehicle, which may include, but is not limited to, owners or lessees.

(15) [~~(14)~~] Out-of-cycle test--refers to an emissions test not associated with the annual vehicle safety inspection testing cycle.

(16) [~~(15)~~] OBD (On-board diagnostic system)--Computer system installed in a 1996 and newer vehicles by the manufacturer which monitors the performance of the vehicle emissions control equipment, fuel metering system, and ignition system for the purpose of detecting malfunction or deterioration in performance that would be expected to cause the vehicle not to meet emissions standards. All references to OBD should be interpreted to mean the second generation of this equipment, sometimes referred to as OBD II.

(17) [~~(16)~~] Person--refers to a human being, a partnership or a corporation that is recognized by law as the subject of rights and duties.

(18) [~~(17)~~] Primarily operated in--refers to the use, including driving, parking, or storing, of a motor vehicle for [~~greater than~~] 60 days or more per calendar year in affected [~~designated~~] counties. It is presumed that a vehicle is primarily operated in the county in which it is registered; the burden is on the motorist to overcome this presumption by a preponderance of the evidence.

(19) [~~(18)~~] Re-test--refers to a successive vehicle emissions inspection following the failure of an initial emissions test by a vehicle.

(20) [~~(19)~~] Revised Texas I/M SIP--refers to the most current Texas Inspection and Maintenance State Implementation Plan.

(21) [~~(20)~~] Safety inspection--refers to a compulsory vehicle inspection performed as required by Texas Transportation Code, Chapter 548, by an official inspection station issued a certificate of appointment by the department.

(22) [~~(21)~~] Safety inspection certificate--refers to an inspection certificate issued under Texas Transportation Code, Chapter 548, after a safety inspection as defined herein.

(23) [~~(22)~~] Tampering-related repairs--refers to repairs to correct tampering modifications, including but not limited to engine modifications, emissions system modifications, or fuel-type modifications disapproved by the TCEQ [~~TNRCC~~] or the EPA.

(24) [~~(23)~~] Testing cycle--refers to an annual cycle for which a motor vehicle is subject to a vehicle emissions inspection.

(25) [~~(24)~~] Test-only facilities--refers to inspection stations certified to do emissions testing that are not engaged in repairing, replacing and/or maintaining emissions control components of vehicles. Acceptable repairs in test-only facilities shall be oil changes, air filter changes, repairs and/or maintenance of non-emissions control components, and the sale of auto convenience items.

(26) [~~(25)~~] Test-and-repair facilities--refers to inspection stations certified to do emissions testing that engage in repairing, replacing and/or maintaining emissions control components of vehicles.

(27) TCEQ [~~(26) TNRCC~~]--refers to the Texas [~~Natural Resource Conservation~~] Commission on Environmental Quality.

(28) [~~(27)~~] Two-speed idle (TSI) I/M test--a test equipment meeting TCEQ [~~TNRCC~~] specifications for the measurement of the tailpipe exhaust emissions of a vehicle while the vehicle idles, first at a lower speed and then again at a higher speed.

(29) [~~(28)~~] Two years old--refers to a vehicle upon the expiration of the initial two-year inspection certificate; or any time the vehicle is presented for inspection or required to be inspected during the year when the date of manufacture indicated on the manufacturer's federal certification label (49 CFR 567.4) is greater than 2 years [~~vehicle model year is two years less than the current calendar year (current calendar year minus two years), whichever comes first~~]. In the event the federal certification label is not present or legible, the first month of production of the model year shall be used as the date of manufacture.

(30) [~~(29)~~] Twenty-four years old--refers to a vehicle when the vehicle model year is 24 years less than the current calendar year (current calendar year minus 24 years).

(31) [~~(30)~~] Uncommon part--refers to a part that takes more than 30 days for expected delivery and installation.

(32) [~~(31)~~] VIR--refers to the Vehicle Inspection Report.

(33) [~~(32)~~] VRF--refers to the Vehicle Repair Form.

(c) Applicability. The requirements of this section and those contained in the Revised Texas I/M SIP shall be applied to motorists, vehicles, vehicle inspection stations and inspectors certified by the department to inspect vehicles, and to Recognized Emissions Repair

Facilities of Texas and Recognized Emissions Repair Technicians of Texas, as defined herein.

(d) Control requirements.

(1) In affected counties, in order to be certified by the department as a vehicle inspection station, the vehicle inspection station must be certified by the department to perform vehicle emissions testing. This provision does not apply to vehicle inspection stations certified by the department as vehicle inspection stations endorsed only to issue one or more of the following inspection certificates: trailer certificates, motorcycle certificates, commercial windshield certificates, commercial trailer certificates.

(2) In affected counties, only department certified inspection stations that are certified by the department to do emissions testing may perform the annual vehicle safety inspection on designated vehicles.

(3) An inspection station in a county not designated as an affected county [herein] shall not inspect a designated vehicle [that is capable of being powered by gasoline, from two years old to and including twenty-four years old and registered in an affected county] unless the inspection station is certified by the department to perform [do] emissions testing, or unless the motorist presenting the vehicle signs an affidavit on a form provided by the department stating the vehicle is excepted from emissions testing. [one of the following: (]The affidavit will be held by the inspection station for collection by the department.[)] Under the following exceptions, a vehicle registered in an affected county may receive a safety inspection at an inspection station in a non-affected county.

(A) The [the] vehicle is not a designated vehicle[;] because it has not and will not be primarily operated in an affected county. This exception includes the following examples.

(i) Company fleet vehicles owned by business entities registered at a central office located in an affected county but operated from branch offices and locations in non-affected counties on a permanent basis.

(ii) Hunting and recreational vehicles registered to the owner in an affected area, but permanently maintained on a hunting or vacation home site in a non-affected county.

(B) The [the] vehicle no longer qualifies as a designated vehicle because is no longer and will be no longer primarily operated in an affected county. For example, the vehicle registration indicates it is registered in an affected county, but the owner has moved, does not currently reside in, nor will primarily operate the vehicle in an affected county.[; or]

(C) The [the] vehicle is registered in an affected county, not primarily operated in an affected county, and currently operated in a non-affected county, but will not return to an affected county prior to the expiration of the current inspection certificate. Under this exception the vehicle will be reinspected at an inspection station certified to do vehicle emissions testing [however] immediately upon return to an affected county [the vehicle will be reinspected at an inspection station certified to do vehicle emissions testing].Examples of this exception include:

(i) vehicles operated by students enrolled at learning institutions.

(ii) vehicles operated by persons during extended vacations, and

(iii) vehicles operated by persons on extended out-of-town business.

(4) All designated vehicles must be emissions tested at the time of and as a part of the designated vehicle's annual vehicle safety inspection at an [a DPS certified] inspection station [that is] certified by the department to perform [do] vehicle emissions testing. The following exceptions apply to this provision. [are for:]

(A) Commercial [commercial] motor vehicles as defined by the Texas Transportation Code, §548.001 meeting[, that meet] the definition of "designated vehicle" as defined by this section [herein]. Designated [Said "designated"] commercial motor vehicles must be emissions tested at an [a DPS certified] inspection station [that is] certified by the department to perform [do] vehicle emissions testing and must be issued [have] a unique emissions test-only inspection certificate, as authorized by Texas Transportation Code, §548.251, affixed to the lower left-hand corner of the windshield of the vehicle, immediately above the registration sticker, prior to receiving a commercial motor vehicle safety inspection certificate pursuant to Texas Transportation Code, Chapter 548. The unique emissions test-only inspection certificate must be issued within 15 calendar days prior to the issuance of the commercial motor vehicle safety inspection certificate. The unique emissions test-only inspection certificate will expire at the same time the newly issued commercial motor vehicle safety inspection certificate expires.[; and]

(B) Vehicles [vehicles] presented for inspection by motorists in counties not designated as affected counties meeting [that meet] the exceptions listed in paragraphs(3)(A)-(C) [requirements of paragraph (3)(C)] of this subsection.

(5) A vehicle with a currently valid safety inspection certificate presented for an "Emissions Test on Resale" inspection shall receive an emissions test. The owner or selling dealer may choose one of two options:

(A) a complete safety and emissions test and receipt of a new inspection certificate, or

(B) an emissions test and receipt of the unique emissions test-only inspection certificate affixed to the lower left-hand corner of the windshield of the vehicle, immediately above the registration sticker. The unique emissions test-only inspection certificate will expire at the same time as the safety inspection certificate currently displayed on the vehicle at the time the unique emissions test-only certificate is issued.

(6) Any vehicle not listed as an exempt vehicle that is capable of being powered by gasoline, from two years old to and including 24 years old, presented for the annual vehicle safety inspection in affected counties will be presumed to be a designated vehicle and will be emissions tested as a part of the annual vehicle safety inspection. Emissions testing will be conducted as follows:

(A) in all affected counties, except El Paso County: [effective until April 30, 2002, all designated vehicles will be emission tested using approved two-speed idle I/M test equipment (TSI).]

[(B) effective May 1, 2002:]

(i) all 1996 model year and newer designated vehicles, which are equipped with an On-board diagnostic system, will be emission tested using approved OBD I/M test equipment, [excluding El Paso County;] and

(ii) all 1995 model year and older designated vehicles [in all affected counties, excluding El Paso County,] will be emission tested using the [a] Acceleration Simulation Mode (ASM-2) I/M test. [All 1995 model year designated vehicles in El Paso will be emissions tested using approved two-speed idle I/M test equipment (TSI).]

(iii) Vehicles which can not be tested using the prescribed emission testing equipment will be tested using the following default methods. OBD vehicles will be tested using ASM-2, if the vehicle cannot be tested on ASM-2 ([~~except for El Paso County,~~] four-wheel drive and unique transmissions), then the vehicle will be tested using TSI.

(B) This subparagraph applies to all designated vehicles [~~(C) effective January 1, 2003,~~] in El Paso County.[~~:~~]

~~*(i)* all 1996 model year and newer designated vehicles, which are equipped with an On-board diagnostic system, will be emission tested using approved OBD I/M test equipment; and~~]

(i) All [~~(ii) all 1995 model year and older~~] designated vehicles will be emissions tested using approved two-speed idle I/M test equipment (TSI).

(ii) In the event that the Texas Commission on Environmental Quality publishes notification in the *Texas Register* that contingency I/M measures in El Paso County are necessary, the following requirements become effective 12 months after the notice is published.

(I) All 1996 model year and newer designated vehicles, which are equipped with an On-board diagnostic system, will be emission tested using approved OBD I/M test equipment.

(II) All 1995 model year and older designated vehicles will be emissions tested using approved two-speed idle I/M test equipment (TSI).

(III) [~~(iii)~~] OBD vehicles which can not be tested using the prescribed emission testing equipment will be tested using the approved two-speed idle I/M test equipment (TSI).

(7) Vehicles registered in affected counties will be identified by a distinguishing validation registration sticker or a registration sticker imprinted with the name of the affected county, as determined by the Texas Department of Transportation.

(8) Vehicles inspected under the vehicle emissions testing program and found to meet the requirements of the program in addition to all other vehicle safety inspection requirements will be passed by the certified inspector, who will thereafter affix to the windshield a unique emissions inspection certificate pursuant to Texas Transportation Code, §548.251. The only valid inspection certificate for designated vehicles shall be a unique emissions inspection certificate issued by the department, unless otherwise provided herein.

(9) The department shall perform challenge tests to provide for the reinspection of a motor vehicle at the option of the owner of the vehicle as a quality control measure of the emissions testing program. A motorist whose vehicle has failed an emissions test may request a free challenge test through the department within 15 calendar days, not including the date of the emissions test being challenged or questioned.

(10) Federal and State governmental or quasi-governmental agency vehicles that are primarily operated in affected counties that fall outside the normal registration or inspection process shall be required to comply with all vehicle emissions I/M requirements contained in the Texas I/M SIP.

(11) Any motorist in an affected county whose designated vehicle has been issued an emissions-related recall notice shall furnish proof of compliance with the recall notice prior to having their vehicle emissions tested the next testing cycle. As proof of compliance, the motorist may present a written statement from the dealership or leasing agency indicating the emissions repairs have been completed.

(12) Inspection certificates issued prior to an effective date in this section shall be valid and shall remain in effect until the expiration date thereof.

(13) A unique emissions test-only inspection certificate expires at the same time the annual vehicle safety inspection certificate it relates to expires.

(14) The department will perform quarterly equipment and/or gas audits on all vehicle emissions [~~exhaust gas~~] analyzers used to perform vehicle emissions tests. If a vehicle emissions [~~exhaust gas~~] analyzer fails the calibration process during the gas audit, the department shall cause the appropriate inspection station to cease vehicle emissions testing with the failing emissions [~~exhaust gas~~] analyzer until all necessary corrections are made and the vehicle emissions [~~exhaust gas~~] analyzer passes the calibration process.

(15) Pursuant to the Revised Texas I/M SIP, the department shall administer and monitor a follow-up loaded mode I/M test on at least 0.1% of the vehicles subject to vehicle emissions testing in a given year to evaluate the mass emissions test data as required in 40 CFR 51.353(c)(3). A contractor(s) may be used to assist in collecting, reviewing and evaluating program data.

(16) On-road testing (Remote Sensing Program) verification emissions inspection. Vehicle owners receiving a notice from the department requiring an emission test shall receive an out-of-cycle test, if the vehicle already has a valid safety and emission inspection certificate. This test will be conducted in accordance with the terms of the department's notice. The results of this verification emissions inspection shall be reported (on-line) to the Texas Information Management System Vehicle Identification Database (VID). Vehicles identified to be tested by the notice will receive the prescribed test regardless of the county of registration and whether the vehicle has a currently valid safety inspection certificate or a valid safety and emissions inspection certificate. When the vehicle has a currently valid safety inspection certificate or a valid safety and emissions inspection certificate, the owner may choose one of two options:

(A) a complete safety and emissions test and receipt of a new inspection certificate, or

(B) an emissions test and receipt of the unique emissions test-only inspection certificate affixed to the lower left-hand corner of the windshield of the vehicle, immediately above the registration sticker. The unique emissions test-only inspection certificate will expire at the same time as the safety inspection certificate currently displayed on the vehicle at the time the unique emissions test-only certificate is issued.

(17) Emissions testing of vehicles requiring vehicle identification insignias issued by public institutes of higher learning. Effective January 1, 2002 as per §51.207 of the Texas Education Code, public institutions of higher learning located in affected counties will require vehicles to be emissions tested as a condition to receive a permit to park or drive on the grounds of the institution, including vehicles registered out-of-state. The following instructions are provided for handling this type of inspection.

(A) Vehicles presented under this subsection shall receive an emissions inspection and be issued a unique emissions test-only inspection certificate which will be affixed to the lower left-hand corner of the windshield of the vehicle. Since this inspection certificate is not dated, this certificate will expire as follows:

(i) Vehicles registered in this state from counties without an emissions testing program. The unique emissions test-only inspection certificate will expire at the same time as the safety

inspection certificate currently displayed on the vehicle at the time the unique emissions test-only certificate is issued.

(ii) Vehicles registered in another state. The unique emissions test-only inspection certificate will expire on the twelfth (12th) month after the month indicated on the date of the Vehicle Inspection Report (VIR) generated by the emissions inspection. Under no circumstances is the inspection station authorized to remove an out-of-state inspection and/or registration certificate, to include either safety, emissions, or combination of any of the aforementioned.

(B) The operator of a vehicle presented for an emissions inspection under this subsection will be notified to retain the Vehicle Inspection Report (VIR) as proof of emissions testing under the requirements of §51.207 of the Texas Education Code.

(e) Waivers and extensions. Under this section, the department may issue an emissions testing waiver or time extension to any vehicle that passes all requirements of the standard safety inspection portion of the annual vehicle safety inspection and meets the established criteria for a particular waiver or time extension. An emissions testing waiver or a time extension defers the need for full compliance with vehicle emissions standards of the vehicle emissions I/M program for a specified period of time after a vehicle fails an emissions test. The department will accept applications for emissions testing waivers and time extensions There are four types of emissions testing waivers and time extensions: Low Mileage Waiver; Individual Vehicle Waiver; Parts Availability Time Extension; and Low-Income Time Extension. The motorist may apply once each testing cycle for the Low Mileage Waiver, Individual Vehicle Waiver, and Parts Availability Time Extension. The motorist may apply every other testing cycle for the Low-Income Time Extension.

(1) Low Mileage Waiver.

(A) Eligibility. A vehicle may be eligible for a Low Mileage Waiver provided that it has:

(i) failed both its initial emissions inspection and re-test; and

(ii) incurred qualified emissions-related repairs, as defined herein, whose cost is equal to at least $100; and

(iii) the vehicle has been driven less than 5,000 miles in the previous inspection cycle; and

(iv) the vehicle will be reasonably expected to be driven fewer than 5,000 miles before the next safety inspection is required.

(B) Qualified Emissions-Related Repairs. Qualified emissions-related repairs are those repairs to emissions control components, including diagnosis, parts and labor, which count toward a Low Mileage Waiver. In order to be considered qualified emissions-related repairs, the repair(s):

(i) must be directly applicable to the cause for the emissions test failure;

(ii) must be performed after the initial emissions test or have been performed within 60 days prior to the initial emissions test;

(iii) must not be tampering-related repairs, as defined herein;

(iv) must not be covered by any available warranty coverage unless the warranty remedy has been denied in writing by the manufacturer or authorized dealer; and

(v) must be performed by a Recognized Emissions Repair Technician of Texas at a Recognized Emissions Repair Facility of Texas in order to include the labor cost and/or diagnostic costs. When repairs are not performed by a Recognized Emissions Repair Technician of Texas at a Recognized Emissions Repair Facility of Texas, only the purchase price of parts, applicable to the emissions test failure, qualify as a repair expenditure for the Low Mileage Waiver.

(C) Conditions. The following conditions must be met in order to receive a Low Mileage Waiver:

(i) the vehicle must pass a visual inspection performed by a department representative to insure that the emissions repairs being claimed have actually been performed;

(ii) the diagnosis, parts and labor receipts for the qualified emissions-related repairs must be presented to the department and support that the emissions repairs being claimed have actually been performed; and

(iii) the valid re-test Vehicle Inspection Report (VIR) and valid Vehicle Repair Form (VRF) for the applicant vehicle must be presented to the department. If labor and/or diagnostic charges are being claimed towards the low mileage waiver amount, the VRF shall be completed by a Recognized Emissions Repair Technician of Texas.

(2) Low-Income Time Extension. A Low-Income Time Extension may be granted in accordance with the following conditions:

(A) The applicant must supply to the department proof in writing that:

(i) the vehicle failed the initial emissions inspection test; proof shall be in the form of the original failed VIR;

(ii) the vehicle has not been granted a Low-Income Time Extension in the previous testing cycle;

(iii) the applicant is the owner of the vehicle that is the subject of the Low-Income Time Extension; and

(iv) the applicant receives financial assistance from the Texas Department of Human Services due to indigence (subject to approval by the director) or the applicant's adjusted gross income (if the applicant is married, the applicant's adjusted gross income is equal to the applicant's adjusted gross income plus the applicant's spouse's adjusted gross income) is at or below the current federal poverty level as published by the United States Department of Health and Human Services, Office of the Secretary, in the Federal Register; proof shall be in the form of a federal income tax return or other documentation authorized by the director that the applicant certifies as true and correct.

(B) After a vehicle receives an initial Low-Income Time Extension, the vehicle must pass an emissions test prior to receiving another Low-Income Time Extension.

(3) Parts Availability Time Extension. A Parts Availability Time Extension may be granted in accordance with the following conditions:

(A) The applicant must demonstrate to the department:

(i) reasonable attempts were made to locate necessary emissions control parts by retail or wholesale parts suppliers; and

(ii) emissions-related repairs cannot be completed before the expiration of the safety inspection certificate or before the 30-day period following an out-of-cycle inspection because the repairs require an uncommon part, as defined herein.

(B) The applicant shall provide to the department:

(i) an original VIR indicating the vehicle failed the emissions test;

(ii) an invoice, receipt, or original itemized document indicating the uncommon part(s) ordered by: name; description; catalog number; order number; source of part(s), including name, address and phone number of parts distributor; and expected delivery and installation date(s). The original itemized document must be prepared by a Recognized Emissions Repair Technician of Texas before a Parts Availability Time Extension can be issued.

(C) A Parts Availability Time Extension is not allowed for tampering-related repairs, as defined herein.

(D) If the vehicle does not pass an emissions re-test prior to the expiration of the Parts Availability Time Extension, the applicant must provide to the department, adequate documentation that one of the following conditions exists:

(i) the motorist qualifies for a Low Mileage Waiver, Low-Income Time Extension or Individual Vehicle Waiver; or

(ii) the motor vehicle will no longer be operated in the affected county.

(E) A vehicle that receives a Parts Availability Time Extension in one testing cycle must have the vehicle repaired and re-tested prior to the expiration of such extension or must qualify for another type of waiver or time extension, in order to be eligible for a Parts Availability Time Extension in the subsequent testing cycle.

(F) The length of a Parts Availability Time Extension shall depend upon expected delivery and installation date(s) of the uncommon part(s) as determined by the department representative on a case by case basis. Parts Availability Time Extensions will be issued for either 30, 60 or 90 days.

(G) The department shall issue a unique time extension sticker for Parts Availability Time Extensions.

(4) Individual Vehicle Waiver. [~~If a vehicle has failed an emissions test, a motorist may petition the director for an Individual Vehicle Waiver. Upon demonstration that the motorist has taken every reasonable measure to comply with the requirements of the vehicle emissions I/M program contained in the Revised Texas I/M SIP and such waiver shall have minimal impact on air quality, the director may approve the petition, and the motorist may receive a waiver. Motorists may apply for the Individual Vehicle Waiver each testing cycle.~~]

(A) Eligibility. If a vehicle has failed an emissions test required by the vehicle emissions I/M program, a motorist may petition the designated representative of the department for an Individual Vehicle Waiver in order for the vehicle to receive a state inspection certificate. The motorist must demonstrate that all reasonable measures (diagnostics, repairs, replacement parts, etc.) have been taken to bring the vehicle into compliance with the program, but have failed. The department will review the measures taken by the motorist to insure that they have been performed, further measures would be economically unfeasible during this inspection cycle, and a waiver will result in a minimal impact on air quality. A vehicle may be eligible for a Individual Vehicle Waiver provided that:

(i) it failed both the initial emissions inspection and re-test; and

(ii) the motorist has incurred qualified emissions-related repairs, as defined by subparagraph (e)(1)(B) of this section, costing equal to or are in excess of the maximum reasonable repair expenditure amounts, as defined herein for the county in which the vehicle is registered.

(B) Maximum Reasonable Repair Expenditure Amounts. The applicable amounts are:

(i) affected counties, except El Paso county - $600, and

(ii) El Paso county - $450.

(C) Validity. The individual vehicle waiver shall be valid through the end of the twelfth month from the date of issuance. Motorists must apply for the individual vehicle waiver each testing cycle.

(D) Conditions. The following conditions must be met in order to receive an individual vehicle waiver:

(i) the vehicle must pass a visual inspection performed by a department representative to insure that the emissions repairs being claimed have actually been performed;

(ii) the diagnosis, parts, and labor receipts for the qualified emissions-related repairs must be presented to the department and support that the emissions repairs being claimed have actually been performed; and

(iii) the valid re-test Vehicle Inspection Report (VIR) and valid Vehicle Repair Form (VRF) for the applicant vehicle must be presented to the department. If labor and/or diagnostic charges are being claimed towards the individual vehicle waiver, the VRF shall be completed by a Recognized Emissions Repair Technician of Texas.

(f) Prohibitions.

(1) No person may operate or allow to be operated any motor vehicle that does not comply with:

(A) all applicable air pollution emissions control-related requirements included in the annual vehicle safety inspection administered by the department, as evidenced by a current valid inspection certificate affixed to the vehicle windshield; and

(B) the vehicle emissions inspection and maintenance requirements contained in the Revised Texas I/M SIP.

(2) No person or entity may own, operate, or allow the operation of a designated vehicle in an affected county unless the vehicle has complied with all applicable vehicle emissions inspection and maintenance requirements contained in the Revised Texas I/M SIP, unless otherwise provided for herein.

(3) No person may issue or allow the issuance of a Vehicle Inspection Report (VIR), as authorized by the department, unless all applicable air pollution emissions control-related requirements of the annual vehicle safety inspection and the vehicle emissions inspection and maintenance requirements and procedures contained in the Revised Texas I/M SIP are completely and properly performed in accordance with the rules and regulations adopted by the department and the TCEQ [~~TNRCC~~].

(4) No person may allow or participate in the preparation, duplication, sale, distribution, or use of false, counterfeit, or stolen inspection certificates, VIRs, VRFs, vehicle emissions repair documentation, or other documents which may be used to circumvent the vehicle emissions inspection and maintenance requirements and procedures contained in Texas Transportation Code, Chapter 548 and the Revised Texas I/M SIP.

(5) No organization, business, person, or other entity may represent itself as an inspector certified by the department, unless such certification has been issued pursuant to the certification requirements and procedures contained in the Revised Texas I/M SIP and the rules and regulations of the department.

(6) No person may act as or offer to perform services as a Recognized Emissions Repair Technician of Texas or a Recognized Emissions Repair Facility of Texas, as defined in subsections (h) and (i) of this section, without first obtaining and maintaining recognition by the department.

(g) Violation/Penalties. Pursuant to Texas Transportation Code, §548.601, any person who operates a designated vehicle in an affected county without displaying a valid unique emissions inspection certificate, may be subject to a fine in an amount not to exceed that set out in Texas Transportation Code, §548.604.

(h) Requirements for Recognized Emissions Repair Technicians of Texas. The department will recognize automotive repair technicians that meet the qualifications as set forth herein.

(1) In order to be recognized by the department as a Recognized Emissions Repair Technician of Texas, the technician must:

(A) have a minimum of three years full-time automotive repair service experience;

(B) possess current certification in the following areas based on the following tests offered by the National Institute of Automotive Service Excellence (ASE):

(i) Engine Repair (ASE Test Al);

(ii) Electrical/Electronic Systems (ASE Test A6);

(iii) Engine Performance (ASE Test A8); and

(iv) Advanced Engine Performance Specialist (ASE Test Ll); and

(C) must be employed by a Recognized Emissions Repair Facility of Texas, as defined herein.

(2) A Recognized Emissions Repair Technician of Texas shall perform the following duties:

(A) complete and certify the VRF form(s); and

(B) notify the DPS in writing within 14 days of changes in the technician's ASE testing status.

(3) Failure to comply with these rules and failure to meet the qualifications set out herein may result in the department ceasing to recognize the technician.

(i) Requirements for Recognized Emissions Repair Facilities of Texas.

(1) In order to be recognized by the department as a Recognized Emissions Repair Facility of Texas, the facility must:

(A) employ at least one full-time Recognized Emissions Repair Technician of Texas, as described in subsection (h) of this section; and

(B) possess equipment to perform the functionality of the following items:

(i) ammeter;

(ii) compression tester;

(iii) cooling system tester;

(iv) dwellmeter;

(v) engine analyzer;

(vi) five gas exhaust analyzer (which can perform diagnostic repair for at least hydrocarbon (HC), carbon monoxide (CO), carbon dioxide (CO2), and oxides of nitrogen (NOX);

(vii) fuel pressure/pressure drop tester;

(viii) ohmmeter;

(ix) repair reference information;

(x) scan tool/or OBDII capable testing equipment;

(xi) tachometer;

(xii) timing light;

(xiii) vacuum/pressure gauge;

(xiv) vacuum pump; and;

(xv) volt meter.

(2) A Recognized Emissions Repair Facility of Texas shall:

(A) notify the DPS in writing within 14 days of changes in the facility's technicians' ASE testing status or employment status and the facility's equipment functionality status; and

(B) agree in writing upon application for recognition by the department to maintain compliance with the qualifications enumerated in paragraph (1) of this subsection, in order to maintain recognition by the department.

(3) Failure to comply with these rules and failure to meet the qualifications set out herein, may result in the department ceasing to recognize the facility.

(j) Certified emissions inspection station requirements.

(1) In order to be certified by the department as an emissions inspection station, for purposes of the emissions I/M program, the station must:

(A) be licensed by the department as an official vehicle inspection station;

(B) comply with the DPS Rules and Regulations Manual for Official Vehicle Inspection Stations and Certified Inspectors and other applicable rules and regulations of the department;

(C) complete all applicable forms and reports as required by the department;

(D) purchase or lease emissions testing equipment that is currently certified by the TCEQ [~~TNRCC~~] to emissions test vehicles, or upgrade existing emissions testing equipment to meet the current certification requirements of the TCEQ [~~TNRCC~~];

(E) have a designated telephone line dedicated solely for each vehicle emissions [~~exhaust gas~~] analyzer to be used to perform vehicle emissions tests; and

(F) enter into and maintain a business arrangement with the Texas Information Management System contractor to obtain a telecommunications link to the Texas Information Management System Vehicle Identification Database (VID) for each vehicle emissions [~~exhaust gas~~] analyzer to be used to inspect vehicles as described in the Revised Texas I/M SIP.

(G) All public certified emissions inspection stations in affected counties, excluding El Paso County shall offer both the ASM-2 test and the OBD test. Certified emissions inspection stations in these affected counties desiring to offer OBD-only emission testing to the public must request a waiver as low volume emissions inspection station from the department Regional Supervisor. All public certified emissions inspection stations in El Paso County shall offer the TSI test. Effective 12 months after TCEQ notification published in the *Texas Register* [~~January 1, 2002~~], all public certified emissions inspection stations in El Paso County shall offer both and the OBD and TSI test.

(2) Failure to comply with these rules may result the in denial, suspension or revocation of an inspection station's certificate of appointment, pursuant to Texas Transportation Code, §548.405, or in a fine, pursuant to Texas Transportation Code, §542.301 and §548.601, in an amount not to exceed that set out in Texas Transportation Code, §542.401.

(k) Certified emissions inspector requirements.

(1) To qualify as a certified inspector, an individual must:

(A) be licensed by the department as an official vehicle inspector;

(B) must complete the training required for the Vehicle Emissions Inspection Program and receive the department's current approved inspector's certificate for such training;

(C) must comply with the DPS Rules and Regulations Manual for Official Vehicle Inspection Stations and Certified Inspectors and other applicable rules, [~~and~~] regulations, and notices of the department; and

(D) complete all applicable forms and reports as required by the department.

(2) Failure to comply with these rules may result in the denial, suspension or revocation of a certified inspector's certificate, pursuant to Texas Transportation Code, §548.405, or in a fine, pursuant to Texas Transportation Code, §542.301 and §548.601, in an amount not to exceed that set out in Texas Transportation Code, §542.401.

(l) Inspection and Maintenance Emissions Testing Fees. The fees for emissions testing will be set by the TCEQ [~~TNRCC~~]. The fee for an emissions test shall provide for one free re-test for each failed initial emissions inspection, provided that the motorist has the re-test performed at the same inspection station where the vehicle originally failed and the re-test is conducted within 15 calendar days of the initial emissions test, not including the date of the initial emissions test.

(m) Audits.

(1) The department is authorized to perform covert and overt audits pertaining to the emissions testing program.

(2) The department may authorize enforcement personnel or other individuals to remove, disconnect, adjust, or make inoperable vehicle emissions control equipment, devices, or systems and to operate a vehicle in the tampered condition in order to perform a quality control audit of an inspection station or other quality control activities as necessary to assess and ensure the effectiveness of the vehicle emissions inspection and maintenance program.

(n) Authority to publish manuals. The Public Safety Commission authorizes the director of the Department of Public Safety to promulgate, publish and distribute necessary manuals of instruction and procedure for the implementation of the emissions I/M testing program in a manner not inconsistent with these rules. The department adopts by reference the VEHICLE EMISSIONS INSPECTION AND MAINTENANCE RULES AND REGULATIONS MANUAL FOR OFFICIAL VEHICLE INSPECTION STATIONS AND CERTIFIED INSPECTORS as the standard for conducting emissions inspections in designated counties. Any violation of these rules and regulations may result in the suspension or revocation of the certificate of appointment of the vehicle inspection station or certificate of the certified inspector. Such manual(s) shall be available for public inspection at reasonable times at offices of the department as designated by the director.

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

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302148
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-2135

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PART 3. TEXAS YOUTH COMMISSION

CHAPTER 85. ADMISSION AND PLACEMENT

SUBCHAPTER A. COMMITMENT AND RECEPTION

37 TAC §85.3

The Texas Youth Commission (TYC) proposes an amendment to §85.3, concerning Admission Process. The amendment to the section will clarify that upon admission, youth who are committed to the agency will be provided with a written description of the sections of the Family Code dealing with automatic restriction of records. The youth's parent or guardian will also receive a copy.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough 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 informing youth and their families about the rights and restrictions of access to the youth's records. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.0385, which provides the Texas Youth Commission with the authority to establish a children's assessment center.

The proposed rule affects the Human Resource Code, §61.034.

§85.3. Admission Process.

(a)-(i) (No change.)

(j) Staff shall provide a written explanation of Sec. 58.209 of the Texas Family Code, regarding access to records, and a copy will be provided to the parent/guardian or custodian.

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302252

Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-6014

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SUBCHAPTER B. PLACEMENT PLANNING

37 TAC §85.61

The Texas Youth Commission (TYC) proposes an amendment to §85.61, concerning Discharge. The amendment to the section will clarify that youth other than sentenced or type A violent offenders who have earned probation as a result of conduct while on parole shall be discharged. An additional change requires that youth be provided with information regarding the sealing of their records upon discharge.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough 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 the timely and efficient discharge of eligible youth. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.045, which provides the Texas Youth Commission with the authority to establish rules appropriate to the accomplishment of its functions.

The proposed rule affects the Human Resource Code, §61.034.

§85.61. Discharge.

(a)-(c) (No change.)

(d) Discharge Criteria.

(1) (No change.)

(2) Special Circumstances.

(A)-(B) (No change.)

(C) Youth of any classification except sentenced offender and type A violent offender shall be discharged under the following circumstances:

(i) Placement on adult probation for conduct which occurred while on parole status. [:]

~~*[(I)* on parole status and only after the youth has completed all minimum lengths of stay.]~~

~~*[(II)* assigned to a residential placement and only after the youth has met all transition movement criteria.]~~

(ii) (No change.)

(D) (No change.)

(e)-(f) (No change.)

(g) A youth's primary service worker (PSW) shall immediately notify the youth of the discharge. [~~and shall provide information on the procedure for sealing records.~~] The PSW shall provide the youth a written explanation on procedures for sealing records utilizing the Sec. 58.003 Sealing of Files and Records form and a copy will be provided to the parent/guardian or custodian.

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302251
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-6014

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CHAPTER 91. PROGRAM SERVICES
SUBCHAPTER B. EDUCATION PROGRAMS

37 TAC §91.41

The Texas Youth Commission (TYC) proposes an amendment to §91.41, concerning Education Administration. The amendment to the section will clarify that TYC schools are accredited under the provisions of the Texas Education Code, Chapter 30, Subchapter E. Additional revisions state that youth who have completed a high school diploma or equivalent will continue to participate in reading and math instruction until they have reached 12.9 in both areas on the Test of Adult Basic Education or are released from TYC institutions. The minimum number of hours of daily instruction will increase from six to seven, and the time allowed for teacher preparation is now 45 minutes.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough 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 the compliance of TYC schools with statutory requirements of the Texas Education Code. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.076, which provides the Texas Youth Commission with the authority to require youth in its care to participate in academic training and activities.

The proposed rule affects the Human Resource Code, §61.034.

§91.41. Education Administration.

(a) Purpose. The purpose of this rule is to establish basic requirements for the administration of educational services consistent with applicable federal and state laws and the educational needs of Texas Youth Commission (TYC) [~~TYC~~] youth.

(b) (No change.)

(c) Institutions.

(1) TYC schools are [~~shall be~~] accredited under the provisions of the Texas Education Code, Chapter 30, Subchapter E. [~~by the Texas Education Agency (TEA).~~]

(2) Education programs will comply with applicable federal and state requirements. [~~TEA alternative schools accreditation standards.~~]

(3) All youth will be enrolled in an education program. Youth who have completed high school will be in a post high school training/education program and may be [~~or~~] employed part-time [~~full-time~~]. Youth who have completed a high school diploma or the equivalent will continue to participate in reading and math instruction until they have reached 12.9 on the Test of Adult Basic Education in both areas, or until they are released from TYC institutions.

(4) The principal, assistant principal [~~educational counselor~~], diagnostician, Reintegration of Offenders - Youth (RIO-Y) Counselor, licensed school psychologist, or qualified teacher will provide educational and vocational counseling to youth.

(5) The school schedule will include a minimum of seven (7) [~~six~~] hours of instruction daily, including intermissions and recesses, according to the school calendar established annually by the central office education department. Four (4) of the seven (7) [~~six~~] hours must be in core curriculum areas. Waivers for less than seven (7) [~~six~~] hours, but not less than four (4), of school may be granted by the superintendent of education.

(6)-(7) (No change.)

(8) Schools will use available federal funds [~~community resources~~] to provide required specialized education and vocational training instruction/training not available in the institution.

(9) Teaching schedule provides each teacher a minimum of 45 minutes [~~one period~~] per day for preparation.

(d)-(e) (No change.)

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302250
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-6014

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37 TAC §91.43

The Texas Youth Commission (TYC) proposes an amendment to §91.43, concerning Basic Education. The amendment to the section will establish that the individual case plan (ICP) developed for each youth addresses special education or English as a second language as needed.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough 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 to ensure that special needs of youth are considered when developing their education and individual case plans. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.076, which provides the Texas Youth Commission with the authority to require the youth in its care to participate in academic training and activities.

The proposed rule affects the Human Resource Code, §61.034.

§91.43. Basic Education.

(a) (No change.)

(b) Assessment Units.

(1)-(2) (No change.)

(3) The individual case plan (ICP) developed for each youth includes academic and vocational objectives for the youth and addresses special education or English as a second language as needed.

(c) Institutions.

(1) The institution continues to develop and implement the ICP with modifications to address special needs, if applicable.

(2)-(6) (No change.)

(7) Youth who complete all TEA requirements for high school graduation whole enrolled in a TYC school may graduate from the TYC school [~~or TYC will petition their home school for graduation from that school~~].

(8)-(10) (No change.)

(d) (No change.)

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302249
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-6014

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SUBCHAPTER D. HEALTH CARE SERVICES

37 TAC §91.84

The Texas Youth Commission (TYC) proposes new §91.84, concerning Health Insurance. The new section will publish an existing rule under a new rule number.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough 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 to allow the previous rule number to be used for a new policy which falls logically and sequentially between other existing rules. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The new section is proposed under the Family Code, §54.06, which provides the Texas Youth Commission with the authority to seek reimbursement from third parties payers for medical expenses of youth committed to the agency.

The proposed rule affects the Human Resource Code, §61.034.

§91.84. Health Insurance.

(a) Purpose. The purpose of this rule is to establish procedures whereby the Texas Youth Commission (TYC) shall pursue reimbursement by third party payers for the medical care of youth committed to the agency.

(b) TYC staff shall pursue information regarding medical insurance coverage of youth, including whether a court order exists for the parent/guardian to provide insurance. The information will be systematically made available to TYC managed health care contractors and residential contract care providers.

(c) TYC managed health care contractors will seek reimbursement for medical care from insurance companies.

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302248
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-6014

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37 TAC §91.87

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Youth Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Youth Commission (TYC) proposes the repeal of §91.87, concerning Health Insurance. The repeal of the section will allow the section to be published under a new number.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough 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 to allow a new rule relating to Suicide Alert procedures to be published in logical and sequential order. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The repeal is proposed under the Family Code, §54.06, which provides the Texas Youth Commission with the authority to seek reimbursement from third party payers for medical expenses of youth committed to the agency.

The proposed rule affects the Human Resource Code, §61.034.

§91.87. Health Insurance.

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302247
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-6014

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37 TAC §91.87

The Texas Youth Commission (TYC) proposes new §91.87, concerning Suicide Alert Explanation of Terms. The new section will define terms used throughout the Texas Youth Commission's policies regarding Suicide Alert procedures.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough 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 the identification, assessment, protection, and treatment of youth who verbalize or display suicidal behavior. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The new section is proposed under the Human Resources Code, §61.076 Type of Treatment Permitted, which provides the Texas Youth Commission with the authority to provide any necessary medical or psychiatric treatment.

The proposed rule affects the Human Resource Code, §61.034.

§91.87. Suicide Alert Explanation of Terms.

(a) Purpose. The purpose of this rule is to establish explanations of terms used pursuant to (GAP) §91.88 of this title (relating to Suicide Alert for Secure Programs), (GAP) §91.89 of this title (relating to Suicide Alert for Non-Secure Programs), and (GAP) §91.90 of this title (relating to Suicide Alert for Parole) which establish procedures for the identification, assessment, treatment, and protection of youth who may be at risk for suicide.

(b) Explanation of Terms Used.

(1) Secure Program--A TYC institution or contract program which contains a security unit.

(2) Non-Secure Program--A TYC institution or contract program which does not contain a security unit.

(3) Mental Health Professional (MHP)--An individual who is a Psychiatrist, doctoral level Psychologist, master level Associate Psychologist, Licensed Professional Counselor, or a Licensed Social Worker with an Advanced Clinical Practitioner (LMSW-ACP) designation. Prior consultation with and the signature of the DMHP is not necessary for a licensed doctoral level Psychologist acting as an MHP who determines that a change in SA status or observation/precaution level is warranted. The licensed doctoral level psychologist shall inform the DMHP of any such changes in youth status.

(4) Designated Mental Health Professional (DMHP)--In TYC institutions, the DMHP shall be a Psychiatrist or a doctoral level Psychologist and is the individual that has the primary responsibility and accountability for the evaluation, monitoring, and treatment of a youth referred as a suicide risk. Where available, the director of clinical services is the DMHP.

(5) Trained Designated Staff--Staff trained to conduct a Suicide Risk Screening. In TYC programs this will include superintendent, assistant superintendent, administrative duty officer (ADO), program administrator (PA), institution placement coordinator (IPC), principal, caseworker, and Juvenile Corrections Officer (JCO) V or VI. A JCO V or VI may only conduct a suicide risk screening during the late night shift in secure programs. JCO staff in TYC halfway houses may not conduct suicide risk screenings.

(6) Appropriate Administrator--The highest level local administrative authority in non-secure programs.

(7) Suicide Alert- Pending (SA-P)--A temporary status that begins with the identification of a potentially suicidal youth, by staff, and terminates after a suicide risk assessment by an MHP.

(8) Suicide Alert (SA)--A status that begins following a face-to-face suicide risk assessment by an MHP indicating that a youth is at risk to attempt suicide or self-injury and is in need of increased supervision.

(9) Overt Suicide Behavior--A physical act or stated intention associated with a potentially dangerous or life threatening outcome or imminent risk of self-injury. The behavior itself may lack the immediate danger, but accidental risk of death or serious injury is likely. Examples of overt suicidal behavior include, but are not limited to, jumping from heights with intent to cause injury, serious and repeated head banging, tying a ligature around the neck, suffocation, medication overdose, self-mutilation requiring nursing or medical care, or stated intent to commit suicide with a specific plan to seriously harm self.

(10) Non-Lethal Suicide Behavior--The superficial self-injury, or sudden change in behavior suggesting risk of self-injury. For example, the youth may display vegetative symptoms of depression, verbalize a non-specific suicide plan, place an object loosely around the neck, or engage in superficial self-injurious behavior, without imminent risk of harm.

(11) Suicide Risk Screening--A standardized face-to-face interview by an MHP or trained designated staff in consultation with an MHP, to determine the placement of youth in security intake or general population.

(12) Suicide Risk Assessment--A clinical face-to-face interview conducted by an MHP for the determination of suicide risk. The youth participates in the interview and has an opportunity to make his/her own statement. The assessment is required for removal of SA-P status, placement on SA status, continuation of SA status, removal of SA status, or admission and extensions to protective custody.

(13) Protective Custody--a segregation program in secure programs designed for the placement of youth, as determined by an MHP, who are at risk of serious harm to themselves, and confinement is necessary to protect the youth from self-harm. A youth may be admitted to protective custody only if the youth has received a face-to-face assessment by an MHP.

(14) Secure Observation Area--a location in the security unit, infirmary, or other secure area where staff may visually check youth to ensure safety.

(15) Suicide Levels of Observation--levels of observation, which are automatically assigned by policy or determined by an MHP to ensure youth safety. Levels of observation are:

(A) One-to-One (1:1) Observation--at a minimum, an assigned staff is within five (5) feet and youth is within sight of staff at all times. The staff will not be assigned other concurrent duties and must be formally relieved of the duty by another staff or by the discontinuation of the 1:1 status. This level of observation may be assigned to youth in the general population or in the security unit.

(B) Constant Observation--youth is within sight of an assigned staff at all times. The staff may have concurrent duties if the duties do not interfere with observation of the youth. Other staff may assist in visual observation of the youth. This level of observation may be assigned to youth in the general population or in the security unit.

(C) Close Observation--youth is visually checked at least once every ten minutes. Staff may be involved in concurrent duties that allow for the flexibility needed to check the youth. This level of observation may be assigned to youth in the general population, but may not be applied to youth in the security unit where youth are visually checked every three minutes for overt suicidal behavior and every five minutes for non-lethal suicidal behavior.

(16) Minimum Dorm Precautions--A youth on SA-P or SA status on a dorm shall be monitored by staff according to the level of observation. These youth should have reduced or monitored access, approved by the MHP, to potentially dangerous objects such as clothing (e.g., belts, hair accessories, bath robe, bras, belts, shoes/shoe laces), personal hygiene items (e.g., razors) or chemical cleaning agents (e.g.,

bleach, cleaning solvents), and have a system to ensure constant observation by staff, unless the level of observation is reduced by an MHP. Youth must sleep in direct sight of staff. This may involve sleeping on a mattress pulled in front of staff desk, sleeping in a day area in direct view of staff, sleeping on a bunk/bed in direct sight of staff, or any other appropriate method of supervision. In consultation with the principal and/or assistant principal, the youth will have monitored or restricted access to vocational instruction, or on campus employment, or any other location where there is access to potentially lethal and/or harmful objects/machinery. Youth may not participate in off-campus employment or privileges except for medical treatment or court hearings.

(17) Minimum Secure Observation Area Precautions--A youth on SA-P or SA status in a secure observation area other than the security unit shall be monitored by staff according to the level of observation. These youth should have reduced or monitored access, approved by the MHP, to potentially dangerous objects such as clothing (e.g., belts, hair accessories, bath robe, bras, belts, shoes/shoe laces), personal hygiene items (e.g., razors) or chemical cleaning agents (e.g., bleach, cleaning solvents), and have a system to ensure constant observation by staff, unless the level of observation is reduced by an MHP. Youth in secure observation areas must sleep in direct sight of staff. This may involve sleeping on a mattress pulled in front of staff desk, sleeping in a day area in direct view of staff, sleeping on a bunk/bed in direct sight of staff, or any other appropriate method of supervision. The youth may not participate in off-campus education, employment or privileges without the approval of the MHP except for medical treatment or court hearings.

(18) Minimum Security Precautions for Secure Programs.

(A) Non-Lethal Suicide Precautions--A youth is admitted to security intake according to (GAP) §97.37 of this title (relating to Security Intake), or protective custody according to (GAP) §97.45 of this title (relating to Protective Custody), and is visually checked once every five minutes by staff. The room is secured by security staff for safety prior to placement and checked for safety every shift or as needed between periods of movement to ensure youth safety. Staff reduces access to potentially dangerous objects (e.g., limited or controlled/supervised access to plastic eating utensils, bed linens), issues suicide safe bedding (e.g. use of suicide blanket). Access to razors is approved by the MHP and visually monitored by staff. Standard suicide precautions are implemented for any youth referred for non-lethal suicide behavior or for a youth who originally engaged in overt suicide behavior but who has stabilized to the point that a reduction in precaution is indicated. The precautions may be modified, by telephone consultation or following a face-to-face suicide risk assessment, by an MHP.

(B) Overt Suicide Precautions--A youth is admitted to security intake according to (GAP) §97.37 of this title (relating to Security Intake), or protective custody according to (GAP) §97.45 of this title (relating to Protective Custody), or a secure observation area, or the infirmary and is visually checked once every three minutes by staff or, if necessary, placed on one-to-one (1:1) or constant observation. For youth who engage in overt suicide behavior as defined in this policy, staff will:

(i) issue protective clothing (e.g., disposable paper gown, suicide barrel, etc.). Staff verbally instructs youth to put on protective clothing and to remove any undergarment. In accordance with (GAP) §97.23 of this title (relating to Use of Force) use of force may be initiated, but only as a last resort. Staff must consult with the facility administrator and/or MHP, regarding alternative interventions that do not involve use of force. When physical or mechanical restraint is employed, at least one staff conducting the restraint must be the same gender as the youth. Staff provides repeated opportunities during the restraint for youth to remove own clothing. If there is no same gender staff available, the youth remains on one-to-one (1:1) observation until such staff is available.

(ii) implement other security precautions, including:

(I) suicide safe bedding (e.g. suicide blanket) and,

(II) where available, placement in a suicide safe room (e.g., no bed frame or toiletry in room, video camera, etc.) which is checked for safety every shift or as needed between periods of movement, and

(III) placement on a "finger food" diet to ensure youth safety; and

(IV) access to razors only if approved by the MHP and visually monitored by staff.

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302246
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-6014

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37 TAC §91.88

The Texas Youth Commission (TYC) proposes new §91.88, concerning Suicide Alert for Secure Programs. The new section establishes procedures to be used at secure TYC programs for the identification and treatment of potentially suicidal TYC youth.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough 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 the identification, assessment, protection, and treatment of youth who verbalize or display suicidal behavior. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The new section is proposed under the Human Resources Code, §61.076 Type of Treatment Permitted, which provides the Texas Youth Commission with the authority to provide any necessary medical or psychiatric treatment.

The proposed rule affects the Human Resource Code, §61.034.

§91.88. Suicide Alert for Secure Programs.

(a) Purpose. The purpose of this rule is to establish procedures for the identification, assessment, treatment, and protection of youth

that may be at risk for suicide. Treatment will be provided within the least restrictive environment necessary to ensure safety.

(b) Applicability.

(1) This rule applies to all youth currently assigned to placement in Texas Youth Commission (TYC) institutions and secure contract programs.

(2) This rule must be read in conjunction with (GAP) §91.87 of this title (relating to Suicide Alert Explanation of Terms).

(3) If a youth is admitted to protective custody following a face to face assessment by a mental health professional (MHP), this rule must also be applied in conjunction with (GAP) §97.45 of this title (relating Protective Custody).

(c) Initial Identification of Youth at Risk for Suicide

(1) Any staff hearing or observing a youth engage in or verbalize non-lethal or overt suicide behavior must immediately respond in a manner that protects youth safety. Staff will immediately seek medical attention for youth if necessary. Staff must provide minimum dorm precautions to prevent dangerous or potentially dangerous behavior, which includes constant observation and confiscating materials which could potentially be used for self-injury.

(2) A youth in general population who has engaged in or verbalized suicide behavior must be referred to security intake according to the procedures in (GAP) §97.37 of this title (relating to Security Intake) and immediately placed on Suicide Alert Pending (SA-P). The youth is placed on overt suicide security precautions upon arrival to security intake.

(3) A youth in a segregation program who has engaged in or verbalized suicide behavior will be immediately placed on Suicide Alert - Pending (SA-P) with overt suicide precautions.

(4) An MHP and a trained designated staff approved to conduct suicide risk screenings are contacted immediately.

(5) A face-to-face suicide risk screening will be initiated within one hour of referral to security intake by a trained designated staff or an MHP. An MHP will make a decision, based on a clinical determination of risk and the suicide risk screening, whether the youth will temporarily remain in security intake or be released to the general population.

(6) An MHP will conduct a face-to-face suicide risk assessment to determine suicide alert (SA) status and treatment/placement options.

(d) Temporary Placement of Youth Following a Suicide Risk Screening. Prior to a face-to-face suicide risk assessment, the following two temporary placement options are available to an MHP after a trained designated staff conducts a suicide risk screening:

(1) Retain Youth in Security Intake. Youth who have engaged in overt suicide behavior must be retained in security intake. Youth who have engaged in non-lethal suicide behavior may also be retained in security intake, at the discretion of an MHP.

(A) Youth will continue on SA-P status. An MHP will determine the suicide level of observation and minimum security precautions.

(B) For youth engaging in overt suicidal behavior, the MHP must conduct a face-to-face suicide risk assessment within three hours of referral to security intake.

(C) Youth engaging in non-lethal suicide behavior are maintained in security intake up to 24 hours after referral, pending a face-to-face assessment by an MHP.

(2) Return Youth to General Population. Return to general population is available only for youth who have engaged in non-lethal suicide behavior.

(A) Youth will continue on SA-P status on, at a minimum, constant observation.

(B) Dorm staff will monitor the youth according to minimum dorm precautions.

(C) The MHP will monitor youth's mental status by consulting with appropriate staff at least every 24 hours.

(D) The MHP will conduct a face-to-face suicide risk assessment within 72 hours of initial referral to security intake.

(3) If a youth on SA-P at any time displays behavior suggesting deterioration in emotional condition, appropriate actions will be taken to ensure the youth's safety, which may include re-admission to security intake if the youth has been returned to the general population. The MHP is immediately advised of the change in the youth's condition.

(e) MHP Face-to-Face Suicide Risk Assessment.

(1) Based on the face-to-face suicide risk assessment with the youth, an MHP determines whether to place the youth on SA. An MHP may do one of the following:

(A) remove the SA-P status;

(B) place the youth on SA status and assign a level of observation, which may include admission to protective custody. If a youth is admitted to Protective Custody, this policy must be read in conjunction with (GAP) §97.45 of this title (relating to Protective Custody);

(C) seek emergency psychiatric placement if the youth is in serious imminent risk of self-injury and cannot be safely managed in protective custody. The MHP, in consultation with the Designated Mental Health Professional (DMHP) or contract psychiatrist, places the youth on one-to-one (1:1) observation and seeks placement in the following order:

(i) the Corsicana Stabilization Unit (CSU);

(ii) the nearest MHMR hospital; or

(iii) as a last resort, a private psychiatric hospital.

(D) admit the youth to the infirmary with one-to-one (1:1) observation if no other options are available, or there are compelling medical reasons.

(2) An MHP, in consultation with the DMHP, develops a plan of treatment to ensure youth safety. The plan includes the monitoring of youth on SA status and regular individual counseling and assessment sessions until youth is removed from SA. The plan also includes consultation with the youth's direct care staff, caseworker, and/or program administrator.

(3) The MHP who is assigned to the youth on SA status may, with prior consultation with the DMHP, release a youth from protective custody or reduce the level of observation of youth on SA status.

(f) Removal of Youth from SA Status.

(1) The MHP who is assigned to the youth on SA status may, with prior consultation with the DMHP, remove the SA status.

(2) The DMHP may remove a youth from SA status or modify the level of supervision upon a face-to-face interview with the youth

(g) Transfer of Youth on SA Status.

(1) Youth who are on SA status may not be moved to another placement unless:

(A) the receiving placement is a TYC institution or residential treatment center, or other placement having on-site psychiatric staff who may function as an MHP; and

(B) the DMHP at the sending site approves and coordinates the transfer of the youth and clinical responsibilities in consultation with the DMHP at the receiving site.

(2) Youth who transfer from one facility to another must receive a suicide risk assessment from the receiving facility, within 72 hours of arrival if:

(A) youth is on SA or SA-P status; or

(B) youth has history of suicide behavior within the past six months.

(h) Notification.

(1) Every TYC facility and secure program develops a system of notification of key personnel to identify youth on SA or SA-P.

(2) Facility staff shall notify the parent or guardian of a youth placed on SA as a result of overt suicide behavior and when the youth is removed from SA.

(3) Appropriate central office staff will be notified of life threatening suicide attempts or completed suicide as outlined by procedures in (GAP) §07.03 of this title (relating to Incident Reporting).

(i) Training. All direct care staff in TYC facilities and in secure programs will receive initial suicide prevention training and annual updates. Staff designated to conduct suicide screenings receive training from an MHP regarding suicide alert policy, suicide indicators, and suicide screening.

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302245
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-6014

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37 TAC §91.89

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Youth Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Youth Commission (TYC) proposes the repeal of §91.89, concerning Suicide Alert. The repeal of the section will allow for a new rule to be published in its place.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough 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 the identification, assessment, protection, and treatment of you who verbalize or display suicidal behavior. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The repeal is proposed under the Human Resources Code, §61.076 Type of Treatment Permitted, which provides the Texas Youth Commission with the authority to provide any necessary medical or psychiatric treatment.

The proposed rule affects the Human Resource Code, §61.034.

§91.89. Suicide Alert.

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302244
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-6014

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37 TAC §91.89

The Texas Youth Commission (TYC) proposes new §91.89, concerning Suicide Alert for Non-Secure Programs. The new section establishes procedures to be used at non-secure TYC programs for the identification and treatment of potentially suicidal TYC youth.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough 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 the identification, assessment, protection, and treatment of youth who verbalize or display suicidal behavior. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The new section is proposed under the Human Resources Code, §61.076 Type of Treatment Permitted, which provides the Texas Youth Commission with the authority to provide any necessary medical or psychiatric treatment.

The proposed rule affects the Human Resource Code, §61.034.

§91.89. Suicide Alert for Non-Secure Programs.

(a) Purpose. The purpose of this rule is to establish procedures for the identification, assessment, protection, and treatment of youth that may be at risk for suicide within the least restrictive environment to ensure safety.

(b) Applicability. This rule applies to all youth currently assigned to placement in Texas Youth Commission (TYC) medium restriction halfway houses, and non-secure contract residential facilities. This rule must be applied in conjunction with (GAP) §91.87 of this title (relating to Suicide Alert Explanation of Terms).

(c) Initial Identification of Youth at Risk for Suicide

(1) Any staff hearing or observing a youth engage in or verbalize non-lethal or overt suicide behavior must immediately respond in a manner that protects youth safety. Staff will immediately seek medical attention if necessary. Staff must provide, at a minimum, constant observation to prevent dangerous or potentially dangerous behavior, which includes confiscating materials used or which could potentially be used for self-injury.

(2) Youth who have engaged in non-lethal or overt suicide behavior must immediately be designated as Suicide Alert - Pending (SA-P) and placed in a secure observation area with minimum secure observation area precautions, pending an assessment by an MHP.

(3) Youth on SA-P are not allowed community access, including community service, employment, or academic attendance, unless supervised on, at a minimum, constant observation by staff.

(4) A trained designated staff initiates a face-to-face suicide risk screening within one hour and consults with an appropriate administrator regarding the results of the screening.

(5) The appropriate administrator will assign a level of observation based on the results of suicide risk screening and contact a mental health professional (MHP) to arrange a face-to-face suicide risk assessment.

(A) For youth engaging in non-lethal behavior, the administrator will ensure the youth remains in a secure observation area on at least constant observation, pending a face-to-face assessment by an MHP.

(B) For youth engaging in overt suicide behavior, the administrator will ensure the youth remains in a secure observation area on one-to-one (1:1) observation, until a face-to-face assessment by an MHP is conducted.

(6) In the event that a youth on SA-P, pending assessment by an MHP, displays behavior suggesting deterioration of emotional condition indicating serious or imminent risk of self-injury, the appropriate administrator coordinates increased supervision, to include one to one (1:1) observation and/or emergency psychiatric care. Increased supervision for youth not on parole status may include temporary admission to a high restriction TYC facility.

(7) If the time required to obtain an MHP to conduct a suicide risk assessment is exceeded, the youth remains on one-to-one (1:1) observation. The facility staff notifies the appropriate administrator in person or directly by telephone to arrange staff coverage and required supervision. The appropriate administrator may secure emergency psychiatric care to obtain an evaluation of the youth.

(d) MHP Face-to-Face Suicide Risk Assessment.

(1) For Non-Lethal Suicidal Behavior. Within 72 hours of placement on SA-P status, the MHP must do the following:

(A) consult with appropriate staff to review the results of the suicide risk screening;

(B) conduct a face-to-face suicide risk assessment;

(C) determine whether to remove the SA-P status or place the youth on SA;

(D) determine whether youth may be safely managed within the structure of the current placement; and

(E) assign the level of observation and develop a plan of treatment for youth placed on SA, including the supervision requirements and degree of community restrictions necessary to ensure youth safety.

(2) For Overt Suicidal Behavior. Within 3 hours of placement on SA-P, the MHP must do the following:

(A) consult with appropriate staff to review the results of the suicide risk screening;

(B) conduct a face-to-face suicide risk assessment;

(C) determine whether to remove the SA-P status or place the youth on SA;

(D) determine whether youth may be safely managed within the structure of the current placement;

(E) assign the level of observation and develop a plan of treatment for youth placed on SA, including the supervision requirements and degree of community restriction necessary to ensure youth safety.

(3) Youth Who Cannot Be Safely Managed in Current Placement. If an MHP determines that a youth on SA cannot be safely managed within the structure of the current placement, the appropriate administrator will:

(A) ensure one-to-one observation for the youth until an emergency psychiatric placement is obtained;

(B) obtain emergency placement directly to the Corsicana Stabilization Unit (CSU) or, if the CSU is not able to receive the youth, placement in a local MHMR hospital or, as a last resort, a private psychiatric hospital. For youth not on parole status, the administrator may seek temporary admission to protective custody in a high restriction TYC facility pending emergency psychiatric placement.

(C) maintain communication with staff at the emergency placement to obtain current mental status information and assess the length and suitability of the current placement. If the emergency placement exceeds five days, the administrator initiates alternate placement in a more secure facility.

(4) In the event that a youth on SA in a non-secure placement displays behavior that indicates a serious or imminent risk of self-injury, an MHP is immediately contacted and the youth is placed on one-to-one (1:1) observation pending a face-to-face suicide risk assessment by and MHP. The appropriate administrator may seek emergency psychiatric care.

(5) For youth maintained on SA and on constant and/or one-to-one observation longer than seven days in placements other than the Corsicana Stabilization Unit, the appropriate administrator in TYC

Halfway House programs or the appropriate TYC staff for contract programs will pursue an alternative placement with longer-term stabilization, clinical resources, and increased supervision where the youth may be safely managed.

(e) Removal of Youth from SA Status. The MHP that initially placed the youth on SA may remove the youth from SA status or reduce the level of supervision immediately following a face-to-face assessment. If the youth has been transferred to another TYC operated institution for emergency placement, the MHP at the receiving facility may remove the youth from SA status or reduce the level of supervision immediately following a face-to-face assessment.

(f) Notification.

(1) Every TYC facility and contract residential program develops a system of notification of key personnel to identify youth on SA or SA-P in the general population.

(2) Facility staff shall notify the parent or guardian of a youth placed on SA as a result of overt suicide behavior and when the youth is removed from SA.

(3) Appropriate central office staff will be notified of life threatening suicide attempts or completed suicide as outlined by procedures in (GAP) §07.03 of this title (relating to Incident Reporting).

(g) Training. All direct care staff in TYC operated facilities and in contract residential programs will receive initial suicide prevention training and annual updates. Staff designated to conduct suicide screenings receive annual training by an MHP regarding suicide alert policy, suicide indicators, and suicide screening.

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302243
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-6014

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37 TAC §91.90

The Texas Youth Commission (TYC) proposes new §91.90, concerning Suicide Alert for Parole. The new section establishes procedures to be used by staff when they are made aware of potentially suicidal behavior exhibited by TYC youth paroled in the community.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough 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 the identification of youth on parole who display suicidal behavior. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The new section is proposed under the Human Resources Code, §61.040, which provides the Texas Youth Commission with the authority to provide active parole supervision for youth given conditional release.

The proposed rule affects the Human Resource Code, §61.034.

§91.90. Suicide Alert for Parole.

(a) Purpose. The purpose of this rule is to establish procedures for the identification, assessment, treatment and protection of youth that may be at risk for suicide within the community on parole to ensure safety.

(b) Applicability. This rule applies to all youth currently assigned to parole in the community in the Texas Youth Commission (TYC). This rule must be applied in conjunction with (GAP) §91.87 of this title (relating to Suicide Alert Explanation of Terms).

(c) Initial Identification of Youth at Risk for Suicide

(1) Any staff hearing or observing a youth engage in or verbalize non-lethal or overt suicide behavior must immediately respond in a manner that protects youth safety.

(2) For youth engaging in non-lethal suicide behavior, staff will immediately notify the family or legal guardian of the youth's behavior and provide community resource information where a Mental Health Professional (MHP) may be consulted.

(3) For youth engaging in overt suicide behavior, staff will immediately notify local law enforcement and the family or legal guardian and provide community resource information where an MHP may be consulted.

(d) Notification. For youth who have engaged in life threatening overt suicide behavior or who have completed suicide, staff will immediately report the incident to Executive staff in Central Office.

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302242
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-6014

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CHAPTER 95. YOUTH DISCIPLINE
SUBCHAPTER A. DISCIPLINARY PRACTICES

37 TAC §95.21

The Texas Youth Commission (TYC) proposes an amendment to §95.21, concerning Aggression Management Program. The amendment to the section will establish new criteria for progression through the stages of the program and release from the program. Additional minor revisions provide clarification to admission criteria.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough 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 the safe and effective management of dangerously aggressive behavior exhibited by youth assigned to a Texas Youth Commission institution. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765.

The amendment is proposed under the Human Resources Code, §61.075 Determination of Treatment, which provides the Texas Youth Commission with the authority to establish special needs treatment programs and criteria for confinement under conditions which best serve the welfare of youth and protection of the public.

The proposed rule affects the Human Resource Code, §61.034.

§95.21. Aggression Management Program.

(a)-(b) (No change.)

(c) Eligibility Criteria. Any youth, (other than females or sentenced offenders eligible for transfer to the Institutions Division of the Texas Department of Criminal Justice (TDCJ) [~~(TDCJ))~~] are eligible for the AMP.

(1) (No change.)

(2) The youth committed, attempted to commit, or helped someone else commit at least one of the following offenses:

(A)-(B) (No change.)

(C) intentionally participated in a riot that caused bodily injury or property damage of over $500.00; or

(D) used or attempted [~~threatened~~] to use either an object defined as a weapon by the *Penal Code* or an object that could be used as a weapon, which placed the victim in fear of imminent bodily injury.

(3) (No change.)

(d) Admission Decision Process.

(1)-(4) (No change.)

(5) Priority is given to youth with the most dangerous [~~,recent,~~] and chronic aggressive behavior, greater frequency of the use of weapons, and older age.

(e) Release from AMP.

(1) Program Completion Requirements.

(A) Youth are released from AMP upon successful completion of the following requirements:

(i) stages I through V of the AMP: [~~; and~~]

(I) Stage I. Youth must complete a minimum of 15 consecutive days without an aggressive act or credible threat of one; and

(II) Stages II-V. Youth must:

(-a-) complete a minimum of 30 consecutive days on each stage without an aggressive act or credible threat of one; and

(-b-) have 30 days on each stage of program compliance; and

(-c-) have completed phase A-2, B-2, C-2; and

(ii) at least phase A-2, B-2, C-2. Youth may not achieve higher than phase A-4, B-2, C-2 in stages I-III and phase A-4, B-2, C-3 in stages IV-V. [~~phase II of the resocialization program.~~]

[~~*(I)* Stage I. Youth must complete a minimum of 15 consecutive days without an aggressive act or credible threat of one; and~~]

[~~*(II)* Stages II-V. Youth must:~~]

[~~(-a-) complete a minimum of 30 consecutive days on each stage without an aggressive act or credible threat of one; and~~]

[~~(-b-) have 30 days on each stage of program compliance; and~~]

[~~(-c-) phase II of the resocialization program.~~]

(B) Program compliance is defined as completion of the resocialization phases (phase components) required for each of the stages as specified in this policy.

(i)-(iii) (No change.)

(iv) The treatment team will determine the appropriate stage for each youth using compliance with ICP objectives as the criteria. A youth may be retained on or promoted to the next stage based on completing ICP objectives. However, youth may be assigned to a lower stage based only on specific acts of aggressive behavior or loss of Behavior phase in resocialization. The treatment team shall document the reasons used to support their decisions and may make recommendations for modification of the treatment objectives or strategies.

(v) (No change.)

(C) (No change.)

(D) The youth will return to the facility that initiated the commitment to AMP. If there are compelling circumstances to prevent the youth from returning to the committing facility, the committing facility will notify the appropriate director of juvenile corrections. The appropriate director of juvenile corrections will make a determination of the appropriate placement. [~~The superintendent or designee will determine whether the youth will be permanently assigned to the MCSJC general campus program or be referred for placement elsewhere. If the youth is to be transferred, the superintendent or designee will refer the case to the Centralized Placement Unit (CPU) for placement assignment.~~]

(2) (No change.)

(f) Stage Requirements and Conditions. A youth obtains stages in the AMP based upon the following criteria.

(1) Stage I.

(A)-(B) (No change.)

(C) Youth will spend at least two (2) [~~up to two~~] hours a day out of the locked room in a structured activity following the daily program.

(2) Stage II.

(A) (No change.)

(B) Youth must have 30 days of program compliance including successful completion of three (3) of the five (5) indicators for the Correctional Therapy Phase C-1 main objective located in the ABC's of Phase Assessment, C1 page 4. The required three (3) main objective indicators are as follows: [~~six components of phase 1 of the resocialization program.~~]

(i) indicator 1: define a Life Story;

(ii) indicator 2: define Offense Cycle; and

(iii) the third indicator can be any of the remaining indicators for the main objective.

(C) Youth must have 30 days of program compliance including successful completion of three (3) of the five (5) sub-objectives located in the ABC's of Phase Assessment, C1 page 4. The required three (3) sub-objectives are as follows:

(i) sub-objective: Thinking Errors to include indicator 1;

(ii) sub-objective: Empathy to include indicator 1; and

(iii) the third sub-objective to include indicator 1 can be any of the remaining sub-objectives excluding Layout. The Layout must be the last sub-objective to be completed.

(D) Youth must maintain the Behavior Phase B-1 behavior objectives located in the ABC's of Phase Assessment, B1 page 2.

(E) Youth must complete the Academic/Workforce Development Phase A-1 main and sub-objective located in the ABC's of Phase Assessment, A1 page 2.

(F) [~~(C)~~] Youth are confined to single occupancy rooms except for periods of specific, highly supervised, and structured activities with limited numbers of other youth in the self contained program.

(G) [~~(D)~~] Youth will spend up to four (4) hours a day out of the locked room in structured activities following the daily program.

(3) Stage III.

(A) (No change.)

(B) Youth must have 30 days of program compliance including successful completion of all Academic/Workforce, Behavior and Correctional Therapy of Phase 1 with the Layout sub-objective the last to be completed [~~components of phase 1 of the resocialization program~~].

(C) (No change.)

(D) Youth will spend up to six (6) hours a day out of the locked room in structured activities following the daily program.

(4) Stage IV.

(A)-(C) (No change.)

(D) Youth must complete three (3) of the four (4) indicators for the Correctional Therapy Phase C-2 main objective located in the ABC's of Phase Assessment, C2 page 4. The required three (3) main objective indicators are as follows: [~~six components of phase 2 of the resocialization program.~~]

(i) indicator 1: accurately discusses significant life events;

(ii) indicator 3: identifies significant unmet needs; and

(iii) the third indicator can be any of the remaining indicators for the main objective.

(E) Youth must complete three(3) of the five (5) sub-objectives, excluding the Layout sub-objective that must be completed last, located in the ABC's of Phase Assessment, C2 page 4.

(F) Youth must complete the Academic/Workforce Development Phase A-2 main and sub-objective located in the ABC's of Phase Assessment, A1 page 2.

(G) Youth must maintain the Behavior Phase B-2 behavior objectives located in the ABC's of Phase Assessment, B1 page 2.

(H) [~~(E)~~] Youth will spend up to eight (8) hours a day out of the locked room in structured activities following the daily program.

(5) Stage V.

(A) (No change.)

(B) Youth must successfully complete all main objectives and sub-objectives to include the Layout sub-objective of Academic/Workforce and Correctional Therapy phase 2 of the ABC's of Phase Assessment. The Behavior Phase 2 objectives must be maintained. [~~components of phase 2 of the Resocialization program.~~]

(C) (No change.)

(D) Youth will spend up to 14 hours a day out of the locked room in structured activities following the daily program.

(g) Program Components.

(1)-(5) (No change.)

(6) Individual Counseling.

(A) Youth in stage I will receive at least one (1) hour a week of individual counseling from either the PSW [~~(PSW)~~] or unit psychologist.

(B)-(C) (No change.)

(7) Group Therapy.

(A) Group therapy will be offered on stages I-III in the AMP. The emphasis will be on individual Correctional Therapy phase 1 resocialization work in stages I and II and on core group in stage III.

(B) (No change.)

(8) Behavior Management. Youth are expected to follow their prescribed schedules and commit no rule violations per (GAP) §95.3 of this title (relating to Rules of Conduct)[~~(relating to Rules of Conduct, Contraband, and Dress)~~]. Youth will be entitled to earn privileges within the AMP with progression through the AMP stages and resocialization phases.

(9)-(10) (No change.)

(h) Program Monitoring and Youth Rights.

(1) (No change.)

(2) Youth will be offered the opportunity to meet with the assistant superintendent [~~youth rights specialist~~] weekly.

(3) (No change.)

(i) -(j) (No change.)

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302241
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-6166

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CHAPTER 97. SECURITY AND CONTROL
SUBCHAPTER A. SECURITY AND CONTROL

37 TAC §97.37

The Texas Youth Commission (TYC) proposes an amendment to §97.37, concerning Security Intake. The amendment to the section will establish procedures for admitting potentially suicidal youth to security intake. The amendment also establishes procedures and controls to ensure that such youth are assessed in person by a mental health professional.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough 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 is the identification, assessment, protection, and treatment of youth who have verbalized or engaged in suicidal behavior. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.045 Operations of Programs and Facilities, which provides the Texas Youth Commission with the authority to establish rules and procedures appropriate to the accomplishment of its functions.

The proposed rule affects the Human Resource Code, §61.034.

§97.37. Security Intake.

(a) Purpose.

(1) The purpose of this rule is to establish criteria and procedure for segregating youth from the general population under certain circumstances. Each Texas Youth Commission (TYC) operated institution [~~high restriction facility~~] or secure contract program provides for segregation programs. Placement in a segregation program may be imposed only in specific situations for specified periods of time. Youth who may be eligible for a placement in a segregation program may be initially referred to the security intake. Such youth are placed into a secure setting that is controlled exclusively by staff.

(2) If a youth from the community is referred to the institution for placement in protective custody, and the youth arrives without a formal assessment by a mental health professional (MHP), that youth will be placed in security intake, pending face-to-face assessment.

(b) Applicability. This rule does not apply to:

(1)-(3) (No change.)

(4) the use of the same or adjacent space when used specifically as protective custody. See (GAP) §97.45 of this title (relating to Protective Custody).

(5) [~~(4)~~] the use of the same or adjacent space when used specifically as temporary admission. See (GAP) §85.41 of this title (relating to Temporary Admission Awaiting Transportation); and

(6) [~~(5)~~] the aggression management program (AMP). See (GAP) §95.21 of this title (relating to Aggression Management Program).

(c) Referral and Admission Criteria. A youth may be admitted to security intake if there is reason to believe, based on overt acts by the youth, and/or under the following circumstances:

(1) (No change.)

(2) the youth is a serious and immediate physical danger to [~~himself/herself or~~] others and staff cannot protect [~~the youth or~~] others except by referring the youth to security intake; or

(3) the youth engages in or verbalizes overt or non-lethal suicide behavior as defined in (GAP) §91.87 of this title (relating to Suicide Alert Explanation of Terms); or

(4) [~~(3)~~] confinement is necessary to prevent imminent and substantial destruction of property; or

(5) [~~(4)~~] confinement is necessary to control behavior that creates disruption of the youth's current program; or

(6) [~~(5)~~] the youth requests confinement, unless self-referrals have been disallowed by the superintendent or designee; or

(7) [~~(6)~~] staff requests detention for a youth.

(d) Referral and Admission Process.

(1)-(4) (No change.)

(5) Designated staff include the superintendent, assistant superintendent, administrative duty officer (ADO), program administrator (PA), institution placement coordinator (IPC), principal, psychologist, caseworker, or designated juvenile correctional officer (JCO) VI [~~V~~] trained in the security intake policy and procedure to admit youth to the security intake program. On the late night shift, a JCO V [~~IV~~] trained in the security intake admission policy and procedure may admit a youth to security intake. The director of security may not admit a youth to security intake.

(6) If a youth is referred to security intake for danger of injury to self, this policy needs to be read in conjunction with (GAP) §91.88 of this title (relating to Suicide Alert for Secure Programs). Security staff shall immediately contact an MHP and a trained designated staff who must initiate a suicide risk screening within one (1) hour from referral.

(7) [~~(6)~~] The director of security or designee will review all admission decisions within one (1) working day to determine if admission criteria have been met. If the criteria are not met or policy and procedures are not followed, the youth will be released from the security unit. The director of security or designee shall not have been involved in the admission decision.

(8) [(7)] A youth may appeal the admission decision to the security intake through the youth complaint system as defined in (GAP) §93.31 of this title (relating to Complaint Resolution System).

(e) Security Intake Termination/Other Segregation Programs.

(1) Within 24 hours of admission to security intake, a youth shall be:

(A) (No change.)

(B) admitted to one of the following programs:

(i)-(ii) (No change.)

(iii) protective custody - if it is determined by an MHP, following a face-to-face assessment, that protective custody admission criteria are occurring. See (GAP) §97.45 of this title.

(2) If a youth is admitted to security intake for any reason other than danger of injury to self, the youth [Youth] may be released by the director of security or any designated staff authorized to admit youth in this policy.

(3) Youth admitted to security intake for danger of injury to self may only be released from security intake to the general population under two circumstances:

(A) by an MHP in accordance with (GAP) §91.88 of this title; or

(B) If an MHP does not assess the youth within 24 hours of admission to intake. The superintendent or assistant superintendent will be contacted immediately and the youth will be returned to the general population under one-to-one (1:1) observation until an MHP conducts a face-to-face suicide risk assessment.

(f) Restrictions.

(1)-(2) (No change.)

(3) The superintendent or assistant superintendent [designee] may place moratoriums of self referrals to security intake for individual dormitories (such as during dorm shutdown), as well as campus-wide when appropriate.

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302240
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-6166

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37 TAC §97.45

The Texas Youth Commission (TYC) proposes new §97.45, concerning Protective Custody. The new section will create a segregation program in secure TYC facilities and contract programs in order for potentially suicidal youth to be temporarily removed from the general population. The new rule will further establish a schedule for clinical assessments and monitoring of such youth by a mental health professional, along with establishing requirements for re-integrating youth back in to the general population.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough 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 the protection, monitoring, and treatment of potentially suicidal youth. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The new section is proposed under the Human Resources Code, §61.045, which provides the Texas Youth Commission with the authority to establish rules appropriate to the accomplishment of its functions.

The proposed rule affects the Human Resource Code, §61.034.

§97.45. Protective Custody

(a) Purpose. The purpose of this rule is to provide for a protective custody program in Texas Youth Commission (TYC) institutions and secure contract programs for the placement of youth who are determined to be at risk of serious harm to themselves and to establish program operation requirements.

(b) Applicability.

(1) This rule does not apply to:

(A) the use of the same or adjacent space when used specifically as security intake. See (GAP) §97.37 of this title (relating to Security Intake);

(B) the use of the same or adjacent space when used specifically as detention in a TYC institution. See (GAP) §97.43 of this title (relating to Institution Detention Program);

(C) the use of the same or adjacent space when used specifically as disciplinary segregation. See (GAP) §95.17 of this title (relating to Behavior Management Program);

(D) the use of the same or adjacent space when used specifically as a security program. See (GAP) §97.40 of this title (relating to Security Program);

(E) the use of the same or adjacent space when used specifically as temporary admission. See (GAP) §85.41 of this title (relating to Temporary Admission Awaiting Transportation);

(F) the aggression management program (AMP). See (GAP) §95.21 of this title (relating to Aggression Management Program).

(2) When a youth is admitted to protective custody, this policy must be read in conjunction with (GAP) §91.87 of this title (relating to Suicide Alert Explanation of Terms) and (GAP) §91.88 of this title (relating to Suicide Alert for Secure Programs).

(c) Admission Criteria. A youth may be admitted to the protective custody program only if the youth has received a face-to-face assessment by a mental health professional (MHP), and the MHP has determined that:

(1) based on the youth's actions, statements, or mental status, the youth is a serious and immediate physical danger to himself/herself; and

(2) confinement in the security unit is necessary to protect the youth from self-harm, and there is no less restrictive setting that provides the necessary level of security and staff supervision.

(d) Admission and Release Process.

(1) Based upon the MHP's assessment that admission criteria are met, the youth will be admitted into protective custody for up to 24 hours.

(2) All admissions to protective custody are reviewed within one (1) working day to determine if policy and procedures have been followed.

(3) The youth may be released from protective custody only if:

(A) a mental health professional determines the youth may return to the regular program immediately following a face-to-face suicide risk assessment; and

(B) the MHP has consulted with the designated mental health professional (DMHP), as defined in (GAP) §91.87 of this title (relating to Suicide Alert Explanation of Terms), prior to releasing the youth from protective custody; or

(C) A review of the admission to protective custody reveals that the youth is being held in violation of policy.

(e) Extended Stay Requirements.

(1) A youth may not be held in protective custody beyond 24 hours from admission to the program unless an MHP conducts a second face-to face suicide risk assessment and the MHP determines that the youth continues to be a serious and immediate physical danger to himself/herself and continued confinement is necessary to prevent self-harm.

(2) The youth may continue to be held in protective custody with a face-to-face suicide risk assessment completed every 24 hours after initial placement to evaluate the youth's status and need for continued placement.

(3) Each 24-hour extension decision will be reviewed within one (1) working day to determine if policy and procedures were followed.

(4) Every seven (7) days following a youth's admission into protective custody, the TYC facility's DMHP shall review the documentation relating to protective custody including the youth's treatment plan.

(5) If the youth remains in protective custody beyond 14 days, the director of treatment and case management shall review the MHP's evaluations and the youth's treatment plan shall be reviewed at least every three (3) days thereafter. Assessments will continue to be completed by the MHP every 24 hours.

(f) Appeals. The youth has the right to appeal his/her placement through the youth complaint system at any point in this process.

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302239

Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-6014

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CHAPTER 99. GENERAL PROVISIONS
SUBCHAPTER A. YOUTH RECORDS

37 TAC §99.11

The Texas Youth Commission (TYC) proposes an amendment to §99.11, concerning Youth Masterfile Records. The amendment to the section will replace some obsolete terminology, as well as make some minor grammatical changes.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough 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 consistent use of terminology relating to youth records among all TYC and contract facilities and programs. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.073, which provides the Texas Youth Commission with the authority to keep written records of all examinations, treatment, and disposition of each youth in its care.

The proposed rule affects the Human Resource Code, §61.034.

§99.11. Youth Masterfile Records.

(a)-(b) (No change.)

(c) Masterfile Description. [~~Explanation of Terms Used. Masterfile~~ -] The official record [~~records~~] maintained for each youth is called the masterfile. It physically consists of four (4) [~~two~~] separate file folders called the security subfile, the incident subfile, the casework subfile, and the medical subfile.

(d)-(e) (No change.)

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302261
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 424-6014

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 6. TEXAS COMMISSION FOR THE DEAF AND HARD OF HEARING

CHAPTER 182. SPECIALIZED TELECOMMUNICATIONS ASSISTANCE PROGRAM

SUBCHAPTER B. PROGRAM ELIGIBILITY

40 TAC §182.22

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission for the Deaf and Hard of Hearing or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Commission for the Deaf and Hard of Hearing proposes the repeal of §181.28, concerning fees required for financial assistance under the telecommunications voucher program. The section is proposed for repeal to comply with the changes of the law establishing this program.

David W. Myers, Executive Director, has determined that for each year of the first five years the section is repealed there will be no fiscal implications for state or local government as a result of this repeal.

Mr. Myers has also determined that for each year of the first five years of this repeal the public benefit anticipated as a result of this repeal will be that the program will comply with the legal statutes establishing this program. There will be no effect on small businesses. There is no anticipated economic hardship to persons required to comply with this repeal as proposed.

Comments on this proposed repeal may be submitted to Eileen Alter, Texas Commission for the Deaf and Hard of Hearing, P.O. Box 12904, Austin, Texas 78711-2904.

The repealed is proposed under the Texas Administrative Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration of programs.

No other statute, code or article is affected by this proposed repeal.

§182.22. Fees.

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

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302211
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Earliest possible date of adoption: May 18, 2003
For further information, please call: (512) 407-3250

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 25. HEALTH SERVICES

PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 417. AGENCY AND FACILITY RESPONSIBILITIES

SUBCHAPTER A. STANDARD OPERATING PROCEDURES

25 TAC §417.47

The Texas Department of Mental Health and Mental Retardation has withdrawn from consideration the proposed new §417.47 which appeared in the December 13, 2002, issue of the *Texas Register* (27 TexReg 11710).

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302266
Rudy Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: April 7, 2003
For further information, please call: (512) 206-4516

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 9. TITLE INSURANCE

SUBCHAPTER A. BASIC MANUAL OF RULES, RATES, AND FORMS FOR THE WRITING OF TITLE INSURANCE IN THE STATE OF TEXAS

28 TAC §9.20

The Texas Department of Insurance has withdrawn from consideration the proposed amendments to §9.20 which appeared in the February 21, 2003, issue of the *Texas Register* (28 TexReg 1607).

Filed with the Office of the Secretary of State on March 31, 2003.

TRD-200302126
Gene Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: March 31, 2003
For further information, please call: (512) 463-6327

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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 the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in 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 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §25.41

The Public Utility Commission of Texas (commission) adopts amendments to §25.41 relating to Price to Beat with changes to the proposed text as published in the November 22, 2002, issue of the *Texas Register* (27 TexReg 10840). The amendments modify certain requirements related to adjustments to the price to beat, including: the number of trading days used to calculate the natural gas price average for fuel factor adjustments; the threshold of price changes needed to justify an adjustment to the fuel factors; the criteria that apply in order to substitute an electricity price index for the natural gas price index; the specific adjustments to the price to beat that will be considered following the true-up proceedings conducted under Public Utility Regulatory Act (PURA) §39.262; and the processing guidelines for price to beat adjustments. The amendments also make other minor changes that are intended to clarify other aspects of the rule. Project Number 26556 is assigned to this proceeding.

The amended §25.41 clarifies that the affiliated retail electric provider (REP) can request up to two adjustments each year to their price to beat fuel factor, upward or downward, upon a showing that the existing fuel factor does not adequately reflect significant changes in the market price of natural gas and purchased energy as measured by changes in natural gas futures prices. As adopted, the revised section requires the use of a 20-day average of the forward 12 month average market clearing price of natural gas traded on the New York Mercantile Exchange (NYMEX) at the Henry Hub delivery point with a 5.0% materiality (or significance) threshold instead of the ten-day average and 4.0% threshold contained in the original rule. Because natural gas prices and electricity prices are very highly correlated in Texas, this adjustment will aid in the development of a robust competitive retail electricity market by continuing to permit the price to beat fuel factor to change in accordance with the market price of electricity, while reducing the potential that transitory changes in prices will be captured.

Amended §25.41 also provides for specific adjustments to the price to beat following the true-up proceedings as permitted by PURA §39.202(k). Specifically, the amended rule specifies that the commission will adjust the fuel factor portion of the price to beat rate downward following the true-up if natural gas prices are below the prices embedded in the then- current factors. Additionally, the base rate portion of the price to beat will be adjusted, upward or downward, in order to account for changes in the non-bypassable delivery charges billed to REPs by transmission and distribution utilities (TDUs). The combination of these two adjustments will provide needed certainty to both retail customers and market participants as to the changes that will occur following the true-up. These adjustments will also provide a benefit to retail customers on price to beat service of lower natural gas and purchased energy prices and non-bypassable charges, if prices fall, while also ensuring that increases in non-bypassable charges do not eliminate the ability of new entrants to effectively compete for retail customers.

Comments were received on December 13, 2002 and reply comments were received on December 20, 2002. Representatives from Consumers Union Southwest Regional Office, Texas Ratepayers' Organization to Save Energy, and Texas Legal Services Center (Consumer Groups); TXU Energy Retail (TXU); the American Electric Power Retail Electric Providers (AEP REPs); Reliant Resources, Inc. (Reliant); City of Houston (Houston); Entergy Gulf State, Inc. (Entergy); the Office of Public Utility Counsel and the Steering Committee of Cities Served by TXU (OPC and Cities); Alliance for Retail Markets (ARM); the State of Texas (the State); and First Choice Power, Inc. (FCP) provided comments and responses to other parties' comments.

A public hearing on the proposed rule and registration form was held January 7, 2003 at 10:00 a.m. in the Commissioners' Hearing Room. No party made additional comments at the hearing.

The commission requested specific comments on the following questions:

1. The current rule provides for the use of a ten-day rolling average of NYMEX natural gas futures prices in order to determine whether or not a significant change in the market price of natural gas and purchased energy has occurred. While it does not appear that the recent adjustments to the price to beat fuel factors have captured a temporary change in natural gas price, but instead appear to have reflected significant and long-term price change, a review of natural gas prices over the course of 2002 suggests that there is a potential for capturing temporary changes in gas price due to the use of a ten-day average. Does the proposed change to a 20-day average, combined with the changes in the significance threshold reduce or minimize the potential for such an occurrence?

TXU, ARM, AEP REPs, Entergy, FCP, Reliant, OPC and Cities, and Houston agreed that adopting a 20 trading-day period does not reduce potential for capturing temporary changes in gas price.

TXU, ARM, AEP REPs, Entergy and FCP commented that it is highly unlikely that an affiliated REP can game fuel factor adjustments using the ten-day rolling average of natural gas prices and the current rule has consistently captured significant changes in the market price of natural gas and purchased power during the 13-month period analyzed (September 4, 2001 through October 10, 2002) by the commission. Reliant argued that there is no systematic ability of an affiliated REP to capture temporary changes in gas prices using either a ten-day average or a 20-day average because the path of future gas prices is unknown. FCP, ARM, and AEP REPs stated that the June 2002 decline in gas prices referenced in the Proposal for Publication as the basis for implementing a 20-day rolling average was transitory in nature, but the overall trend in gas price increases was not. FCP and ARM argued that the possibility of an affiliated REP capturing an inadvertent spike in gas prices should not be the basis for making the proposed change in trading days.

TXU, ARM, and Reliant commented that lengthening the amount of time it takes to implement revisions to the fuel factor component of the price to beat rates increases the risk that will be borne by both affiliated REPs and competitive REPs because the existing retail prices fail to reflect wholesale purchased energy prices. ARM and Reliant argued that using a longer time period, along with the regulatory schedule, creates significant lag between the wholesale market price changes and retail market price changes. ARM noted that the greater the number of trading days used to calculate average prices increases, the greater the lag from actual market prices. Reliant stated that this was not an issue under the former regulatory regime because utilities were allowed to recover purchased energy costs through a fuel surcharge. No such mechanism exists for affiliated REPs. In turn, ARM and Reliant argued, the greater the lag from actual market prices, the more difficult it is for all REPs to effectively manage their risk in the market. FCP added that affiliated REPs specifically would lose revenues due to this proposed change, hampering the company's ability to compete outside of their service area, therefore harming competition.

TXU, FCP, and Entergy argued that there is not a substantial difference between using a ten- day period, a 15-day period, or a 20-day period; therefore, they argued that the ten-day period should be retained in the rule. FCP agreed, stating that there is only a 2.0% variance between the ten- and 20-day rolling averages.

OPC and Cities agreed that there is virtually no difference between the ten-day and 20-day averages with respect to problems of transitory price changes discussed by the commission. But Houston and OPC and Cities argued that adoption of the 20-day average would not really further the commission's goal of reducing "gaming" opportunities by eliminating transitory price spikes and that the commission should require an even longer trading-day period to evaluate true trends in natural gas prices. OPC and Cities point out that TXU and FCP agree with them that there is little difference between ten and 20 days, citing this as evidence that a longer time frame is needed to prevent gaming.

TXU and Entergy commented that a 20 trading-day period would add at least 14 more calendar days to the length of time it takes to change the fuel factor to reflect wholesale prices. TXU stated that using a 20 trading-day period would require at least 28 calendar days, followed by several days to make the filing, followed by 45 days (or more, under the proposed revisions) until a final order is entered by the commission. Thus, TXU stated, there would be approximately 75 days between the time wholesale prices begin to change and the time that such change can be reflected in the price to beat fuel factor. Entergy stated that if the 20 trading-day period is adopted, then they proposed that the discretionary procedural deadlines be made mandatory and changed as follows: the deadline for requesting a hearing (if any) be reduced from 15 days to seven days after the petition is filed; and if a hearing is requested, the final order issuance date be reduced from 45 days to no later than 30 days. These changes, Entergy argued, would make up for the filing time lost by extending the trading day period from ten to 20 days. Cities and OPC believe these proposals would severely disadvantage interveners by limiting the time for analysis and preparation of testimony, as well as seriously limiting the time available for the ALJ and commission to analyze cases. Cities and OPC further argued that the shortened time frame, from 15 to seven days, would also make it more, rather than less, likely that parties would request hearings to preserve their rights, and would make reaching a settlement in advance more difficult. OPC and Cities reiterate that Entergy has not provided any proof that these additional ten days would have any actual financial impact. OPC and Cities point out that the reduction of the filing window from ten days to one fulfills the same function of offsetting the increase from a ten to a 20 day rolling average. The State suggested that affiliated REPs' statements that costs and revenues are irrelevant to the statutory requirement to demonstrate losses, and their claim of the possibility of losses due to a delay, are inconsistent.

While the commission agrees with virtually all of the parties that suggest that the move to a 20-day period does not result in a substantial change in the average used to calculate gas price adjustments, no party refuted the potential that, based on actual gas prices that occurred in 2002, there was in fact a period of time that the use of a ten-day average captured a transitory period of natural gas price increases that a 20-day average would not have.

The commission agrees with Reliant and others that there is no systematic way for an affiliated REP to "time" the natural gas market in order to capture temporary spikes in natural gas prices; however, the commission remains concerned that prices for a ten-day average have demonstrated the potential for an affiliated REP to capture a transitory change in natural gas prices, intentionally or not.

The commission also agrees with TXU, FCP, and others who argue that the increase in the number of days used to average gas prices may result in the gas price average becoming further divorced from how prices are actually changing in the marketplace, especially given the time needed to process requests for adjustments. However, the commission believes that a move to a 20 trading-day period would provide a slight benefit over a 10-day or 15-day trading period to smooth price spikes in the gas market, but still retain the timeliness to adequately reflect market prices. The commission also believes that a 20 trading-day average, combined with the increase to a 5.0% materiality (or significance) threshold, and the change in the filing window would adequately address the concern discussed by the commission in the preamble to the published rule. The commission makes corresponding changes in the rule.

For the reasons discussed above, the commission disagrees with OPC and Cities and others who argued that the similarity between the ten-day and 20-day average supported the use of an even longer period of time to average natural gas prices. As stated in the original Order Adopting §25.41, Relating to Price to Beat, if the price to beat does not remain an above- market rate

with adequate headroom for new providers to enter the market and be able to profitably compete for retail customers, then retail competition in Texas will not succeed. (*Price to Beat*, Project Number 21409 (Mar. 21, 2001)) The transcript of the floor debate in the Texas House of Representatives provided by OPC illustrates that this was of paramount concern to the Legislature. Representative Steve Wolens, the sponsor of Senate Bill 7 (Act of May 27, 1999, 76th Legislature, R.S., Ch 405, 1999 Texas General Laws 2543) in the House stated: "And that is the genius of this bill. If you want competition, they (competitors) have got to come in, and they got to have headroom to be able to come in and price." (See OPC Comments at 38.)

Additionally, the requirement that the affiliated REP lose 40% of the load in their residential and small commercial customer classes before each is permitted to offer other products than price to beat service in their own area also illustrates the intent of the Legislature that the price to beat contain sufficient headroom such that new entrants could entice customers to switch to a new provider.

Also, PURA §39.262 provides that the affiliated REP is required to refund the difference between the price to beat and the prevailing market price of electricity (subject to certain limitations) at the time of the true-up. This further illustrates that the Legislature intended and expected the price to beat to be an above market rate.

It is therefore inconsistent with this intent for the price to beat to become significantly divorced from the market price of electricity. The greater the number of days that are averaged to compute the natural gas price average, the greater the potential that that average will significantly lag behind changes in market prices. The commission agrees with the comments of Reliant and others that argue that natural gas and electricity prices are very highly correlated in Texas, a significant lag in natural gas prices correlates very strongly to a significant lag in the market price of electricity. As such, the commission declines to make the changes suggested by OPC and Cities and finds that the use a 20-day average, combined with the other changes to the rule discussed herein, mitigates the potential that temporary spikes in prices would be captured by an affiliated REP's request, while still retaining a sufficiently close reflection of actual conditions in natural gas and purchased energy markets.

2. In order to provide more certainty to both retail customers and the marketplace, the commission has proposed additional detail as to what factors will be considered with respect to adjustments to the price to beat following the stranded cost true-up proceedings pursuant to the commission's authority under PURA §39.202. Is the proposed methodology appropriate, or should a different adjustment mechanism be used? If the commission instead ordered that the price to beat be adjusted (either up or down) such that initial headroom that existed on January 1, 2002 was achieved, what would be the proper method of distributing adjustments to the price to beat, between the base rate components and the fuel factor component of the price to beat?

Reliant, ARM, TXU, and FCP commented that the proposed methodology is appropriate. In addition, they supported the idea that any price changes pursuant to PURA §39.202(k) should be symmetric, reflecting increases or decreases in natural gas prices or non-bypassable charges. Reliant and TXU recommended that, should market prices indicate an increase in the price to beat fuel factor is warranted, the price to beat fuel factor be increased following the true-up. Likewise, Reliant and ARM suggested that the rule should clarify that the base rate adjustment should include any "known and measurable changes" to the TDU's non-bypassable charges. FCP agreed and specifically argued that any increase in the non-bypassable charges resulting from a competitive transition charge (CTC) should result in an increase in the base rate component of the price to beat rate, after updating for gas prices. FCP argued that the base component of the price to beat rate applicable to the non-bypassable charges should not be adjusted outside the normal regulatory proceeding for the TDU. FCP also stated that if the intent of the rule is to have a different TDU rate for price to beat customers and for competitive customers, then FCP opposed this portion of the rule because it would result in billing of two sets of TDU rates.

In reply comments, OPC and Cities stated that, while they do not object to the fuel factor adjustments being symmetric, the current rule and proposed amendments allow no opportunity for the fuel factor to be reduced under PURA §39.202(l) filings and that only a potential downward adjustment should be allowed under the PURA §39.202(k) true-up adjustment, because affiliated REPs would still have the opportunity to make a filing under PURA §39.202(l) if an increase is needed. In reply comments, AEP REPs disagreed with OPC and Cities and Houston's objection to changing fuel factor rates during the true-up proceeding and stated that because price to beat fuel factor changes are not cost-based changes, the commission should reject their argument.

The commission notes that all customers, irrespective of whether customers are receiving price to beat service or not, are assessed the same non-bypassable charges. Also, the commission notes that the base rates of the price to beat are set by law as a 6.0% reduction of the rates in effect on January 1, 1999, and are not directly related to the non-bypassable charges set by the commission in the relevant unbundled cost of service proceeding. Therefore, it appears that FCP's concerns do not require revisions to the rule.

The commission agrees that all changes in non-bypassable charges should be reflected in the adjustment to be made following the true-up, including changes in stranded cost charges and transmission and distribution rates, and that this should be symmetrical with respect to these charges. Clarifying language has been added to subsection (g)(3)(B).

The commission disagrees that the fuel factor adjustment contemplated by (g)(3)(A) should be symmetric. The commission finds that it is appropriate to provide certainty to retail customers that a downward adjustment to the fuel factor will be made if natural gas and electricity prices warrant such an adjustment. The commission notes that affiliated REPs would still retain their ability to request an adjustment to the fuel factor if natural gas prices increase up to twice per year. No revision to the proposed rule has been made.

Entergy commented that the proposed amendments to the price to beat rule could result in a decrease in the shopping credit because there is not a provision that allows the commission to account for the shopping credit margin. Instead, Entergy argued, the proposed fuel factor revisions appear to require either the status quo or a downward adjustment based solely on NYMEX gas prices but does not attempt to measure the "before" and "after" shopping credit. Entergy argued that if the shopping credit is reduced to a level below its pre-true-up level, then competition in the retail market will be irrevocably harmed. Entergy stated that whatever the commission decides with regard to the price to beat rule, it should ensure that the resulting shopping credit is at least

the same as the pre-true-up shopping credit, if not increased, as necessary to protect and enhance the competitive retail market. Entergy argued that the proposed amendments to the rule limit the commission's ability to ensure a healthy competitive retail market by presuming that PURA §39.202(k) is intended to result in a post-true-up affiliated REP headroom level that is no more than headroom that existed initially in the market and that PURA does not require this limited result. Entergy stated that PURA §39.202(k) authorizes a discretionary action, but does not require that the commission adjust the price to beat and does not require that the post-true-up adjustment to the price to beat simply maintain the then-existing price to beat headroom level to the initial price to beat headroom level. Entergy argued that the commission should retain flexibility to ensure that competitive REPs are not forced out or otherwise adversely affected by changes to the affiliated REPs' price to beat rates. Entergy suggested that this could be achieved by ensuring that the post-adjustment shopping credit is at least no less than the pre-adjustment shopping credit. In reply comments, ARM agreed with Entergy's observation that the language in PURA §39.202(k) gives the commission full discretion as to the scope and degree of any adjustment to the price to beat following the true-up but argued that it does not preclude the commission from establishing the restoration of eroded headroom in the future proceeding envisioned by this provision. ARM also stated that they agree with Entergy's position that the statutory provision permits the commission to adjust the price to beat in a manner that affords greater headroom than that which existed on January 1, 2002, if it concludes that additional headroom is necessary.

The commission declines to make the change suggested by Entergy. The commission believes that the adjustments proposed in the rule combined with the ability of the affiliated REP to request up to two adjustments per year should be adequate to maintain a sufficient amount of headroom in the price to beat. The commission disagrees with Entergy that the rule contemplates either a status quo or downward adjustment to the fuel factor and notes that affiliated REPs are permitted to request two adjustments to the fuel factor per year if changes in the market price of natural gas and purchased energy warrant. Therefore, to the extent the market price of natural gas and purchased energy increases, thereby reducing headroom, a mechanism already exists for the affiliated REP to remedy that headroom decrease by requesting an upward adjustment to its fuel factor. The commission also finds that, if the "shopping credit" or headroom is reduced due to increases in non-bypassable charges, the rule as proposed addresses that concern through providing for an adjustment to the base rates to account for that. Therefore, no change to the proposed rule has been made.

The commission agrees that the statute does provide the commission with great flexibility as to how the price to beat should be adjusted following the true-up, and the commission agrees that it is not precluded from considering adjustments to the price to beat to create additional headroom. However, the commission believes it appropriate, as stated in the preamble to the proposed rule, to provide additional certainty and guidance as to what adjustments will be made at that time, in order to better assist both REPs and customers in making arrangements for electric service. No change has been made to the proposed rule.

In reply comments, Houston, OPC and Cities opposed Entergy's proposal to arbitrarily adjust the price to beat to "ensure a healthy retail open access market" because they argued this language much too broad and subjective. However, OPC and Cities did support Entergy's argument that PURA §39.202(k) places no limit on the commission's ability to adjust the base rate component of the price to beat. OPC and Cities argued that the level of price increases needed to achieve healthy retail open market access are unknown and there is no way to determine what the outcome of such a proposal might lead to in terms of regulatory proceedings. OPC and Cities also stated that the whole concept of "price supports" from ratepayers to subsidize the competitive market is antithetical to the entire concept of free market, the price to beat, and economic theory.

The commission agrees with Houston and OPC and Cities that Entergy's proposed language is extremely broad and does not add much in the way of certainty to the marketplace and customers. The commission therefore declines to make the changes suggested by Entergy. However, to the extent that OPC and Cities' concept of "price supports" is meant to indicate that the price to beat was not intended to be an above market rate, the commission disagrees for the reasons previously stated.

Houston did not support the proposed addition of subsection (g)(3)(B) to adjust the base rate portion of the price to beat to account for adjustments in non-bypassable fees. Houston argued the proposal of subsection (g)(3)(B) is inappropriate and contrary to PURA because they believe that it will likely result in an increase in the price to beat for the sake of certainty. Houston stated that the proposed mechanism would provide for an automatic adjustment to rates without any cost support and that PURA has a prohibition on automatic adjustments to rates. Houston argued that the mechanism could increase the price to beat base rates even if the utility's costs have not changed, or may have even decreased creating a windfall that would flow to the utility's bottom line. Houston stated that this windfall should instead flow back to the customer rather than the utility and that if the windfall is used to reduce stranded costs the mechanism has succeeded in a more rapid recovery of stranded costs.

PURA's prohibition on automatic adjustments to rates is included in PURA §36.201, which states that "the commission may not establish a rate or tariff that authorizes an *electric utility* to automatically adjust and pass through to the utility's customers a change in the *utility's* fuel or other costs (emphasis added)." PURA §31.002(6)(H) explicitly excludes retail electric providers from the definition of "electric utility." Therefore, the commission finds there is no explicit prohibition on automatic rate adjustments for retail electric providers.

Moreover, the commission disagrees that the adjustment contemplated in the proposed rule is an "automatic adjustment." PURA §39.107(d) provides that a transmission and distribution utility "shall bill a customer's retail electric provider for non-bypassable delivery charges" and that the REP "must pay these charges." As such, it is unquestioned that changes in non- bypassable delivery charges are a cost to REPs and may change as a result of the true-up proceeding. PURA §39.202(k) permits the commission to adjust the price to beat following the true-up proceedings. Subsection (g)(3) merely prescribes the type of adjustment that will be considered by the commission following the true-up and specifies a methodology to effectuate that adjustment. Subsection (g)(3) also contemplates filings to be made by the affiliated REPs for the commission to review and approve the adjustments and ensure that they are performed in accordance with the rule methodology. Adjustments to the rates will not occur without commission review and approval, and therefore, the commission does not agree that the adjustments are automatic.

ARM suggested that the commission revise subsection (g)(3) to state that: (1) the price to beat shall be adjusted to a level, that

at a minimum, achieves the same amount of headroom which existed on January 1, 2002; and (2) after re-achieving the original amount of headroom in existence on January 1, 2002, the commission may further increase the adjusted price to beat in order to "encourage full and fair competition among all providers of electricity," consistent with the legislative objective in PURA §39.101(b)(1).

TXU disagreed with ARM and opposed the possibility of using an adjustment based on the amount of headroom that existed on January 1, 2002. TXU commented that such an approach would be more difficult to implement than the approach contained in the proposed rule, as the commission explicitly declined to calculate the amount of headroom when it decided the initial price to beat cases for the affiliated REPs.

AEP REPs proposed that the commission retain an option to adjust price to beat rates to preserve headroom and that if additional adjustment is made to price to beat rates solely to preserve pre-existing headroom, the change should be applied to the price to beat fuel factor, consistent with the way such changes are to be handled in price to beat fuel factor filings at the request of the affiliated REP.

The commission agrees with TXU and declines to make the changes proposed by ARM and AEP REPs for the same reasons as discussed above with respect to the similar proposal by Entergy. The commission believes that the combination of an adjustment to the base rates to account for changes in the non-bypassable charges assessed to REPs, and the adjustments to the fuel factors that can be requested by the affiliated REPs to reflect significant change in the market price of natural gas and purchased energy, are sufficient to retain headroom under the price to beat for new competitors.

AEP REPs, Entergy, TXU, and Reliant suggested that the commission clarify that if a fuel factor adjustment is made pursuant to subsection (g)(3)(A), that adjustment will not reduce the number of adjustments the affiliated REP may request pursuant to §25.41(g)(1). AEP REPs stated that PURA §39.202(l) permits affiliated REPs to request two changes per year. AEP REPs argued that if the commission, under separate rule authority, allows adjustments during the true-up, that adjustment cannot be considered a request by the REP pursuant to PURA §39.202(l). TXU and AEP REPs agreed that an adjustment to the price to beat following the true-up would be undertaken pursuant to PURA §39.202(k), not requests to adjust the fuel factor under PURA §39.202(l). In reply comments, Reliant suggested that if the commission decides that a fuel factor adjustment pursuant to subsection (g)(3)(A) is considered one of the affiliated REPs two allowed fuel factor adjustments per year, then such a fuel factor adjustment should be made at the affiliated REP's option.

The commission agrees with AEP REPs, Entergy, TXU, and Reliant that it is appropriate to clarify that the adjustment contemplated in (g)(3)(A) is not intended to reduce the number of adjustments that the affiliated REP may request. Adjustments to the price to beat made by the commission following the true-up are pursuant to PURA §39.202(k), whereas PURA §39.202(l) provides separately for adjustments to the fuel factor requested by the affiliated REP. A clarifying addition to this subsection has been made.

Entergy opposed proposed subsection (g)(3)(A) to allow for a fuel factor adjustment following the true-up. Entergy stated that PURA does not give the commission unfettered discretion to adjust any component of the price to beat. Entergy argued that, while the commission has the discretion to adjust the base rate components of the price to beat, it does not have the discretion to adjust the fuel factor components. Entergy commented that fuel factor adjustments are filed at the sole discretion of the affiliated REP in accordance with PURA §39.202(l) and that the proposed addition of subsection (g)(3)(A) inappropriately would allow the commission to adjust both the base rate components and the fuel factor components of an affiliated REP's price to beat by requiring an affiliated REP to do something that the commission does not have the authority to do under PURA §39.202(l).

The commission agrees with Entergy that only the affiliated REP has the right to request adjustments to the price to beat fuel factor under PURA §39.202(l). Specifically, in the Order Adopting §25.41, the commission found that, "under the plain language of PURA §39.202(l), only the affiliated REP can request a change in the fuel factor portion of the price to beat."

However, the commission does not agree that it lacks authority to require an adjustment to the fuel factor following the true-up. PURA §39.202(k) contains no limitation on the commission's authority to adjust the price to beat following the true-up. The commission believes it appropriate to provide for two separate adjustments at that time -- one to reflect lower natural gas and power prices, if appropriate, and one to reflect changes in non-bypassable charges, also if appropriate. The commission finds that these two adjustments, together with the continued ability of affiliated REPs to request adjustments to the price to beat fuel factor, provide a reasonable method to ensure that all retail customers, including those that remain on price to beat service, will receive the benefits of lower natural gas and power prices, while at the same time continuing to ensure that there is adequate headroom under the price to beat for new competitors to enter the market.

TXU and ARM agreed that only the base rate components of the price to beat should be adjusted in the proceeding conducted pursuant to subsection (g)(3). TXU commented that the fuel factor portion of the price to beat rate can vary over time so that it will, in general, reflect the wholesale energy prices available to the REPs and that the price to beat rates will reflect the energy prices that competitive REPs pay and upon which those competitive REPs base their retail prices. Therefore, the only portion of the price to beat rate where "headroom" can exist is the base rate portion. TXU argued that any attempt to achieve a certain amount of "headroom" in the fuel factor portion is subject to being lost whenever the affiliated REP requests a change to the price to beat fuel factor. Thus, TXU argued, to ensure that the headroom differential remains intact, it must be fully reflected in the base rate portion of the price to beat, while the fuel factor portion of the price to beat rate should continue to be set as otherwise provided in the price to beat rule.

The commission agrees with TXU's comments, and believes that retaining the proposed adjustment mechanism in the rule is consistent with those comments because changes in non- bypassable charges (which have the effect of changing headroom) are applied to the base rate portion of the price to beat.

ARM stated that, while they appreciate the commission's objective to recapture lost headroom attributable to a net increase in non-bypassable charges in the proposed revision to subsection (g)(3), such a discrete adjustment to the price to beat will not capture the numerous other factors that will increase the market price of power and erode headroom during the period in which the price to beat is in effect. These factors include, but are not limited to, the following: increases in the Electric Reliability Council of Texas (ERCOT) administrative fee; reliability must

run (RMR) contracts approved by ERCOT; the potential for future plant mothballing and future RMR contracts; the possibility that plant mothballing and retirement will result in a decrease in the level of competition in the wholesale market; potential increases in fuel prices; the approval and implementation of non-bypassable charges; and the possibility that the commission may order the institution of a generation adequacy mechanism in Project Number 24255, *Rulemaking Concerning Planning Reserve Margin Requirements*. Entergy agreed and argued that the impact of these factors could seriously impair, and possibly eliminate, retail competition if they are not all taken into account in adjusting the price to beat pursuant to subsection (g)(3).

In reply comments, OPC and Cities opposed ARM's suggestion that the commission consider such items as ERCOT fees, RMR costs, and potential costs such as generation surcharge because, they argued, allowing such costs would greatly complicate the true-up proceeding. OPC and Cities argued that the commission should reject ARM's proposed language to allow the commission to increase the price to beat during the true-up proceeding due to such costs and argued that there would be nothing transparent or predictable about a rule that says the commission could arbitrarily increase the price to beat to encourage competition.

The commission agrees with OPC and Cities that items such as RMR costs and costs related to generation adequacy proposals should not, at this time, be included in the adjustment mechanism to follow the true-up proceeding. The commission notes that it is still evaluating the appropriate mechanisms for generation adequacy and it is therefore premature at this time to consider whether the costs that are required to be borne by REPs under such proposals be reflected explicitly in the price to beat. The commission finds that ARM's concerns regarding changes in fuel costs have been addressed through PURA §39.202(l), which permits the affiliated REP to request adjustments to their fuel factors to reflect changes in the market price of natural gas. The commission also notes that, the retirement of older generation plants typically occurs because these plants are less efficient and therefore no longer economic to run. While it is possible that decreased reserve margins may lead to higher wholesale market prices in the future (setting aside the effect of natural gas price changes), the commission believes that such changes will be captured either by the current mechanism contained in subsection (g)(2), or through the transition from a natural gas price index to an electricity commodity price index contemplated in subsection (g)(1).

The commission also recognizes that costs related to RMR contracts, and a variety of other costs, do represent real costs to REPs operating in the marketplace. However, the commission declines at this time to provide for an adjustment to the price to beat for these costs. The commission notes that ERCOT currently has a working group addressing RMR issues, and the commission is currently investigating whether more extensive changes to the wholesale market design in ERCOT is needed to remedy such costs. Therefore, the commission believes that it is inappropriate at this time to provide for an adjustment to the price to beat for these costs.

The commission also notes that the initial price to beat fuel factors included costs (22 cents per MWh) related to the ERCOT administrative fee. Because the initial level of the fee was included in the fuel factor portion of the rate, it has effectively been increased due to the subsequent adjustments to the fuel factors. The commission therefore finds that, although it is not a perfect match with the actual changes in the ERCOT administrative fee and that changes in the ERCOT administrative fee and changes in natural gas prices are unrelated, that there has effectively been an adjustment for the increased fee through the fuel factor adjustment mechanism.

Houston opposed the proposed method of calculating the price to beat base rate adjustment in subsection (g)(3)(B). Houston commented that as proposed, the rate adjustment is based on rate calculations for a typical commercial customer based on the assumption of "35 kilowatts (kW) of demand and 15,000 kWh per month in usage" and that, as defined, the typical customer has a load factor of approximately 59%. Houston stated that the price to beat rate adjustment necessary to maintain the prior level of headroom for this load factor will not be appropriate for commercial customers with different load factors and that the result would be to have lower and higher headroom levels (as compared to their initial headroom levels) for most commercial customers, contrary to the intent of the proposed mechanism. Houston stated that although they do not believe the proposed price to beat base rate adjustment mechanism is appropriate, they are not recommending an alternate method.

The commission disagrees with Houston and retains the proposed adjustment mechanism. The commission notes that changes to the base rates required under this subsection will be applied equally to each rate component, and therefore, should generally have the same level of impact on all customers, irrespective of load factor. While it may be the case that some customers will have greater amounts of headroom than others, the commission believes that this will predominantly be due to the particulars of the existing rate design of price to beat rates and non-bypassable charges, and that any incremental change in those rates will have relatively minor impacts.

In reply comments, ARM disagreed with Houston, arguing that an adjustment pursuant to subsection (g)(3)(B) does not result in an automatic adjustment as Houston claims. The proposed adjustment would only occur after a proceeding before the commission to determine whether the adjustment was appropriate. Therefore a one-time adjustment following the true-up is not contrary to any statutory provision prohibiting automatic adjustment mechanisms.

The commission disagrees that the adjustment mechanisms provided for by the rule are automatic adjustments for the reasons previously stated.

TXU stated that it is their understanding that the difference between the average price to beat rate and the non-bypassable charges effective as of January 1, 2002 would be determined, and that differential would then be added to the level of non-bypassable charges in effect after the 2004 true-up proceedings to determine the base rate portion of the price to beat rate. TXU suggested that this differential be calculated for each affiliated REP and specifically included in the proposed rule so that all parties will know in advance the amount that will be added to an affiliate REP's non-bypassable charges to determine the base rate portion of the price to beat rate.

ARM opposed TXU's suggestion to include a calculated differential in the rule. ARM stated that while they agree that the differential between the average price to beat and the non- bypassable charges in effect as of January 1, 2002 can be calculated now, ARM did not agree that the inclusion of those differentials in the rule is necessary. Instead, ARM argued, those differentials should be established as part of the proceedings established in

subsection (g)(3) of this rule, in the event there is any disagreement about what they should be.

The commission agrees with TXU that the rule provides that the January 1, 2002 average price to beat rate and the non-bypassable charges differential would be added to the level of non- bypassable charges in effect after the 2004 true-up proceedings to determine the base rate portion of the price to beat rate. However, the commission agrees with ARM that it is unnecessary to include those mathematical calculations in the rule and that it is more appropriate that those differentials are filed in the true-up cases.

OPC and Cities supported the proposed amendments to allow adjustments for changes in the market price of energy used to serve retail customers and the retail clawback, but disagree with the other aspects of this proposal. OPC and Cities stated that the retail clawback is the only true- up provision which is specific to the price to beat. They argued that unless the retail clawback credits are flowed through to the price to beat customers, the largest part of the affiliated REP "excess earnings" would only be returned to the affiliated REP resulting in little or no cost to the affiliated REP for charging above-market prices to 60% or more of the retail market. OPC and Cities stated that if the retail clawback is to perform a function analogous to a fuel reconciliation, as some market participants have argued, then the credit must be reflected on end-users' bills.

The commission agrees with OPC and Cities that it is appropriate to include the retail clawback in the proposed adjustment to the base rates and finds that the proposed amendment would effectively pass through the retail clawback credit to ratepayers. Specifically, §25.263(m) of this title (relating to True-up Proceedings), provides for a reduction to the rates of a TDU to reflect the retail clawback. The commission disagrees that this is the only change in non-bypassable charges that should be included. The commission finds that it is appropriate and reasonable to reflect all changes in non-bypassable charges, positive or negative, in the adjustment provision.

3. What objective criteria should the commission consider adopting with respect to what constitutes a "sufficiently liquid" electricity commodity index or trading hub? The commission desires comments on specific criteria, such as volume of trades, number of participants, spread between bid and ask prices, etc.

Houston, OPC and Cities, TXU, and Entergy generally agreed that the commission should wait to define objective standards that could be used to define a sufficiently liquid electricity commodity index or trading hub. They also agreed that a trading hub either does not currently exist or should not be defined at this time.

Reliant, AEP REPs, and ARM provided varying amounts of detail as to what would constitute a "sufficiently liquid" electricity commodity index or trading hub. Reliant stated that in order for an electric commodity index to be considered sufficiently liquid for purposes of the price to beat adjustment, the following characteristics would need to be met: it is published; it is consistently reported on a regular schedule and is widely available; it represents standardized forward products; buying or selling electricity in the market will not materially change the index price; it is mature (has been in existence at least one year with all of the characteristics here present for that time); and, it contains zonal price differences to reflect ERCOT's unique structure. Reliant added that spreads between bid and ask prices are not necessarily meaningful measures of an index because spreads are functions of, among other things, the underlying volatility of the commodity, the anticipated holding period, and interest rates, and therefore, not necessarily a good indicator of liquidity.

AEP REPs stated that the schedule for amendments to the price to beat rule does not provide ample time to develop the comprehensive language needed to determine when an electricity- trading index or trading hub exists. AEP REPs argued that the commission first should determine what products are being traded in ERCOT. For example, currently Seller's Choice and Zones(s) are traded in the hourly, day ahead, and term markets with zone differentials. In addition, the ERCOT wholesale markets trade a "heat rate" product that is dependent upon the natural gas settlement price. AEP REPs contended that trading a heat rate product is clear evidence that there is a high level of correlation between forward gas prices and power prices in ERCOT. AEP REPs stated that several parameters need to be considered when relying upon an index for commercial transactions such as: accounting; risk management; multi-months of trade volume; and, bid/ask spreads extending across the spring/fall shoulder periods as well as summer. AEP REPs recommended that, at a minimum, the criteria described below should be considered in establishing an electric index in ERCOT:

Figure 1: 16 TAC Chapter 25--Preamble

(1) Average volume should exceed this minimum by 20-50%;

(2) An active participant should at a minimum engage in one transaction per day every day; and

(3) An active broker should be a specialist whose primary focus is on the ERCOT market, who is responsible for creating liquidity in the market, and who engages in at least two transactions per day.

ARM commented that a "sufficiently liquid" electricity commodity index or trading hub used in lieu of the NYMEX natural gas price index should: be published, verifiable, and independent (e.g., an exchange); exhibit significant trading volume; demonstrate small bid/ask spreads; and, have at least two years of published price history. ARM added that these criteria could be expressly incorporated into subsection (g)(1)(F) and that if any of these criteria require subjective judgment, such further definition would need to be developed on a case-by-case basis in proceedings initiated pursuant to that subsection.

Responding to AEP REPs' and ARM's suggestion that the size of the bid/ask spread be used as one of the criteria for measuring whether an index is sufficiently liquid, Reliant cautioned that bid/ask spread cannot be used as a stand-alone criterion. Reliant added that spreads are a function of, among other things, the underlying volatility of the commodity, the anticipated holding period, and interest rates, and that it is therefore possible for the bid/ask spread to be relatively large due to one of these underlying variables and yet, the market is not necessarily liquid.

Entergy acknowledged that natural gas is not a perfect indicator of electricity costs and that it supports the use of a mature, liquid electricity commodity index. However, Entergy argued that given real world constraints and existing market conditions, continued use of the NYMEX gas index to adjust the price to beat fuel factor is appropriate at this time. Entergy stated that it would be difficult to define, in advance, specific objective criteria that could indicate exactly when the switch from the NYMEX gas index to an electricity index or trading hub should occur. Entergy

commented that the commission should also recognize the difficulty in setting prescribed measures of liquidity for the non-ERCOT portion of Texas as the Regional Transmission Organizations and the spot markets continue to evolve, and that, at this time, it would be premature to establish specific criteria on which to judge the liquidity of future electricity markets.

TXU argued that it is too early to move to an electricity index and stated that determining what constitutes a "sufficiently liquid" index is more an art than a science. TXU commented that when looking to see if a viable market index exists, the commission should look only to a settled forward index (an index that is based upon actual settled trades, such as the NYMEX Henry Hub price for natural gas) as opposed to a reported index that is dependent upon calls made to marketing companies inquiring as to the trades that they have made. TXU recommended that rather than predetermining the criteria for selecting an index, the commission should periodically solicit comments from interested parties concerning the development of a promising index or hub.

In reply comments, Houston agreed that there are not any recognized objective standards that currently exist that could be used to define a sufficiently liquid electricity commodity index or trading hub for use in determining future price to beat fuel factor adjustments for all utilities, but stated that this should not prevent the affiliated REPs from meeting their statutory burden to establish a significant increase in the market price of purchased energy, as there are other means to assess the reasonableness of an application to increase price to beat fuel factors based on alleged increases in market prices of purchased energy.

Houston argued that the commission should not decide this issue or whether there are other reasonable methods to determine the market price of purchased energy in this rulemaking and instead leave this issue open for consideration in all future price to beat fuel factor cases. Houston also urged the commission to require all applicants to present direct testimony in each fuel factor adjustment case demonstrating why such a commodity index does or does not exist. In reply comments, Reliant argued that the commission should reject Houston's recommendation because they stated that it is essentially rulemaking "on the fly," and confuses the fuel factor adjustment contested case proceedings with a rulemaking. Reliant added that Houston's suggestion would require an affiliated REP to prove in each contested case proceeding that the rule under which the application was filed is appropriate. Reliant offered that if any market participant believes that a sufficiently liquid electricity commodity index exists, the appropriate action is to request that the commission consider an amendment to the rule, which would then be applied prospectively.

OPC and Cities stated that before a market can be considered liquid, there should exist a framework for the verification of trading prices, and a public entity (i.e. NYMEX, NASD, NYSE) that operates a transparent market in the commodity. OPC and Cities argued that until these threshold issues are met, the commission would be unwise to consider establishment of criteria related to liquidity. In reply comments, Consumer Groups supported the positions of OPC and Cities.

The commission generally agrees with the parties that suggested that it is inappropriate at this time to attempt to adopt specific standards for what would constitute a "sufficiently liquid" electricity commodity index. The commission instead believes it most appropriate for a party that believes a sufficiently liquid index or trading hub exists to make a separate filing under subsection (g)(1)(F) demonstrating that such an index or hub in fact exists and can be relied upon for purposes of making price to beat fuel factor adjustments. Accordingly, the commission rejects Houston's proposal to require affiliated REPs to address this issue in each and every fuel factor adjustment proceeding as unnecessary and an inefficient use of those proceedings. The commission also finds it appropriate to clarify that the relevant prices to be used for fuel factor adjustments are futures prices, not historical prices and amends subsection (g)(1)(F) accordingly.

The commission does agree that certain of the recommended standards are appropriate for parties to consider, in such a filing; specifically, that the index or price be published, verifiable, and independently reported, that the index exhibit significant trading volume, and have a reasonable period of published price history. At this time, the commission also agrees with TXU that the index should be based on actual settled trades as opposed to a reported index that is dependent upon calls made to reporting agencies by brokers or traders, and with OPC and Cities that a verification of reported prices and trades by an independent entity is crucial.

For example, the commission notes that Platts Megawatt Daily currently publishes a "long term forward assessment" which provides for some information regarding futures electricity prices for ERCOT. Platts' description of how it computes prices is located at http://www.platts.com/electricpower/oct28notice.shtml. Specifically for forward prices, Platts' description indicates:

"Platts' assessments of daily forward trading at 16 hubs have always been based on informed judgment by editors and reporters, based on all available data, including reported transactions and all other available information, such as bids and offers, prices at other hubs, and other market dynamics. Platts will continue to assess these daily forward markets, despite their lack of liquidity, because it believes the market values an independent third-party benchmark for these markets."

This statement illustrates the concern the commission has in adopting an electricity price index based on reported prices. While the commission acknowledges that Platts has recently adopted more stringent procedures and verifications as to reported prices, the commission remains concerned about permitting adjustments based on indices where "informed judgment by editors and reporters" and the use of "bids and offers, prices at other hubs, and other market dynamics" have the potential to skew the index from actual market prices.

However, the commission does not necessarily foreclose that a reporting agency can develop a sufficient verification system, but believes the ultimate burden of showing such an index is sufficiently liquid and trustworthy will be higher than an exchange or index based on actual trades.

General Comments on PUC Substantive Rule §25.41

Reliant commented that the current rule has worked as intended and that revisions are unnecessary.

In general, Houston and OPC and Cities argued that the current rule and many of the proposed amendments erode the initial 6.0% rate cut provided by Senate Bill 7. They argued that PURA §39.202(p) places an absolute limit on the level the price to beat may reach which is the level of rates charged by the affiliated electric utility on September 1, 1999, adjusted to reflect the bundled electric utility's final December 31, 2001 fuel factor. They suggested that the price to beat is intended to be a "safe harbor" for rates, not a mechanism to increase prices to ensure

that competitors could succeed in the competitive market at the expense of consumers.

AEP REPs, Reliant, Entergy, and TXU disagreed with Houston and OPC and Cities that the current rule violates the provisions of PURA. AEP REPs, in reply comments, argued that the commission has previously rejected these arguments concerning the interpretation of PURA §39.202(l) when the price to beat rule was initially adopted and again when the commission decided the first round of price to beat fuel factor cases in 2002. AEP REPs noted that the preamble and comments to the initial rulemaking and the briefing in the first round of cases address and support the appropriateness of the price to beat fuel factor rule in its present form. AEP REPs and Reliant argued that the price to beat was never intended to be a cost-based escape from a market-based customer choice market that was found by the Legislature to have significant benefits. Instead, AEP REPs argued that the price to beat was meant to support the transition to a fully competitive market. To support their argument, AEP REPs point out that the price to beat protects customers in rural areas where competitive retailers might not initially offer their products because of low customer density. Reliant added that the price to beat was never intended to offer customers a below-market price. Additionally, Reliant stated, customers are free to choose another REP at any time and that any difference between the price to beat and market prices will be captured in the retail clawback at the time of the true-up.

TXU, in reply comments, responded that PURA §39.202(p) applies only to base rates, in that it continues to include an exception so that fuel factors can be adjusted. Further, TXU and ARM argued that the provisions of PURA §39.202(p) apply only with respect to a request made under that provision to increase the price to beat due to a lack of financial integrity. Thus, TXU stated, the restriction on increasing base rates applies only to a financial integrity application made pursuant to PURA §39.202(p). It does not apply to adjustments to the price to beat made pursuant to PURA §39.202(k), which allows the commission to adjust the price to beat after the 2004 true-up and contains no explicit restrictions thereon; nor does it apply to requests by the affiliated REP to adjust the price to beat fuel factor made pursuant to PURA §39.202(l). Entergy stated that it is clear that the cited language does not apply to fuel factors. Entergy argued that the term "safe harbor" refers only to the fact that, with a price to beat, customers are not forced to pay more than that price to beat unless they choose to do so.

The commission disagrees that the current rule violates PURA for the reasons detailed in the Order Adopting §25.41, Relating to Price to Beat, and notes the original rule was not challenged by OPC, Cities, or Houston as unlawful as they could have done under PURA §31.001(f).

The commission also disagrees that PURA §39.202(p) provides for an absolute cap on the price to beat in all circumstances. The commission agrees with TXU and ARM that the provisions of PURA §39.202(p) only apply in the case of a filing by an affiliated REP due to financial integrity reasons and these provisions are intended to apply only to the non-fuel factor portions of the rate. The commission believes that PURA §39.202(p) must be construed with PURA §39.202(a), (b), and (l). That is, an adjustment due to financial integrity reasons must result in rates that are no higher than those in effect on September 1, 1999, as adjusted for the fuel factor set as of December 31, 2002, but that also reflects any adjustments to that fuel factor that have subsequently been made under PURA §39.202(l). OPC and Cities' interpretation could lead to a circumstance that an affiliated REP requests an adjustment due to financial integrity reasons, but ends up with an overall rate that is *lower* that that which existed before the financial integrity adjustment. Such a result appears to be inconsistent with the allowance for an affiliated REP to increase its rate if needed to sustain its financial integrity.

The commission does agree that the price to beat was intended to be a safe harbor for customers, and believes that that intent has been fulfilled by enabling any customer eligible for price to beat service to continue to receive service under the price to beat or return to price to beat service after having selected another REP, and that no eligible customer will pay more than price to beat service unless they so choose. The commission finds that this is consistent with the discussion cited by OPC between Representative Wolens and Representative Williams during the floor debate on Senate Bill 7 in the Texas House of Representatives.

REP. WOLENS: "This will be a safe harbor for rates. They will be able to spend more money. Customers will be able to spend more money than the price to beat for green power, for example, if they want to. It will be their option. But it will always be a safe harbor that a customer will be able to pay this rate through '07."

REP. WILLIAMS: "So you're telling me that any ratepayers -- anyone who is getting their electricity through a meter, whether it's a residential customers, a small business customer, or a large business customer, will not pay a price higher than the price to beat unless it's their choice to do so?"

REP. WOLENS: "That is - I will be even more specific on the details if you would like. This applies to residential owners. It applies to businesses, and it applies to small commercials. And it applies in the deregulated areas, and yes, I am saying that there are certain exceptions. One exception would be for an increase in fuel as that would have to be approved by the PUC. So subject to an increase in fuel, that would have to be approved at a hearing before the PUC, I agree with what you just said."

Nowhere in the discussion cited by OPC is any suggestion that the price to beat would not be adjusted if natural gas or purchased energy costs changed; in fact, just the opposite was discussed. The commission finds that Legislature very clearly expected and intended that the price to beat remain an above market rate as illustrated by the following:

1. PURA §39.001 specifies the Legislature's policy and purpose for implementing Senate Bill 7. Specifically, the legislature found that it was appropriate to establish a "competitive retail electric market that allows each retail customer to choose the customer's provider of electricity and that encourages full and fair competition among all providers of electricity" (See PURA §39.001(b)(1)). This indicates that the Legislature intended that new competitors would be able to enter the marketplace and effectively compete for retail customers. This cannot happen if the price to beat becomes a below market rate.

2. PURA §39.202(e) prohibits the affiliated REP from offering other products and services to retail customers than the price to beat for the earlier of 36 months, or when they lose 40% of their residential and small commercial customers. This illustrates the desire of the Legislature to give new competitors three years to acquire customers and establish a foothold in the marketplace by restricting the ability of the affiliated REP to respond to competitive pressures by severely reducing its prices. Again, this cannot happen if the price to beat becomes a below-market rate for a sustained period of time. This is supported by Representative Wolens' statement that:

"If you want competition, they (competitors) have got to come in, and they got to have headroom to be able to come in and price.

"When you think about what goes on with American Airlines, every time American Airlines has had competition, they will rush in. They will lower their price immediately. Sometimes they go underneath the competition. They drive competition out of business. Competition goes away, and then American Airlines is back with higher rates. It happens in every industry.

"And what this is generally going to say is the utility has got to hold their rate here, and we are going to give competitors an opportunity through '05 to come in right here. They've got to come in and compete. They will have the opportunity to come in during this time period and compete unless, unless, one thing happens: the incumbent has lost 40% of the market. We say that as a matter of market power, if the incumbent loses 40 percent of their customers, competition begins, and then they can lower their price."

3. PURA §39.202(l) provides that the affiliated REP may request up to two adjustments per year to the fuel factor portion of the rate if they demonstrate that the existing fuel factor does not adequately reflect significant changes in the market price of natural gas and purchased energy used to serve retail customers. Notably, this provision does not refer to the actual costs incurred by the affiliated REP to serve retail customer; it refers instead to the market price of natural gas and purchased energy. This provision recognizes that, from the perspective of a new entrant into the marketplace, market prices are what will dictate its ability to compete for service to the retail customer. Again, this supports an interpretation that the Legislature intended that the price to beat remain an above market rate for new entrants. While PURA §39.202(l) does not appear to limit the ability of the affiliated REP to request a downward adjustment to the price to beat fuel factor, it does condition such requests on a showing that a significant decline in natural gas and purchased energy prices has occurred. If that has occurred, it is less likely that a downward adjustment would eliminate the ability of new entrants to continue to economically compete to serve retail customers.

4. PURA §39.262(e) requires the affiliated REP to refund the difference between the price to beat and the prevailing market price of electricity (subject to certain limitations) at the time of the true-up proceedings. This further indicates an expectation and intention that the price to beat would be an above market rate. In fact, PURA §39.262(e) provides for a cap on the amount required to be refunded, indicating that the Legislature acknowledged that the price to beat could be substantially above market.

While the commission believes that these provisions of PURA, combined with the discussion during the House floor debate on Senate Bill 7 supports that the Legislature intended and expected that the price to beat be an above market rate, the commission notes that the Legislature did not guarantee that would be the case. The Legislature clearly prescribed the composition of the initial price to beat as 6.0% less than the rates in effect on January 1, 1999, adjusted for a final fuel factor. The Legislature then provided for an adjustment mechanism to enable the fuel factor portion of the rate to be adjusted based on changes in market conditions. The Legislature also provided for an adjustment to the base rate portion of the price to beat through the financial integrity test contained in PURA §39.202(p). Notwithstanding all of these provisions and the commission's rules further defining these provisions, it remains possible that the price to beat in some areas may at some point become a below market rate. However, the commission believes that the rule provisions adopted both in the original rulemaking relating to price to beat as well as the amendments to the rule provided for herein provide reasonable means to best accomplish the Legislature's goals of a robust competitive retail marketplace, within the other constraints of the statute.

OPC and Cities argued that under the rule, there is no practical way the price to beat could be reduced, even if natural gas prices dropped significantly, because an application for an increase in the price to beat must be approved. Even the proposed amendments to subsection (g)(3)(A), they argued, would only apply many months after an excessive price to beat had been in effect.

TXU, in reply comments, responded that the affiliate REP can petition to lower the price to beat fuel factor as long as the reduction meets the significance threshold in the rule. FCP argued that while it may be true that there is potential for an affiliated REP to get windfall profits if gas prices decrease after a fuel factor increase is granted, competitive market forces mitigate that potential by penalizing affiliated REPs that are slow to react to decreasing prices.

OPC and Cities suggested that the rule be amended to make all price changes temporary, and to require that the price to beat fuel factors revert back to the January 1, 2002 level at the end of each calendar year. TXU, in reply comments, responded that this suggestion is inconsistent with the statute, which in no way implies, let alone explicitly states, that this is allowed. Further, TXU argued that this would amount to a regulatory method to change the price to beat, which is contrary to the requirements in PURA §39.001(d) that the commission use "competitive rather than regulatory methods... so as to impose the least impact on competition."

The commission agrees with TXU that the affiliated REP does have the right to request a downward adjustment to the price to beat if the significance thresholds in the rule are met and makes clarifying revisions to subsection (g)(1) and subsection (g)(1)(D) to clarify this provision. The commission notes that since the first set of requests by the affiliated REPs to adjust their fuel factors was approved at the end of August 2002, natural gas prices have consistently risen, and there have not yet been any opportunities for an affiliated REP to request a decrease to their fuel factors. The commission agrees with FCP that customers can, in all areas open to competition, avoid seeing some or all of the price increase requested by the affiliated REP by switching to another REP. Additionally, the commission has added an additional protection for retail customers in the revised rule because, if natural gas prices fall prior to the true-up and the affiliated REP does not request a downward adjustment to the fuel factor, new subsection (g)(3)(A) would result in a downward adjustment to the fuel factor. The commission believes that these provisions of the rule, combined with the right of customers to select service from a non-affiliated REP provide a reasonable implementation of the Legislature's goal of successful retail competition.

The commission disagrees with OPC and Cities' suggestion that the fuel factor adjustments be made temporary. As previously stated in the Order Adopting §25.41 Relating to Price to Beat, while PURA apparently does not prohibit the commission from imposing this requirement, the commission again concludes that such a limitation is unreasonable and unnecessary. This proposal would add an additional layer of uncertainty into the marketplace as the fuel factor would be re-set every January, irrespective of whether or not market prices remained high. An affiliated REP could then immediately request an adjustment that

would return the fuel factor to a level comparable to where it had been prior to the re-setting of the factor. In this circumstance, OPC and Cities' proposal would effectively only permit the affiliated REP to make one adjustment per year, making it significantly more difficult for the fuel factor to continue to reflect changes in the cost of natural gas and purchased energy.

As stated in the order adopting the original rule, the fact that affiliated REPs may only make two adjustments per year should guard against unnecessary adjustments, and an affiliated REP that fails to timely request a downward adjustment to the fuel factor will lose customers to other REPs. The commission notes that three affiliated REPs used only one adjustment in 2002, even when the existing rule would have permitted a second adjustment. In the case of those REPs, OPC and Cities proposal would have likely lead those REPs to request an adjustment to their fuel factors in January 2003, and may have resulted in a higher rate than the customers actually paid during January and February 2003. The commission believes that OPC and Cities' proposal would create unnecessary and costly proceedings. The commission therefore declines to make the requested change.

Subsection (c)(9)(B)

TXU suggested revising the definition of representative power price in subsection (c)(9)(B). TXU proposed that the term "by the affiliated PGC" be added at the end of the first sentence to clarify that the capacity auctions being referred to are the ones conducted by the REP's affiliated power generation company. TXU Energy also noted that the word "PURA" should be deleted, as §25.381 is one of the commission's Substantive Rules, not a provision of PURA. TXU commented that the commission should amend the proposed last sentence of subsection (c)(9)(B) to clarify the time period for the equivalent products. Reliant offered a similar suggestion and further proposed that the commission amend this definition to maintain consistency with the methodology used to determine initial headroom and replicate the original capacity auction. TXU similarly suggested that "the most recent aggregated forward 12 months of entitlements" in the second sentence of subsection (c)(9)(B) be amended to clarify exactly what this alternative is and how it would work, as well as whether it is the affiliated REP or the commission that decides whether or not the alternative is to be used in making the price calculation.

The commission agrees with TXU's proposed deletion of the word "PURA" in this subsection and makes the corresponding change. The commission also agrees with the other clarifying language recommended by TXU and Reliant and amends the rule accordingly.

Subsection (c)(11)

Reliant suggested that language be added to the definition of "small commercial customer" in subsection (c)(11) to clarify that for purposes of the threshold targets in subsection (i), unmetered guard and security lights are not considered small commercial customers unless such an account has historically been treated as a separate customer for billing purposes.

The commission agrees with Reliant and makes the requested clarification.

Subsection (g)(1)(A)

Reliant requested that the language regarding the use of the *Wall Street Journal* be clarified due to recent changes in that newspaper's policy regarding publication of Henry Hub natural gas prices.

The commission concurs with the need for clarification, and revises subsection (g)(1)(A) to state, "..., as reported by the Wall Street Journal (either in print or on-line)."

Subsection (g)(1)(A) and (B)

TXU, ARM, AEP REPs, Reliant, and FCP opposed the proposed amendments in subsection (g)(1)(A) and (B) to increase the number of days upon which the average price is calculated from ten days to 20 days. ARM commented that the commission's proposed amendments to the price to beat rule appropriately do not change the fundamental market-based approach embodied in the current rule for adjusting the fuel factor component of the price to beat pursuant to PURA §39.202(l). ARM argued that those amendments, however, are unnecessary because the ten- day rolling average captures true trends in gas prices, while allowing adjustments to the fuel factor to better reflect changing market conditions and assist REPs in hedging their purchases.

TXU suggested that a 15 trading-day period would still meet the commission's objectives without unduly extending the time it takes to implement a fuel factor change. OPC and Cities point out that 15 days is little different from ten or 20 days, by TXU's own admission.

As discussed in the response to comments filed in response to preamble question number one, the commission disagrees with TXU that it is appropriate to adopt a 15 trading-day average, and instead adopts a 20 trading-day average.

In contrast, Reliant proposed a two-day average be adopted. Using a longer time period, Reliant argued, results in an administratively-determined price to beat adjustment rather than a market-based price adjustment. Furthermore, according to Reliant, hedging a rolling average gas price much beyond a one-day average would assume that the affiliated REP could accurately predict the day the price to beat fuel factor adjustment triggers would be met. Similarly, Reliant stated, this would presume that an affiliated REP could accurately predict in advance when the required threshold would be met at the end of a specific 20-day period. Because this is impossible, Reliant concluded that hedging becomes increasingly less likely as the rolling average time period increases.

The commission declines to adopt Reliant's change. Use of a 20 trading-day average will continue to ensure that real trends in the market price for natural gas and purchased energy are captured as opposed to the often temporary volatility that would result from use of a two-day average.

OPC and Cities suggested that a minimum 90-day trading period be used to calculate an average price to serve as a basis for changes to the price to beat fuel factor. TXU, in reply comments, opposed these suggestions because they said it would put all REPs at great financial risk during the interim, and would ensure that retail prices do not timely reflect wholesale prices. Further, TXU argued, such an extended period would make it very difficult, if not impossible, to manage price risks by hedging.

Houston suggested at least a 60-day average and argued that an affiliated REP could still file an application to amend its fuel factor based on a 20-day trading day average and continue to file updated filings to include the new NYMEX forward prices for each day after the case has been filed up until it is decided. If the updated index falls below the materiality threshold, the case would then be dismissed. In reply comments, Houston stated that a ten-day or 20-day standard is insufficient to demonstrate

that the change in prices in permanent, a demonstration made necessary by the fact that the rule only contemplates price increases. Houston pointed out that only affiliated REPs are given the power in this rule to change prices; consumers have no way to bring prices down. Houston argued that its proposal does not increase the lag between price change in the gas market and the increase in the fuel factor by using the administrative lag time as the majority of the additional days.

In reply comments, TXU, Entergy, Reliant, and AEP REPs argued that proposals to require a longer averaging period, more than 60 days to more than 90 days, should be rejected. First, TXU argued that the commission may act before 40 days has passed, as it just did in the Reliant case. Second, TXU stated that the affiliated REP has the right to file for an adjustment of its choosing, not what might simply come to pass 40 days after it files. And, while notice is not required, TXU stated that affiliated REPs have been giving notice, and they argued that it would be impossible to provide customers with notice as to what change is being requested, as that would not be known until just before the case is decided by the commission. Houston replied that Reliant and TXU do not provide any solution to the risk that a ten-day average would capture a temporary spike in prices. Houston observed that since gas and electric prices are not correlated, using the 60-day average at least tempers the reliance on NYMEX until a true electric index is developed.

AEP REPs stated that such long averaging periods ignore the balancing of competing objectives that resulted in the rule in its present form and that no new evidence suggests that it is necessary to lengthen the averaging period. Specifically, AEP REPs stated that the commission concluded in the initial rulemaking that there needs to be a short timeline between a significant change in prices and the adjustment of fuel factors so that affiliated REPs are encouraged to hedge their risk of higher fuel prices. Reliant offered similar comments, stating that it would be impossible for an affiliated REP to hedge a 90-day average gas price.

The commission agrees with those commenters who recommend that the use of a 60-day to 90-day average should be rejected. As discussed earlier, the longer the period of time used to average market prices, the greater the potential that the average will be significantly different than the realities of the marketplace because of the lag involved in averaging over so many days. The commission finds that the use of a 20-day average best balances the need to ensure that changes in market prices are real trends and not transitory changes while still permitting the price to beat to remain in line with true market prices.

The commission disagrees with Houston that the market price of natural gas and the market price of electricity in ERCOT are uncorrelated. In fact, forward natural gas prices compared to forward electric prices for the comparable period of time in ERCOT indicates a very strong correlation, as would be expected due to the fact that natural gas fired generation is the marginal unit in virtually all hours of the year, and therefore sets the market price. This is demonstrated by the capacity auction prices provided by Reliant in its reply comments.

Figure 2: 16 TAC Chapter 25--Preamble

Additionally, an analysis of natural gas futures prices and forward ERCOT energy prices taken from Platts' MegaWatt Daily also indicates a very strong correlation. While the commission has expressed concerns about use of the Platts forward assessment for purposes of adjusting the fuel factor, the data is currently the best available with respect to forward prices for energy in ERCOT, and therefore can be viewed as indicative of the marketplace when analyzed over a long period of time. The forward prices from the capacity auctions, and the other available data from Platts together demonstrate the correlation between natural gas and energy prices.

Figure 3: 16 TAC Chapter 25--Preamble

The commission disagrees with Houston that consumers have no means to lower their cost of electricity. The commission notes that the annual rate comparison of the offers available by other REPs as of January 2003, located on the commission's web site at http://www.puc.state.tx.us/electric/rates/RES_avgrate/Jan03rates.pdf, shows that residential customers in all areas of the state have numerous options of REPs who are in some cases offering savings in excess of 10% on an annual basis.

The State and OPC and Cities argued that the rule should require an affiliated REP to demonstrate that its existing fuel factor does not adequately reflect the significant changes in the price of natural gas and purchased energy used to serve retail customers. Then, the State, and OPC and Cities argued that an affiliated REP must demonstrate that the market price of natural gas and purchased energy it is using has changed significantly since the initial fuel factor was set. The State suggested that the NYMEX trading index should not be used at all because it does not reflect the prices an affiliated REP has paid for energy purchased to serve retail customers. TXU responded, in reply comments that PURA §39.202(l) looks only to whether the existing fuel factor adequately reflects significant changes in the market price of natural gas and purchased energy used to serve retail customers, not whether a profit is being earned or whether the REP has incurred losses. TXU and ARM argued that PURA §39.202(l) inquires only as to whether the existing fuel factor adequately reflects the changes in market prices. Finally, TXU argued that there is no direction in PURA §39.202(l) to examine the costs, revenues, load, or generation mix of the affiliated REP. ARM suggested that such a cost-based approach would not serve legislative intent, and would rather reflect a return to a regulatory paradigm. ARM argued that such proof would require a lengthy and complicated proceeding, creating an unreasonable lag between changes in the market price of natural gas and implementation of the adjustment.

Consumer groups argued that using only gas prices results in a price to beat fuel factor which overstates the actual cost of fuel and purchased power. Houston and OPC and Cities argued that the rule should be amended so that natural gas fuel factor adjustments based on a significant change in natural gas should only be applied to the portion of the initial fuel factor, which was subject to the October 1, 2001 gas price update, not on costs associated with non-gas fired generation. OPC and Cities argued that a substantial portion of embedded generation in Texas is comprised of power plants which use coal, lignite, or uranium as the fuel source. OPC and Cities further stated that basing a price to beat fuel factor change on natural gas prices exaggerates the impact of gas prices upon power market prices. Houston, OPC and Cities stated that ERCOT power prices are poorly correlated with gas price changes and that the level and range of power prices within ERCOT support the notion that coal and nuclear plants exert a depressing effect upon power prices. Further, they argued, the adjustment mechanism should be consistent with the

framework of the initial fuel factor. The fuel factor is based upon average cost, not marginal cost, they said, and changing that premise would imply other changes to the fuel factor, such as reflecting the more efficient heat rates of new merchant gas plants. The State argues that the problem of fuel factor increases not reflecting fuel mix is one that the commission represented as being fixed in this rulemaking in comments to the Legislature.

TXU and Reliant opposed the suggestion that adjustments to the price to beat fuel factor should take into account the fuel mix of the generation purchased by the affiliated REP. Reliant and TXU argued that REPs do not own generation resources, and therefore there is no gas generation portion of the price to beat fuel factor. Further, Reliant and TXU argued that market prices are determined by the price of the incremental, or marginal, unit of production and in Texas, the marginal unit is gas-fired. Therefore, Reliant concluded, power prices in Texas are driven by the price of natural gas regardless of the type of fuel used in purchased energy. In essence, trading in the ERCOT market today is done based upon a given heat rate and gas price. TXU stated that even if the electricity is in fact generated by a lignite or nuclear plant, the wholesale market price is based upon heat rate and gas prices. TXU and Reliant, in reply comments, responded that this issue was carefully considered by the commission when it adopted the current rule. In deciding how to determine the price changes in purchased energy and natural gas, TXU pointed out that the commission chose to use a gas index both to represent the change in gas prices and as a proxy for an electricity index because: (1) an electricity price index did not exist; and (2) the market price of electricity will likely be set by gas-fired generation.

Reliant disagreed with OPC and Cities' claim that ERCOT power prices are poorly correlated with natural gas prices. Reliant pointed out that the claim is based upon a comparison of NYMEX forward prices to ERCOT spot prices, which Reliant argued is meaningless because it does not compare similar products. Instead, Reliant argued, NYMEX forward natural gas prices are highly correlated, at 96%, to ERCOT forward power prices over the same period.

Reliant also opposed the argument that increased natural gas prices is not enough to satisfy the requirements of PURA §39.202(l). Reliant argued that the commission has the discretion and expertise to determine that the price for natural gas is sufficiently correlated to the price of electricity to act as a proxy when implementing PURA §39.202. Reliant pointed out that the commission has already determined that because the price of wholesale power will be set by gas- fired generation and a sufficiently liquid electricity commodity index does not exist, it is appropriate to use the natural gas price changes in the NYMEX index to the entire fuel factor.

The commission disagrees with the comments of the State, Houston, and OPC and Cities that suggest that fuel factor adjustments should, in fact, become a review of all of the power contracts actually executed by the affiliated REP or should result in an adjustment of only a portion of the fuel factor for changes in natural gas prices. The commission disagrees that examining whether or not there have been "significant changes in the market price of natural gas and purchased energy used to serve retail customers" should be interpreted as something other than an examination of current market prices for natural gas and purchased energy. As the commission found in the original order adopting the price to beat rule, natural gas fired generation is the marginal unit dispatched in most hours of the year in Texas, and therefore will set the market price of electricity. REPs cannot, by law, own generation resources and therefore must buy all of their power in the marketplace. The initial price to beat fuel factors approved in December 2001 were based on the fuel mix of the electric utility; however, since a REP is not a utility, there is no basis in law to review the generation purchase contracts for an affiliated REP as part of a fuel factor adjustment request. The commission concurs with TXU that irrespective of whether that power is in fact generated by a nuclear or coal generation unit, it will be priced in the marketplace based on the price of the marginal unit, which is gas fired. It is true that as gas prices increase, coal and nuclear generated power may not cost any more to generate, and the owners of those plants will realize increased profits. However, the owners of those plants are not REPs, affiliated or otherwise.

Furthermore, the commission is concerned that if actual contracts of the affiliated REPs are examined and the contracts are in fact tied to changes in natural gas prices, then parties will next attempt to argue that those contracts were not prudent, and the affiliated REPs should have instead entered into different types of contracts, such as fixed price contracts. Fuel factor adjustment proceedings would then become not only "fuel reconciliation" type proceedings where actual costs are examined, but also prudency reviews. Such costly, lengthy, and unnecessary proceedings are not contemplated in PURA, and would be contrary to the directive in PURA §39.001(d) that the goals of Senate Bill 7 are to be achieved using "competitive rather than regulatory methods" and that rules adopted to implement Senate Bill 7 must be "limited so as to impose the least impact on competition."

Moreover, the arguments made by OPC and Cities and State ignore the fact that new entrants seeking to acquire retail customers will most certainly need to buy all of their power needs from the marketplace. Basing price to beat fuel factor adjustments solely on the actual costs of the affiliated REP and not the market price of natural gas and purchased energy (as required by statute) will ignore the market prices that non-affiliated REPs must incur to compete against the affiliated REP. As discussed previously, the Legislature provided clear indication that it expected there to be adequate headroom under the price to beat for new entrants to be able to effectively compete, and that the price to beat could be adjusted in response to changes in market prices, not the specific costs of a specific REP. Tying price to beat fuel factor adjustments solely to the costs of the affiliated REP would arguably conflict with the directive in PURA §39.001(c) that the commission "may not make rules...(that) discriminate against any participant or type of participant during the transition to a competitive market and in the competitive market."

OPC and Cities, the State, and Houston also fail to acknowledge that although customers always retain the option to take service at the price to beat as a safe harbor, they are not required to do so, and may switch (and in fact, were expected to switch) to competitive offers. The commission also notes that, if natural gas prices fall prior to the true-up proceeding, that the adjustment provided for in subsection (g)(3)(A) will be a smaller decrease under the OPC and Cities' proposal than that contained in the rule.

The available data continues to demonstrate that natural gas prices and electricity prices in ERCOT are significantly correlated, in stark contrast to the assertions to the contrary made by OPC and Cities, State, and Houston. The capacity auction prices cited by Reliant in its reply comments demonstrate a very

strong correlation between the two. A comparison of changes in forward natural gas prices and the limited forward electricity prices contained in Platt's MegaWatt Daily also suggest a very high (over 95%) correlation between the two prices.

The commission therefore declines to alter the rule to only adjust a portion of the fuel factor for changes in natural gas prices or to require a reconciliation or review of the actual costs of the affiliated REP and finds that PURA instead requires an examination of the market prices of natural gas and purchased energy. The commission believes that the provisions of the rule that require adjustments to the fuel factor based on the market price of natural gas and purchased energy are reasonable given the requirements of PURA §39.001(c) and (d), §39.202(l), §39.262(e), and the aforementioned floor debate on Senate Bill 7 in the Texas House of Representatives.

OPC and Cities supported the amendment in subsection (g)(1)(A) to require the affiliated REP make its filing the day after the 20 trading-day period upon which it bases its proposed fuel factor change. OPC and Cities stated that this amendment will somewhat reduce the opportunity for "strategic" selection of the rolling average period.

TXU, FCP, and ARM opposed the amendment in subsection (g)(1)(A) to require the affiliated REP make its filing the day after the 20 trading-day period upon which it bases its proposed fuel factor change. FCP argued that this provision is unreasonable because an affiliated REP would be forced to choose a day to file its request and hope that the gas prices are approaching a peak, or the opposite for decreasing gas prices. By contrast, FCP argued, allowing the affiliated REP to identify the point where gas prices have leveled off, as the current rule allows, significantly reduces the risk of divergence between gas prices and the fuel factor. In reply comments, OPC and Cities point out that affiliated REPs have otherwise insisted on using data which is as fresh as possible, and that this one day deadline is more in line with this desire. They also observe that affiliated REPs have full discretion in choosing when to file, so allowing them to select the best ten-day average from a window would institutionalize the ability to "game" the system to the extent of picking the most advantageous time frame. Houston suggests that its 60-day solution would allow a more extended filing window while still protecting against gaming. Houston otherwise opposes a more extended filing window.

In response to OPC and Cities' comments that Reliant's recent filing is proof that REPs have gamed the selection of the rolling average period to "maximize price increases," TXU pointed out that Reliant did not use the highest ten trading-day average it could have used.

TXU and FCP stated that it would be administratively difficult to get the filing prepared in less than one day. ARM noted that the proposed amendment may have the unintended consequence of requiring subsequent amendments to the affiliated REP's petition to correct matters prepared in haste, the effect of which may be to increase, rather than reduce, the lag between the market information used to determine whether the current fuel factor will reflect the market price of natural gas and the affiliated REP's adjustment of its fuel factor based on that information. Instead, TXU suggested that the rule require affiliated REPs to make the filing no later than the third business day after the 20 trading-day period has closed, while FCP suggested that the filing be made within five days. OPC and Cities observed that adjustment applications have thus far been somewhat limited, and that all that would be required on the filing date is updating a few spreadsheets from the Wall Street Journal that morning.

The commission agrees with OPC and Cities that the elimination of the window reduces the potential for an affiliated REP to make a strategic selection of which trading days to use in order to maximize an adjustment request. The commission disagrees with FCP that the affiliated REP should retain the filing window in order to better time a peak in the market. The commission believes that the affiliated REP should retain the risk in choosing when to file for an adjustment, and notes that the current filing window only permits a very limited ability to time a peak in the gas market. The commission appreciates the comments by TXU and FCP regarding the administrative difficulty in preparing a filing in less than one day, and therefore modifies the proposed rule to reflect that the filing should be made no later than the second day after the 20 trading-day period ends.

TXU suggested that the word "business" in subsection (g)(1)(B) should be replaced with the word "trading" to be consistent with the rest of the rule.

The commission agrees and makes the suggested change.

Subsection (g)(1)(C) and (D)

TXU, AEP REPs, Reliant, Entergy, FCP, and ARM all stated that there has been no change in circumstances which would warrant changing the 4.0% threshold from the original rule. AEP REPs pointed out that the 4.0% standard is harmonious with long-standing fuel surcharge rules, and that raising the threshold simultaneously with increasing the number of days averaged significantly reduces the affiliated REPs ability to respond to changing market conditions and alters the balance achieved by the original rule. From AEP REPs' standpoint, if the 4.0% threshold represented significant loss under regulation, when the REP was guaranteed of recovering the loss through the reconciliation process; it surely represents a significant loss under the price to beat, where there is no recovery or reconciliation. AEP REPs argued that affiliated REPs should not be forced to ignore unrecoverable losses when other commission rules require refunds and surcharges for recoverable amounts because it would be inconsistent. ARM pointed out that there is no need to harmonize the price to beat rule's 4.0% threshold with the POLR rule's 5.0% threshold, because POLR fuel factors can be adjusted monthly while price to beat fuel factors can be adjusted only twice per year, making a threshold of 5.0% actually a tougher criteria than the POLR rule's threshold represents. FCP stated that increasing the threshold imposes an additional cost risk for affiliated REPs, which could reduce competition and lower the quality of service to retail customers. AEP REPs suggested that changing the threshold now suggests that the commission lacks confidence that competitive REPs can offer a real alternative for consumers. OPC and Cities stated in reply that they believe that a lack of confidence is justified. OPC and Cities cited the existence of a regulated price to beat as evidence that the Legislature did not have unwavering faith in competitive markets. They also cited the lack of switching by residential and other small customers as evidence that consumers do not see a benefit in having electric choice.

TXU argued that the current 4.0% threshold and the two-times-per-year restriction on requesting changes are redundant -- the second renders the first unnecessary. TXU suggested that the higher thresholds could make it difficult for competitive REPs to compete by restricting headroom. It could also make it difficult for affiliated REPs to adjust fuel factors downward in the event

of a long term decrease in natural gas prices, especially true if a figure greater than 5.0% were chosen, according to TXU.

The commission finds that it is appropriate to retain the 5.0% threshold. The commission believes that harmonizing this requirement with the POLR rule provides for consistency in the level of natural gas and purchased energy market price changes deemed to be significant by the commission.

The commission disagrees with the suggestion that the Legislature did not have sufficient confidence in competitive markets. This is directly contrary to the Legislature's policy pronouncement in PURA §39.001(a). The commission believes that the Legislature recognized that competition does not develop overnight, and that the public interest was best protected by transitioning customers to a competitive marketplace through the price to beat. As such, the price to beat was created as a safe harbor that customers could return to, but the fuel factor portion of that rate could adjust as market prices changed. The aforementioned discussion of the floor debate in the House of Representatives suggest that the Legislature expected and intended for new entrants to have a period of time to be able to enter the market and successfully compete for customers so that when the price to beat expires totally in 2007, there would be an adequate number of competitors to protect customers from market power abuse.

AEP REPs, FCP, TXU, Reliant, and ARM opposed the higher 10% threshold for fuel factor adjustment requests filed after November 15 in a given calendar year. ARM and FCP claimed that this higher threshold could expose affiliated REPs to significant financial risks. FCP agreed and calculated that an ill-timed rise in natural gas prices could cost them as much as $800,000 due to the six-week delay in implementing an adjustment. ARM, Reliant, TXU, and AEP REPs stated that the definition of the word "significant" does not change late in the year, so there is no justification for raising the standard after November 15. TXU pointed out that changes in natural gas prices near the end of the year are not necessarily transitory, so requests for an adjustment of between 5.0-10% after November 15 are not necessarily abusive. AEP REPs and TXU suggested that this bar actually creates an incentive for claiming a 5.0-10% increase in October or early November. TXU observed that Reliant's most recent filing would have been legal under the new environment. TXU further believed that the 10% threshold is an unnecessary restraint upon the exercise of the affiliated REP's legal rights. ARM argued that had the legislature wished to restrict late year changes; they would have done so when they imposed the two-changes-per-year restriction.

Houston and OPC and Cities suggested that the commission impose a higher threshold, such as 10% or 15% for all fuel factor adjustment requests. Houston argued that 4.0-5.0% changes in natural gas prices are common, and thus not significant. OPC and Cities believed such a higher threshold would be better at deterring unnecessary price changes. Houston, and OPC and Cities stated that the 4.0% standard worked under regulation because consumers were be protected from unnecessary rises in fuel charges by the reconciliation process, which does not exist under the current or proposed rule. The lack of reconciliation requires a higher standard to protect consumers. OPC and Cities, and the State pointed out that the affiliated REPs have never presented evidence that a higher standard would result in actual losses rather than reduced profits for the affiliated REPs, and thus suggested that the commission discount such claims by the affiliated REPs. The State cited statements by affiliated REPs that actual financial cost is irrelevant to fuel factor adjustment as reason to discount the affiliated REPs' claims of potential losses; and described the losses which affiliated REPs claim as reduced windfalls, rather than actual losses. OPC and Cities, the State, and Houston all stated that meeting these thresholds for natural gas prices, whether 4.0% or higher, do not by themselves meet the statutory requirement that a demonstration of an increase in the market price of energy used to serve customers be made. OPC and Cities cited the recent Reliant filing as one that this rulemaking is intended to prevent, and pointed out that even the proposed thresholds would not have prevented it. Houston stated that natural gas traders have already been caught manipulating that market, and that a higher threshold would make it more difficult to game that market to meet the threshold. Houston specifically agreed with the idea of a higher threshold at the end of the year to prevent the utility from capturing a run-up in the natural gas prices.

As stated in the original order adopting the price to beat rule, there are two limitations on the affiliated REP's ability to request adjustments to the fuel factor: (1) the fact that the affiliated REPs may only make two adjustments per year; and (2) the materiality (or significance) thresholds in the rule. It is these limitations that have led the commission to find that it is not reasonable or necessary to make adjustments temporary. However, the first of these limitations becomes less of a restraint toward the end of a calendar year because the risk of requesting an adjustment (in that it uses one of the two-per-year adjustments) is significantly reduced. As a result, the commission finds that a more stringent materiality threshold is in the public interest near the end of a calendar year in order to balance that reduced risk. The commission agrees that this may make affiliated REPs more likely to make a request in October or November for an increase in market prices between 5.0% and 10%, but the affiliated REPs do so at the risk of not being able to request a larger increase later in the year if market price warrant.

The commission disagrees with the statement by Houston implying that recent allegations and admissions regarding potential manipulation of the natural gas market are relevant with respect to the use of NYMEX natural gas prices. In fact, in its *Initial Report on Company Specific Separate Proceedings, and Generic Reevaluations; Published Natural Gas Price Data; and Enron Trading Strategies Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, (Docket Number PA02-2-000, August 2002; The full report can be found on the FERC's website) the Federal Energy Regulatory Commission (FERC) staff did conclude that spot gas price indices for California delivery points may have been manipulated. However, the FERC staff in no way concluded that Henry Hub spot or NYMEX Henry Hub futures prices had been manipulated. To the contrary, FERC staff considered using Henry Hub prices as a substitute for California delivery points because "Henry Hub is the most liquid natural gas market in the country (Docket Number PA-2-2-000, August 2002 at 61) and therefore less susceptible to manipulation. Furthermore, FERC staff found that because NYMEX is a "regulated, organized exchange... required by the CFTC (Commodities Futures Trading Commission), among other things, to maintain and enforce internal auditing mechanisms and to maintain painstakingly detailed records of trading activity," NYMEX markets "play an important role in determining an appropriate benchmark for prices." The FERC report details at length the manner in which NYMEX oversees its commodities market to deter manipulation.

TXU suggested rephrasing subsection (g)(1)(D) to clarify that meeting the threshold fulfills the PURA statutory requirement that it be demonstrated that fuel factors do not reflect significant changes in the market price of electricity and natural gas used to serve customers. ARM agreed with TXU's proposal, and further suggested that subsection (g)(1)(D) use "meets or exceeds 5.0% (or 10% if applicable)" in place of "exceeds 5.0% (or 10% if applicable)", to be harmonious with the threshold of "5.0% or more" from subsection (g)(1)(C).

The commission agrees with the recommendations of ARM and TXU and makes the corresponding clarifications.

Subsection (g)(1)(D)(i) and (ii)

The State supported the amendment in subsection (g)(1)(D)(i) and (ii) to increase flexibility in the processing of an affiliated REP's fuel factor adjustment; but argued that the 45-day deadline has no basis in statute, is unprecedented for a contested case at the commission, and is not consistent with fundamental requirements of due process.

TXU, ARM, Reliant, and FCP opposed the amendment in subsection (g)(1)(D)(i) and (ii) to increase flexibility in the processing of an affiliated REP's fuel factor adjustment. TXU and ARM argued that the 45-day deadline be retained in the rule because the objective is to timely adjust the fuel factor in the price to beat to reflect significant changes in the market price of natural gas and purchased energy. ARM stated that this objective benefits both affiliated REPs, by allowing them to reflect significant changes in the market price of natural gas and purchased energy in the price to beat, and nonaffiliated REPs, by ensuring that headroom is not adversely affected by any significant changes in such a market price.

TXU, in reply comments, argued that it is not only possible to meet a 45-day deadline, but it will be quite practical now that the commission has, through its decisions in the initial round of price to beat fuel factor filings, clearly set out the limited scope of proceedings to change the fuel factor; and has through this rulemaking reaffirmed those decisions. TXU pointed out that Reliant's November 2002 fuel factor request provides proof that proper application of the price to beat rule can readily be accomplished within 45 days, as that case was decided only 36 days after it was filed. AEP REPs agreed, stating that it is reasonable to assume that 45 days provide an adequate period for most price to beat fuel factor change proceedings.

TXU, in reply comments, disagreed with the State's claim that a 45-day deadline constitutes a denial of due process. TXU argued that if the limited scope of a fuel factor filing under the rule is properly observed, then there should be no issue that requires extensive discovery or litigation.

The commission agrees with TXU and others who note that the proceedings contemplated to adjust the fuel factors are limited in scope, and can therefore be performed in a 45-day timelines. The commission notes that the 45-day processing timeline was included in the original price to beat rule, and was not challenged by any party, including the State. The commission believes that, if a fuel factor adjustment is warranted due to increases in the market price of natural gas and purchased energy, that the adjustment should be processed as expeditiously as possible while still providing adequate time to ensure that the adjustment has been made in accordance with the provisions of the rule. The commission does not agree that fuel factor adjustment proceedings should be lengthy and costly proceedings, as the rule adopted by the commission is prescriptive in nature as to how the adjustments should be processed. Because the commission has found that the statute provides for changes to the fuel factor based on changes in the market price of natural gas and purchased energy and found it reasonable to measure those changes in market prices by independent indices (i.e. NYMEX futures market prices), it is unnecessary to expand the scope of fuel factor adjustment proceedings beyond the examination of how the prices in those markets have changed.

TXU, Reliant, and ARM suggested that in those instances where a final order cannot be issued on or before the 45-day deadline, then the rule should specify that the order shall be adopted at the next scheduled Open Meeting held thereafter. In addition, TXU supported including a provision allowing the parties to agree to extend the 45-day deadline, with such an agreement possibly including interim rate relief. FCP proposed that any extension of the 45-day deadline automatically include implementation of interim rate relief.

Houston and OPC and Cities stated that the 45-day time frame is extremely short. However, OPC and Cities argued that the commission does not have any authority to grant interim rate increases and opposed any such amendment in this rule. Houston argued that there is no statutory requirement that the commission decide a fuel factor case in an allotted time frame. Houston suggested that, at a minimum, a 90-day time period be adopted. Further, Houston suggested that the rule allow for a good cause exception to the deadlines set forth in the rule.

The commission declines to make the change suggested by TXU, Reliant, and ARM. While the commission generally concurs with the intent behind the suggested revision, and notes that current fuel factor proceedings are being completed within the 45-day timeline embodied in the current rule, the commission believes it appropriate to retain flexibility in processing the adjustment applications in the event unforeseen circumstances arise.

The commission agrees with Houston that there is no statutory requirement to process fuel factor adjustments in a specific time frame, however, the commission believes that having a defined period of time for processing adjustments to the fuel factor provides certainty to the marketplace, and better allows non-affiliated REPs to respond to fuel factor changes through increased marketing efforts, or revisions to their rates. The commission agrees that there is no explicit authority to grant interim rate relief in fuel factor adjustment proceedings, but notes that the rule only provides for interim relief if agreed to by all of the parties to a fuel factor adjustment proceeding.

Subsection (g)(1)(E)

OPC and Cities stated that the rule should delete any references to headroom and should not allow an affiliated REP to request an adjustment to the fuel factor if headroom decreases as a result of significant changes in the price of purchased energy because, they argued, PURA does not allow for the creation or maintenance of headroom to be a factor in the price to beat. They stated that considering headroom as a factor would create higher prices without any real price competition. They argued that the Legislature intended for ratepayers to save money as the result of the introduction of competition, and that even in cases where financial integrity of competitors was in question, there were limits placed on allowable price increases. They stated that there is nothing in PURA that supports the view that maintaining adequate headroom to ensure the success of unaffiliated competitors was the goal or desire of the legislation.

Entergy replied that OPC and Cities own evidence, an attached transcript of a statement on Senate Bill 7 by Representative Wolens, contradicts OPC and Cities position on headroom. Specifically, Entergy cites a statement by Representative Wolens describing headroom maintenance as being part of the "genius" of the bill.

The commission disagrees with OPC and Cities and Entergy for the reasons previously stated and notes that no change to subsection (g)(1)(E) has been made from the current rule except with respect to the timeframes for the commission to issue a final order in a proceeding brought under this portion of the rule. The commission further notes that no party challenged the validity of this provision when the commission originally adopted §25.41.

Subsection (g)(1)(E)(ii)

TXU suggested that the phrase "or as soon as practicable thereafter" be replaced with the phrase "or at the next Open Meeting held thereafter." TXU also stated that the rule should allow the parties to agree to extend the 60-day deadline, with such an agreement possible including interim rate relief.

The commission declines to make the change suggested by TXU. While the commission generally concurs with the intent behind the suggested revision, the commission believes it appropriate to retain flexibility in processing the adjustment applications in the event unforeseen circumstances arise.

Subsection (g)(1)(F)

TXU recommended that the last portion of the first sentence be modified as follows: "to adjust the fuel factor *to adequately reflect* significant changes in the price of purchased energy." TXU stated that the proposed change uses the statutory language and thus should help to clarify the commission's intent.

The commission concurs with TXU and has made the requested clarification.

AEP REPs and OPC and Cities commented that they do not oppose the changes to subsection (g)(1)(F) to encourage the development of liquid trading hubs, but stated that the proposed amendment would have little practical effect. OPC and Cities recommended that a more reasonable solution would be to require applicants to provide data of actual purchases of gas and electricity used to serve retail customers, which could be collected over time and verified.

The commission believes that the creation of liquid trading hubs can add significant benefits to the competitive retail market by increasing transparency and liquidity in the wholesale market. The commission declines to make the change suggested by OPC and Cities because the reporting of bilateral transactions by market participants is currently being addressed in Project Number 26188, *Rulemaking Proceeding Concerning Disclosure of Information Related to Electricity Transactions Originating or Terminating in Texas*.

Subsection(g)(3)(A)

OPC and Cities supported the proposed amendments to subsection (g)(3)(A) to require a reduction to the price to beat at the time of the true-up if gas prices have declined. They also argued that the rule should require price reductions at any time when gas prices are substantially reduced, not just at the time of true-up. Entergy argues that this is contrary to PURA §39.202(l), which gives the affiliated REP sole right to request a price to beat fuel factor adjustment, other than at true-up.

As previously stated, PURA §39.202(l) vests sole authority to request adjustments to the price to beat fuel factor in the affiliated REP, with the exception of the ability of the commission to adjust the price to beat following the true-up. The commission declines to make the change recommended by OPC and Cities for that reason.

Subsection (g)(3)(B)

ARM and Reliant supported the amendments in subsection (g)(3)(B) to adjust the price to beat base rates to correlate with changes made to non-bypassable charges so that headroom is preserved. ARM further suggested that the rule require the commission to adjust the price to beat to achieve the level of headroom established by the commission at the onset of the competitive retail market and allow the commission to further increase the adjusted price to beat to encourage full and fair competition.

The commission declines to make the change suggested by ARM for the reasons stated in response to the similar comments provided by ARM on question two.

ARM also proposed that the rule require that any adjustments to the price to beat ordered in the true-up proceeding be made to the base rate components of the price to beat on a schedule consistent with the processing of the TDU rate adjustment application pursuant to §25.263(n) of this title. Reliant agreed and suggested that the price to beat be adjusted accordingly with interim rates that may be awarded to TDUs during the lengthy true-up proceedings and that language changes be made to reflect the rule changes they proposed in their answer to Question 2.

The commission declines to make the change suggested by Reliant because PURA §39.202(k) permits the commission to adjust the price to beat *following* the true-up proceedings. While the commission recognizes that interim rate relief may result in an increase to the non-bypassable charges paid by REPs to serve their retail customers, the commission notes that PURA §39.262(j) requires the commission to issue an order within 150 days of the true- up filing, which should limit the exposure of REPs to interim rate relief. The commission believes that the language contained in subsection (g)(3)(B) is consistent with the comments made by ARM.

OPC and Cities did not support the proposed amendments in subsection (g)(3)(B) regarding adjustments of the base rate portion of price to beat to reflect changes in non-bypassable charges after the true-up. OPC and Cities argued that the amendments would allow increases in the price to beat for factors unrelated to changes in prices for gas or electric energy used to serve retail customers. They further argued that it would be unlawful and inequitable for the commission to allow increases in the price to beat for issues such as stranded costs and securitization at the time of the true-up. OPC and Cities stated that the concept of "headroom" is never referenced in Senate Bill 7 and that by including a "headroom adjustment" as part of the true-up, the commission has improperly concluded that stranded cost and/or transition charges determined in the true-up should be flowed through to price to beat customers. OPC and Cities stated that this would result in a double recovery of stranded generation assets from ratepayers since the underlying assets are already included in the January 1, 1999 base rate charges.

Reliant and ARM disagreed with OPC and Cities in reply comments. Reliant argued that the price to beat is not a cost-based rate so there are no cost-based components and therefore the

argument about double-recovery is not founded. ARM stated that the concept of "headroom" is a viable one in the context of both the price to beat and any statutorily allowed adjustments to the price to beat. ARM argued that OPC and Cities' argument that this proposed amendment is contrary to PURA §39.202(l) ignores the plain language of PURA §39.202(k) that permits the commission to adjust the price to beat following the true-up proceedings. Finally, ARM stated that the contention that the proposed amendment would result in automatic adjustment to rates without cost support ignores the fact that non-bypassable charges will have a cost basis, as computed in the true-up.

The commission agrees with the comments of ARM and Reliant. The commission finds that it has broad authority under PURA §39.202(k) to adjust the price to beat following the true-up and finds that it is appropriate to provide for an adjustment to reflect changes in non-bypassable charges for the reasons previously stated.

To avoid a perceived discrepancy, ARM proposed that the commission use the word "shall make" rather than "may consider" in the second sentence of subsection (g)(3). ARM stated that such a change would reflect the commission's exercise of discretionary judgment under PURA §39.202(k) that it *shall* make certain adjustments to the price to beat in this future proceeding. ARM argued that this provision also should allow for an upward adjustment to the price to beat fuel factor if the calculated rolling price permits such an adjustment under the criteria of the rule, and if the affiliated REP requests to make such an adjustment. ARM suggested that any such adjustment would count as one of the two requests per year that the affiliated REP may make under PURA §39.202(l).

The commission agrees with the comments of ARM to change the term "may" to "shall" to reflect that the adjustments contemplated in subsection (g)(3) will be made in accordance with the rule provisions. The commission believes that it is appropriate to provide certainty that the adjustments will occur. The commission disagrees, for the reasons previously stated, that the fuel factor should be adjusted upward by the commission if natural gas prices have risen, and notes that the affiliated REP retains the right to make such a request under PURA §39.202(l).

FCP suggested clarifying the last sentence in subsection (g)(3)(B) which now reads, "Each component of the base rates shall be adjusted in the same proportion in complying with this section." TXU and ARM suggested that the commission amend subsection (g)(3)(B) to add the phrase "residential and small commercial price to beat" before the words "base rates" to make it clear that the adjustment is applied to all price to beat components.

The commission concurs with the need for a clarification, but instead revises the last sentence of subsection (g)(3)(B) to state, "Each component of the base rates for each residential price to beat base rate tariff shall be adjusted in the same proportion in complying with this section. Each component of the base rates for each small commercial price to beat base rate tariff shall be adjusted in the same proportion in complying with this section."

This section is adopted under the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2003), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and PURA §39.202 which establishes the price to beat obligation for affiliated retail electric providers.

Cross Reference to Statutes: PURA §§14.002, 39.202, 39.262.

§25.41. Price to Beat.

(a) Applicability. This section applies to all affiliated retail electric providers (REPs) and transmission and distribution utilities, except river authorities. This section does not apply to an electric utility subject to Public Utility Regulatory Act (PURA) §39.102(c) until the end of the utility's rate freeze.

(b) Purpose. The purpose of this section is to promote the competitiveness of the retail electric market through the establishment of the price to beat that affiliated REPs must offer to retail customers beginning on January 1, 2002 pursuant to PURA §39.202.

(c) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context indicates otherwise:

(1) Affiliated electric utility--The electric utility from which an affiliated REP was unbundled in accordance with PURA §39.051.

(2) Competitive retailer--A REP or a municipally owned utility or distribution cooperative that offers customer choice in the restructured competitive electric power market or any other entity authorized to sell electric power and energy at retail in Texas.

(3) Headroom--The difference between the average price to beat (in cents per kilowatt hour (kWh)) and the sum of the average non-bypassable charges or credits approved by the commission in a proceeding pursuant to PURA §39.201, or PURA Subchapter G (in cents per kWh) and the representative power price (in cents per kWh). Headroom may be a positive or negative number. A separate headroom number shall be calculated for the typical residential customer and the typical small commercial customer. The calculation for the typical residential customer shall assume 1,000 kWh per month in usage. The calculation of the typical small commercial customer shall assume 35 kilowatts (kW) of demand and 15,000 kWh per month in usage.

(4) Nonaffiliated REP--Any competitive retailer conducting business in a transmission and distribution utility's (TDU's) certificated service territory that is not affiliated with that TDU unless the competitive retailer is a successor in interest to a retail electric provider affiliated with that TDU.

(5) Peak demand--The highest 15-minute or 30-minute demand recorded during a 12- month period.

(6) Price to beat period--The price to beat period shall be from January 1, 2002 to January 1, 2007. In a power region outside the Electric Reliability Council of Texas (ERCOT) if customer choice is introduced before the date the commission certifies the power region pursuant to PURA §39.152(a) are met, the price to beat period continues, unless changed by the commission in accordance with PURA Chapter 39, until the later of 60 months after the date customer choice is introduced in the power region or the date the commission certifies the power region as a qualified power region.

(7) Provider of last resort (POLR)--As defined in §25.43 of this title (relating to Provider of Last Resort).

(8) Registration agent--As defined in §25.454 of this title (relating to Rate Reduction Programs).

(9) Representative power price--The simple average of the results of:

(A) a request for proposals (RFP) for full-requirements service of 10% of price to beat load for a duration of three years expressed in cents per kWh; and

(B) the price resulting from the capacity auctions of the affiliated power generation company (PGC) required by §25.381 of this title (relating to Capacity Auctions) for baseload capacity entitlements auctioned in the ERCOT zone where the majority of price to beat customers reside, expressed in cents per kWh. The calculation of the price resulting from the capacity auctions shall assume dispatch of 100% of the entitlement and shall use the most recent auction of a 12-month forward strip of entitlements, or the most recent aggregated forward 12 months of entitlements. The affiliated REP, at its option, may conduct an RFP or purchase auction for an amount equivalent to the amount, in MWs, of the affiliated PGC's capacity auction for the September 2001 12-month forward strip baseload entitlements.

(10) Residential customer--Retail customers classified as residential by the applicable transmission and distribution utility tariff or, in the absence of classification under a residential rate class, those retail customers that are primarily end users consuming electricity for personal, family or household purposes and who are not resellers of electricity.

(11) Small commercial customer--A non-residential retail customer having a peak demand of 1,000 kilowatts (kW) or less. For purposes of this section, the term small commercial customer refers to a metered point of delivery. Additionally, any non-residential, non-metered point of delivery with peak demand of less than 1,000 kW shall also be considered a small commercial customer. For purposes of subsection (i) of this section, unmetered guard and security lights are not considered small commercial customers unless such an account has historically been treated as a separate customer for billing purposes.

(12) Transmission and distribution utility--As defined in §25.5 of this title (relating to Definitions), except for purposes of this section, this term does not include a river authority.

(d) Price to beat offer.

(1) Beginning with the first billing cycle of the price to beat period and continuing through the last billing cycle of the price to beat period, an affiliated REP shall make available to residential and small commercial customers of its affiliated transmission and distribution utility rates that, subject to the exception listed in subsection (f)(2)(A) of this section, on a bundled basis, are 6.0% less than the affiliated electric utility's corresponding average residential and small commercial rates that were in effect on January 1, 1999, adjusted to reflect the fuel factor determined in accordance with subsection (f)(3)(D) of this section and adjusted for any base rate reduction as stipulated to by an electric utility in a proceeding for which a final order had not been issued by January 1, 1999.

(2) Unless specifically required by commission rule, an affiliated REP may only sell electricity to price to beat customers labeled or marketed as "green," "renewable," "interruptible," "experimental," "time of use," "curtailable," or "real time," if and only if such a tariff option existed on January 1, 1999 and only for service under the price to beat rate that was developed from that tariff.

(e) Eligibility for the price to beat. The following criteria shall be used in determining eligibility for the price to beat:

(1) Residential customers. All current and future residential customers, as defined by this section, shall be eligible for the price to beat rate(s) for which they meet the eligibility criteria in the applicable price to beat tariffs for the duration of the price to beat period. An affiliated REP may not refuse service under the price to beat to a residential customer except as provided by §25.477 of this title (relating to Refusal of Service). An affiliated REP may not require residential customers to enter into service agreements with a term of service as a condition of obtaining service under the price to beat, nor may an affiliated REP provide any inducements to encourage customers to agree to a term of service in conjunction with service under the price to beat.

(2) Small commercial customers.

(A) A non-residential customer taking service from the affiliated electric utility on December 31, 2001, shall be considered a small commercial customer under this section and shall be eligible for service under price to beat tariffs if that customer's peak demand during the 12 consecutive months ending on September 30, 2001, does not exceed 1,000 kilowatts (kW). A non-residential customer with a peak demand in excess of 1,000 kW during the 12 months ending September 30, 2001, or during the price to beat period, shall no longer be considered a small commercial customer under this section. However, any non-residential customer whose peak demand does not exceed 1,000 kW for any period of 12 consecutive months after it became ineligible to be a small commercial customer under this section shall be considered a small commercial customer for billing periods going forward for purposes of this section.

(B) All small commercial customers, as defined by this section, shall be eligible for the price to beat rate(s) for which they meet the eligibility criteria in the applicable price to beat tariffs for the duration of the price to beat period. An affiliated REP may not refuse service under the price to beat to a small commercial customer, except as provided by §25.477 of this title. An affiliated REP may not require small commercial customers to enter into service agreements with a term of service as a condition to obtaining service under the price to beat, nor may an affiliated REP provide any inducements to encourage customers to agree to a term of service in conjunction with service under the price to beat.

(f) Calculation of the price to beat.

(1) Rates to be used for price to beat calculation. The following criteria shall be used in determining the rates to be used for the price to beat calculation.

(A) Residential. A price to beat rate shall be calculated for each rate and service rider under which a residential customer was taking service on January 1, 1999, except as approved by the commission pursuant to subparagraph (C) of this paragraph. A price to beat rate shall not be calculated for any new service or tariff option granted to an affiliated electric utility pursuant to PURA §39.054, or any other rate or tariff option not in effect on January 1, 1999.

(i) Beginning with the first full billing cycle of the price to beat period, residential customers served by the affiliated REP shall be placed on the price to beat rate derived from the rate under which they were taking service on December 31, 2001.

(ii) Beginning with the first full billing cycle of the price to beat period, residential customers served by the affiliated REP who were taking service under a rate for which a price to beat rate was not developed, shall be placed on the price to beat rate derived from any eligible residential rate that was or would have been available to the customer on January 1, 1999.

(iii) New residential customers after December 31, 2001, may choose any price to beat rate for which they meet the eligibility requirements as detailed in the applicable price to beat tariff.

(iv) Residential customers who return to the affiliated REP after being served by a non-affiliated REP may choose any price to beat for which they meet the eligibility requirements as detailed in the applicable price to beat tariff(s).

(v) Notwithstanding clauses (i) - (iv) of this subparagraph, residential customers may request service under any price to beat

rate for which they are eligible. Selection of the most advantageous rate shall be the sole responsibility of the residential customer.

(B) Small commercial. A price to beat rate shall be calculated for each rate and service rider under which a small commercial customer was taking service on January 1, 1999, except as approved by the commission pursuant to subparagraph (C) of this paragraph. A price to beat rate shall not be calculated for any new service or tariff option granted to an affiliated electric utility pursuant to PURA §39.054, or for any rate of tariff option not in effect on January 1, 1999.

(i) Beginning with the first full billing cycle of the price to beat period, small commercial customers served by the affiliated REP shall be placed on the price to beat rate derived from the rate under which they were taking service on December 31, 2001.

(ii) Beginning with the first full billing cycle of the price to beat period, small commercial customers served by the affiliated REP beginning in January of 2002, who were taking service under a rate for which a price to beat rate was not developed, shall be placed on a price to beat rate derived from an eligible rate that was or would have been available to the customer on January 1, 1999.

(iii) New small commercial customers after December 31, 2001, may choose any price to beat rate for which they meet the eligibility requirements as detailed in the applicable price to beat tariff.

(iv) Small commercial customers who return to the affiliated REP after being served by a non-affiliated REP may choose any price to beat rate for which they meet the eligibility requirements as detailed in the price to beat tariff(s).

(v) Notwithstanding clauses (i) - (iv) of this subparagraph, small commercial customers may request service under any price to beat tariff for which they are eligible. Selection of the most advantageous rate shall be the sole responsibility of the small commercial customer.

(C) An electric utility, on behalf of its future affiliated REP, shall file within 60 days of the effective date of this section, price to beat tariffs and supporting workpapers for the price to beat rates developed in accordance with subparagraphs (A) and (B) of this paragraph. At the time of this filing, the affiliated REP may request that a price to beat rate not be developed from a particular rate of service rider along with justification for the request. The electric utility shall provide notice to all customers currently taking service under such rates or service riders of the utility's request.

(2) Base rate component of price to beat. For the eligible rates identified in paragraph (1) of this subsection, the affiliated REP shall reduce each base rate component including any purchased power cost recovery factor (PCRF), in effect for the affiliated electric utility on January 1, 1999, by 6.0% in order to determine the base rate component of the price to beat, with the following exceptions:

(A) If base rates for the affiliated electric utility were reduced by more than 12% as the result of a final order issued by the commission after October 1, 1998, then the price to beat shall be the rate in effect as a result of a settlement approved by the commission after January 1, 1999.

(B) For affiliated REPs operating in a region defined by PURA §39.401, the commission may reduce rates by less than 6.0% if the commission determines a lesser reduction is necessary and consistent with the capital requirements needed to develop the infrastructure necessary to facilitate competition among electric generators.

(C) Except as provided in subparagraphs (A) and (B) of this paragraph, for any affiliated electric utility that has stipulated to rate reductions in a proceeding for which a final order had not been issued by January 1, 1999, such rate reductions shall be deducted from the base rates in effect on January 1, 1999, in addition to the 6.0% reduction. Such rate credits shall also be applied to the rates of the transmission and distribution utility.

(3) Fuel factor component of price to beat.

(A) Each affiliated electric utility shall file an application to establish one or more fuel factors, to be effective on January 1, 2002, according to the following schedule:

(i) April 1, 2001 - Reliant Houston Lighting & Power;

(ii) May 1, 2001 - TXU Electric Company;

(iii) June 1, 2001 - Texas-New Mexico Power Company and Central Power & Light Company;

(iv) July 1, 2001 - Entergy Gulf States, Inc. and West Texas Utilities;

(v) August 1, 2001 - Southwestern Electric Power Company and Southwestern Public Service Company.

(B) The rate year for the filing shall be calendar year 2002. The affiliated electric utility shall follow the requirements of §25.237(a)(1), (b), (c) and (e) of this title (relating to Fuel Factors) and the Fuel Factor Filing Package of November 23, 1993, for the filing of its fuel factor(s). To the extent that the commission has issued an order for a utility that includes provisions relating to the price to beat fuel factor, the price to beat fuel factor shall be set consistent with such an order.

(C) Subject to the limitations in clause (i) and (ii) of this subparagraph, affiliated electric utilities may utilize seasonal fuel factors to reflect the expected differences in the cost of the market price of electricity throughout the year.

(i) Affiliated electric utilities with seasonal fuel factors in effect on or before March 1, 2001, may request seasonal fuel factors for their residential and small commercial price to beat customers provided the level of seasonality is identical to that reflected in its commission-approved fuel factors on March 1, 2001.

(ii) Affiliated electric utilities without seasonal fuel factors in effect on or before March 1, 2001, may request seasonal fuel factors to be applicable to small commercial price to beat customers only. Any request for seasonal fuel factors under this clause must demonstrate that the average small commercial customer will receive, on an annual basis, a 6.0% reduction from the average bundled rate in effect on January 1, 1999, adjusted for the final fuel factor determined under subparagraph (D) of this paragraph; provided, however, that a utility subject to the exception in paragraph (2)(A) of this subsection must demonstrate that the average small commercial customer will receive, on an annual basis, the average bundled rate in effect as the result of a settlement approved by the commission after January 1, 1999, adjusted for the final fuel factor determined under subparagraph (D) of this paragraph.

(D) Each affiliated electric utility shall file additional information on October 1, 2001, to reflect changes in the price of natural gas for the rate year of 2002. The affiliated electric utility shall also file information necessary to determine the initial headroom that exists under the price to beat as a result of the setting of the initial price to beat fuel factor pursuant to this subparagraph. The adjustment shall be calculated using the following methodology:

(i) For the ten-day period ending on September 15, 2001, an average price shall be calculated for each month of 2002 in

the closing forward NYMEX Henry Hub natural gas prices, as reported in the Wall Street Journal.

(ii) All other inputs into the calculation of the fuel factors will be the same as those used to calculate the fuel factor in subparagraphs (B) and (C) of this paragraph.

(iii) Except for affiliated electric utilities whose base rates were reduced by more than 12% as the result of a final order issued by the commission after October 1, 1998, the fuel factor(s) to be used at the beginning of the price to beat period shall be the fuel factor in effect on January 1, 1999, reduced by 6.0%, plus the difference between the fuel factor(s) established pursuant to this subparagraph and the fuel factor in effect on January 1, 1999.

(iv) The fuel factor(s) for affiliate electric utilities whose base rates were reduced by more than 12% as the result of a final order issued by the commission after October 1, 1998, to be used at the beginning of the price to beat period shall be the fuel factor(s) established pursuant to this subparagraph.

(E) For a non-generating investor-owned utility with no fuel factor as of January 1, 1999, its PCRF in effect on January 1, 1999, shall be the equivalent to a fuel factor for purposes of calculating its price to beat rates and future fuel cost adjustments under subsection (g) of this section. Upon expiration of a purchased power contract of an affiliated REP unbundled from such a utility, the affiliated REP may request a change in its PCRF to account for any difference in purchased power costs.

(g) Adjustments to the price to beat.

(1) Fuel factor adjustments. An affiliated REP may request that the commission adjust the fuel factor(s) established under subsection (f)(3) of this section upward or downward not more than twice in a calendar year if the affiliated REP demonstrates that the existing fuel factor(s) do not adequately reflect significant changes in the market price of natural gas and purchased energy used to serve retail customers. As part of a filing made pursuant to this paragraph, an affiliated REP may also request an adjustment to the seasonality imparted to the fuel factor in accordance with subsection (f)(3)(C) of this section. Alternatively, the commission may, as part of its approval of an adjustment to the fuel factor, impose a change in the seasonality imparted to the fuel factor. The methodology for calculating the adjustment to the fuel factor(s) shall be the following:

(A) For each day of the 20 trading-day period ending no later than two days before the filing of a fuel factor adjustment application, an average of the closing forward 12-month NYMEX Henry Hub natural gas prices, as reported by the *Wall Street Journal* (either in print or on-line), is calculated.

(B) The average forward price for each trading day calculated in subparagraph (A) of this paragraph will then be averaged to determine a 20 trading-day rolling price.

(C) The percentage difference between the averaged 20 trading-day rolling price calculated under subparagraphs (A) and (B) of this paragraph and the averaged price used to calculate the current fuel factor(s) is calculated. If the current fuel factor was calculated through an adjustment under subparagraph (E) of this paragraph, then the averaged 20 trading-day rolling price calculated concurrent with that adjustment shall be used. If the percentage difference is 5.0% or more, then the current fuel factor(s) may be adjusted, unless the filing is made after November 15 of a calendar year, in which event the percentage difference must be 10% or more.

(D) If the absolute value of the percentage difference calculated in subparagraph (C) of this paragraph meets or exceeds 5.0% (or 10% if applicable), then the current fuel factors are deemed to be unreflective of significant changes in the market price of natural gas and purchased energy. To adjust the current fuel factor(s), the percentage difference calculated in subparagraph (C), either positive or negative, is added to one and then multiplied by the current factor(s). The results are the adjusted fuel factor(s) that will be implemented according to the procedural schedule in clause (i) and (ii) of this subparagraph:

(i) if no hearing is requested within 15 days after the petition has been filed, a final order shall be issued within 20 days, or as soon as practicable thereafter, after the petition is filed;

(ii) if a hearing is requested within 15 days after the petition is filed, a final order shall be issued within 45 days, or as soon as practicable thereafter, after the petition is filed. The 45 day timeline for issuance of an order may be extended upon mutual agreement of the parties. Such agreement may provide for interim rate relief.

(E) In addition to the adjustment permitted under subparagraphs (A)-(D) of this paragraph, an affiliated REP may also request an adjustment to the fuel factor if the headroom under the price to beat decreases as a result of significant changes in the price of purchased energy. In making a request under this subparagraph:

(i) an affiliated REP shall demonstrate that:

(I) the representative power price has changed such that the headroom under the price to beat has decreased; and

(II) the adjustment to the fuel factor is necessary to restore the amount of headroom that existed at the time that the initial price to beat fuel factor was set by the commission using then current forecasts of the representative power price.

(III) an affiliated REP making an adjustment under this subparagraph shall also file the gas price calculation in subparagraphs (A) and (B) of this paragraph for purposes of subsequent adjustments to the fuel factor based on changes in natural gas prices.

(ii) the commission will issue a final order on an application filed under this subparagraph within 60 days, or as soon as practicable thereafter, after the application is filed. The 60 day timeline for issuance of an order may be extended upon mutual agreement of the parties. Such agreement may provide for interim rate relief.

(F) The commission shall, upon a showing made by an interested party, that a sufficiently liquid electricity commodity trading hub (or hubs) or index has developed for the affiliated REP's relevant geographic or power region, allow an affiliated REP to transition to the use of electricity commodity futures prices at that hub or index to adjust the fuel factor to adequately reflect significant changes in the price of purchased energy. After the commission has made a finding that a sufficiently liquid electricity commodity trading hub or index has developed, the affiliated REP shall be required to perform an additional adjustment under subparagraphs (A) through (D) or (E) of this paragraph before utilization of the futures prices at that trading hub or index to change the fuel factor so that a benchmark electricity price can be established. Subsequent changes to the fuel factor shall be based on the percentage change in the electricity commodity index using the same methodology for the natural gas price adjustment under subparagraphs (A) - (D) of this paragraph.

(2) Adjustment for financial integrity. Upon a finding that an affiliated REP will be unable to maintain its financial integrity if it complies with subsection (f) of this section, the commission shall set the affiliated REP's price to beat at the minimum level that will allow the affiliated REP to maintain its financial integrity. However, in no event shall the price to beat exceed the level of rates, on a bundled

basis, charged by the affiliated electric utility on September 1, 1999, adjusted for fuel.

(3) True-up adjustment. The commission shall adjust the price to beat following the true-up proceedings under PURA §39.262. The commission shall consider the following adjustments to the price to beat on a schedule consistent with the processing of the TDU rate adjustment application pursuant to §25.263(n) of this title (relating to True-up Proceeding):

(A) Fuel factor adjustment. A 20 trading-day rolling price shall be calculated in accordance with paragraph (1)(A)-(D) of this subsection. If the 20 trading- day rolling price is less than the price used to calculate the then-current fuel factor (i.e. the percentage difference is negative), then the price to beat fuel factor shall be adjusted downward by the percentage difference in the prices. An adjustment required to be made in accordance with this subparagraph shall not be considered a request by an affiliated REP under paragraph (1) of this subsection.

(B) Base rate adjustment. Using the typical residential and small commercial usage calculations described in subsection (c)(3) of this section, the base rate components of the price to beat shall be adjusted, either upward or downward, such that the difference between the average price to beat base rate and the average non-bypassable charges that exist following the proceeding pursuant to §25.263(n) of this title is the same as existed on January 1, 2002. Each component of the base rates for each residential price to beat base rate tariff shall be adjusted in the same proportion in complying with this section. Each component of the base rates for each small commercial price to beat base rate tariff shall be adjusted in the same proportion in complying with this section

(C) Filing by affiliated REP. An affiliated REP shall make filings necessary to implement subparagraphs (A) and (B) of this paragraph on a schedule to be determined by the commission.

(h) Non-price to beat offers.

(1) Offers to residential customers. An affiliated REP may not offer any rates other than the price to beat rates to residential customers within the affiliated electric utility's service area until the earlier of 36 months after the date customer choice is introduced, or when the commission determines that an affiliated REP has met or exceeded the threshold target for residential customers described in subsection (i) of this section, except as provided by §25.454 of this title (relating to Rate Reduction Program).

(2) Offers to small commercial customers. An affiliated REP may not offer rates other than the price to beat rates to small commercial customers until the earlier of 36 months after the date customer choice is introduced, or when the commission determines that an affiliated REP has met or exceeded the threshold target for small commercial customers described in subsection (i) of this section.

(3) Offers to aggregated small commercial load. Notwithstanding paragraph (2) of this subsection, an affiliated REP may charge rates different from the price to beat for service to aggregated loads having an aggregated peak demand in excess of 1,000 kW provided that all affected customers are commonly owned or are franchisees of the same franchisor.

(A) If aggregated customers whose loads are served by an affiliated REP in accordance with this subsection disaggregate, those individual customers may resume service under the applicable price to beat rate(s), provided that those customers meet the eligibility requirements of subsection (e) of this section.

(B) Any usage removed from the threshold calculation in subsection (i)(1)(B) of this section due to aggregation shall be added back into the threshold calculation upon disaggregation of the aggregated load.

(i) Threshold targets.

(1) Calculation of threshold targets.

(A) Residential target. The residential threshold target shall be equal to 40% of the total number of kilowatt-hours (kWh) consumed by residential customers served by the affiliated electric utility during the calendar year 2000.

(B) Small commercial target. The small commercial threshold target shall be equal to 40% of the following difference: the total number of kWh consumed by small commercial customers served by the affiliated electric utility during the calendar year 2000 minus the aggregated load served by the affiliated REP that complies with the requirements of subsection (h)(3) of this section. The kWh associated with a customer who becomes ineligible for the price to beat because the customer's peak demand exceeds 1,000 kW shall also be removed from the threshold target.

(2) Meeting of threshold targets. Upon a showing by the affiliated transmission and distribution utility that the electric power consumption of the relevant customer group served by nonaffiliated REPs meets or exceeds the targets determined by the calculation in paragraph (1) of this subsection, the affiliated REP may offer rates other than the price to beat.

(A) Calculation of residential consumption. The amount of electric power of residential customers served by nonaffiliated REPs shall equal the number of residential customers served by nonaffiliated REPs, except customers that the affiliated REP has dropped to the POLR, times the average annual consumption of residential customers served by the affiliated utility during the calendar year 2000.

(i) The number of customers served by nonaffiliated REPs shall be determined by summing the number of customers in the transmission and distribution utility's certificated service area with a designated REP other than the affiliated REP in the registration database maintained by the registration agent. Customers dropped to the POLR by the affiliated REP shall not count as load served by a nonaffiliated REP.

(ii) The average annual consumption shall be calculated by dividing the total kWh consumed by residential customers during the calendar year 2000 by the average number of residential customers during the calendar year 2000. The average number of residential customers during the calendar year 2000 shall be calculated by dividing the sum of the total number of such customers for each month of the year 2000 by 12.

(B) Calculation of small commercial consumption. The amount of electric power consumed by small commercial customers served by nonaffiliated REPs shall be determined using the following criteria, except that customers served by the POLR shall not count as load served by a nonaffiliated REP:

(i) The amount of electric power of small commercial customers with peak demand less than 20 kW consumed by nonaffiliated REPs shall be equal to the number of small commercial customers with peak demand less than 20 kW served by nonaffiliated REPs times the average annual consumption of small commercial customers with peak demand less than 20 kW served by the affiliated electric utility during the calendar year 2000.

(I) The number of customers served by nonaffiliated REPs shall be determined by summing the number of small commercial customers with peak demands less than 20 kW served in the transmission and distribution utility's certificated service area with a designated REP other than the affiliated REP in the registration database maintained by the registration agent.

(II) The average annual consumption shall be calculated by dividing the total kWh consumed by small commercial customers with peak demand of less than 20 kW during the calendar year 2000 by the average number of small commercial customers with peak demand of less than 20 kW during the calendar year 2000. The average number of small commercial customers with peak demand of less than 20 kW shall be calculated by dividing the total number of such customers for each month of 2000 by 12.

(ii) The amount of electric power consumed by small commercial customers with peak demand in excess of 20 kW shall be the actual usage of those customers during the calendar year 2000.

(I) If less than 12 months of consumption history exists for such a customer during the calendar year 2000, the available calendar year 2000 usage history shall be supplemented with the most recent prior history of service at that customer's location for the unavailable months.

(II) For customers with service to a new location, the annual consumption shall be deemed to be equal to the estimated maximum annual demand used by the affiliated transmission and distribution utility in sizing the facilities installed to serve that customer multiplied by the product of 8,760 hours and the average annual load factor for small commercial customers with peak demand greater than 20 kW for the year 2000.

(j) Prohibition on incentives to switch. An affiliated REP may not provide an incentive to switch to a nonaffiliated REP, promote any nonaffiliated REP, or exchange customers with any nonaffiliated REP in order to meet the requirements of subsection (f) of this section. Nonaffiliated REPs may not provide an incentive to return to the price to beat.

(k) Disclosure of price to beat rate. An affiliated retail electric provider shall disclose to customers, the price to beat in accordance with §25.471 (relating to General Provisions of Customer Protection Rules). In addition, if an affiliated REP offers a rate greater than the price to beat, the price to beat rate must be disclosed along with a statement that the customer is eligible for the price to beat. This disclosure must appear on all written authorizations, Internet authorizations, the electricity facts label and Terms of Service document. It must also be disclosed during telephone solicitations before the customer authorizes service.

(l) Filing requirements.

(1) On determining that its affiliated retail electric provider has met the requirements of subsection (i) of this section, an electric utility or transmission and distribution utility shall make a filing with the commission attesting under oath to the fact that those requirements have been met and that the restrictions of subsection (h) of this section as well as the true-up in PURA §39.262(e) are no longer applicable.

(2) An electric utility or transmission and distribution utility shall file a progress report with the commission after its affiliated REP has met the requirements of subsection (i) of this section using a 35% threshold target in lieu of a 40% threshold. Such progress reports(s) shall be filed no later than 30 days after the 35% threshold has been met and shall contain the same information required in this subsection.

(3) No later than December 31, 2001, each transmission and distribution utility shall determine the power consumption threshold targets under subsection (i) of this section for residential and small commercial customers within its certificated service area and shall file this information with the commission and shall also make this information publicly available through its Internet website. Each transmission and distribution utility, together with its affiliated REP, shall update the small commercial power consumption threshold as needed to reflect additional small commercial load that has met the requirements of subsection (h)(3) of this section and therefore is appropriately removed from the calculation of the threshold target. Concurrent with this update, the transmission and distribution utility, together with its affiliated REP, shall provide, for each group of aggregated customers that have been removed from the calculation of the threshold target, the customers' names, electric service identifiers, size of the customers' loads (individually and in the aggregate), and how the customers meet the requirements of subsection (h)(3). Such information may be filed under confidential seal. All certificated REPs shall be deemed to have standing to review such filings.

(4) Any application filed pursuant to this subsection shall contain the following information:

(A) a detailed explanation of how the relevant customer group has met or exceeded the threshold consumption targets in subsection (i) of this section;

(B) calculation of the power consumption threshold target under subsection (i) of this section for the relevant customer group and the date such target was met;

(C) verification of the meeting of the threshold target in the following manner:

(i) for the residential customer class, independent verification from the registration agent verifying the number of customers in the residential customer class within the transmission and distribution utility's certificated service area that are committed to be served by non-affiliated REPs.

(ii) for the small commercial class, an affidavit detailing the number of customers in the small commercial class with peak demand below 20 kW within the transmission and distribution utility's certificated service area committed to be served by non-affiliated REPs and the customers with peak demand in excess of 20 kW with their actual usage calculated in accordance with subsection (i)(2)(B)(ii) within the transmission and distribution utility's certificated service area that are committed to be served by non-affiliated REPs.

(iii) For purposes of this subsection, a residential and small commercial customer has committed to be served by a nonaffiliated retail electric provider if the registration agent has received a switch request for that customer and any mandated cancellation period pursuant to applicable commission rule has expired.

(5) The commission staff shall review all applications filed under this subsection and shall make a recommendation to the commission within ten days after the application is filed to approve or reject the application. If a filing has insufficient information from which the commission can make a determination, the commission may reject the filing without prejudice for refiling the application. The commission shall issue an order approving or rejecting the application within 30 days after the application is filed. An electric utility or transmission and distribution utility filing an application under this subsection shall not charge rates different from the price to beat until the earlier of 36 months after the date customer choice is introduced or the date such application has been approved by the commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 3, 2003.

TRD-200302191
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: April 23, 2003
Proposal publication date: November 22, 2002
For further information, please call: (512) 936-7308

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 60. TEXAS COMMISSION OF LICENSING AND REGULATION

SUBCHAPTER E. ADMINISTRATION

16 TAC §60.201

The Texas Department of Licensing and Regulation ("Department") adopts new §60.201, concerning training and education for employees of the Department without changes to the text as published in the February 14, 2003, issue of the *Texas Register* (28 TexReg 1315) and will not be republished.

The new rule provides requirements for the use of state funds for training and education in accordance with the State Employee Training Act, Government Code, §§656.041-656.049.

These rules are necessary to comply with Government Code, §656.048, which requires state agencies to adopt rules relating to the eligibility of the agency's administrators and employees for training and education which is supported by the agency as well as obligations assumed by the administrators and employees on receiving the training and education.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. No comments were received regarding the proposed rules.

The new rule is adopted under Texas Occupations Code, Chapter 51, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department and Texas Government Code, §656.048, which provides that each state agency shall adopt rules relating to the eligibility of the agency's administrators and employees for training and education supported by the agency and the obligations assumed by administrators and employees on receiving the training and education.

The statutory provisions affected by the adopted new rule are those set forth in Texas Occupations Code, Chapter 51 and Texas Government Code, §656.048.

No other statutes, articles, or codes are affected by the new rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302281
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: April 27, 2003
Proposal publication date: February 14, 2003
For further information, please call: (512) 475-4879

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PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT

SUBCHAPTER D. LOTTERY GAME RULES

16 TAC §401.305

The Texas Lottery Commission adopts the repeal of 16 TAC §401.305 relating to Lotto Texas on-line game without changes as published in the February 14, 2003 issue of the *Texas Register* (28 TexReg 1316).

The repeal is adopted because the provisions of the rule are being revised so significantly that it is more efficient and less confusing to repeal this section and adopt a new rule 16 TAC §401.305 concurrently. With regard to the timing of the implementation and application of the provisions of new rule 16 TAC §401.305 and the repeal of the Lotto Texas rule adopted concurrently with the adoption of the new rule, all tickets purchased under the provisions of the repealed Lotto Texas rule and claims for prizes made based on tickets purchased under the provisions of the repealed Lotto Texas rule are subject to and construed under the provisions of the repealed Lotto Texas rule. Likewise, tickets purchased under the provisions of the new Lotto Texas rule and claims for prizes made based on tickets purchased under the provisions of the new Lotto Texas rule are subject to and construed under the provisions of the new Lotto Texas rule. Any prize breakage or roll-over remaining in the top four prize categories at the termination of the 6/54 Lotto Texas game will roll or be applied respectively to the top four prize categories in the new 5/44 + 1/44 Lotto Texas game. The prize reserve fund for the 6/54 Lotto Texas game will become the prize reserve fund for the new 5/44 + 1/44 Lotto Texas game.

Comments were received by the Texas Lottery Commission. The Commission conducted two comment hearings to receive comment on the proposed new rule and the proposed repeal of rule 16 TAC §401.305. The first hearing was held on February 26, 2003 at 9:00 a.m. at the Commission auditorium, 611 E. Sixth Street, Austin, Texas. No person appeared to provide comment. On February 26, 2003, Austin, Texas encountered inclement weather that may have prevented persons from being able to attend the hearing. The Commission noticed an additional hearing to afford persons an opportunity to comment on the proposed rulemakings. The second hearing was held on Friday, March 7, 2003 at 9:00 a.m. at the Commission auditorium, 611 E. Sixth Street, Austin, Texas. Two persons appeared at the March 7, 2003 hearing and provided comment. Additionally, the Commission received written comment during the comment period. Comment received was considered and summarized in this rule because the Commission is uncertain as to whether the comment received was intended by the commenters to address only

the new rule or whether the comment received was intended to be on the repeal or both on the new rule and the repeal. Therefore, in an abundance of caution, the Commission considered and summarized the comment for the repeal as well as for the new rule. To the extent required, an agency response is provided. Comment contained may appear to be redundant to other comment. Agency responses that appear elsewhere in response to comment are to be applied, where appropriate, to the redundant comment, as if fully set out for that comment.

Generally, most of the commenters indicated opposition to changing the Lotto Texas matrix. Commenters indicated that they are opposed to the addition of the "power number" or Powerball format. Many commenters indicated that they will stop playing if the matrix is changed or will spend less. Commenters also indicated that, in the event the change is made, they will only play when the jackpots are higher. Commenters also indicated they opposed the change to the Lotto Texas game the last time and that it didn't work then and questions why the Commission thinks it would be any different this time. Commenters indicated that they spent less when the last change to the Lotto Texas game was made and will stop spending money if the proposed changes are made. Some commenters believe the reason for the decrease in sales is the economy. Some commenters indicated that the Commission should be fair and not greedy. Some commenters indicated they want the game to return to the original matrix and join the multi-state lottery to satisfy the high rollers. Agency response: The Commission disagrees with the comment. Mini-lab/focus group research was conducted with Lotto Texas players in Houston and Dallas and the proposed 5/44 +1/44 bonus ball matrix was tested against the current matrix. The research shows increased spending on the proposed matrix compared to the existing matrix. The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently. Like any business enterprise, the Lottery must be able to respond to the ever-changing dynamic nature of the gaming industry. Lottery sales are closely monitored to track the projected success of the Commission's products. In order to keep the on-line games fresh and exciting, game enhancements should be implemented. The Commission believes that the Lotto Texas game should be changed at this time due to the lack of higher jackpots and decreasing sales that have been experienced with the current game. The Commission believes this matrix will generate higher jackpots and therefore increase Lotto Texas sales. It is up to the individual player to determine the amount of money he/she spends and at what jackpot level he/she chooses to enter the game. The Commission believes the decrease in Lotto Texas sales is due to the lack of higher jackpots and consistent wins at the lower level jackpots. Lower jackpots do not cause the excitement necessary for a lottery jackpot game to be successful. The proposed game is anticipated to increase revenue to the State of Texas. The original matrix (6-of-50) had been in place for approximately eight years and was no longer generating the jackpots, sales or revenue expected. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. Additionally, the Commission disagrees with the comment that the Commission should be fair and not greedy. The Commission believes its role is to generate revenue for the State. With regard to this responsibility, the Commission must review game performance and make decisions regarding such performance. To that end, the Commission reviewed the performance of the Lotto Texas game and determined the game was not performing at the levels the Commission expected. The Commission conducted player research to determine the best approach to enhance the game in order to generate revenue. The Commission proposed the new rule for public comment, has received comment, and has considered the comment received. The Commission believes the process has been fair. The Commission also believes the new features of the Lotto Texas game do afford meaningful opportunities to players to win prizes, including the jackpot prize.

One commenter indicated that he stopped playing the game because the prizes won at the lower levels is not enough money. The commenter indicated that anyone in business knows that "you can not make money if you do not give something back to your customers." The commenter believes that people are waiting until the amount is high and it is not because people playing think they are going to win, but they hope they can win something more than five dollars. The commenter suggests the Commission conduct a survey and ask the people who play the lottery and not the people sitting in the Commission's office. The commenter believes the proposed rule will only cause people to wait until the amount is high. Agency response: The Commission disagrees. The proposed rule will "give something back" to Lotto Texas players as the proposed game has improved overall odds of winning any prize and will create an approximate increase of 25% in the number of overall winners. Mini-lab/focus group research was conducted with Lotto Texas players and the proposed 5/44+1/44 bonus ball matrix was tested against the current matrix. The Commission agrees that people/players are waiting until the jackpot is high before they begin playing. Higher jackpots are the main reason this new game has been proposed.

One commenter indicated that the proposed changes to the Lotto Texas game mimic the style of play in Powerball and Megamillions and, if so, the commenter suggests joining one of these games. The commenter also suggests raising the starting prize from $4 million to $10 million because it will generate enthusiasm and higher prize pools. The commenter also suggests a game that draws once monthly and is based on some percentage of all the revenue generated. Agency response: The Commission disagrees. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. Sales would not support a starting jackpot of $10 million and would create too much risk for the Commission. Lotto style games are usually drawn twice per week. A drawing once a month would be confusing for players and retailers and would not create the customer/player traffic retailers are accustomed to with the current twice-per-week drawing schedule.

One commenter considers the Lottery a voluntary tax and it allows the commenter to dream of winning some day. The commenter suggests adding balls to the mix but leaving the basic premise of the game alone. The commenter believes that there are only so many gambling dollars available in Texas and neighboring states and Texas has added many new games. The commenter suggests eliminating one or more of the games. The commenter indicates that the commenter will stop buying Lotto Texas tickets if Powerball or other drastic changes are introduced. The commenter believes that the per capita money spent in 2002 compared to 1992 is the same but just spread out over more games. Agency response: The Commission disagrees. The mini-lab/focus group research tested a 6/59 matrix. The research showed that the 5/44 +1/44 matrix was more appealing and ranked higher on many levels. With

"likelihood to play" it was reported that this game was the more positive choice when choosing a change from the current Lotto Texas matrix. Sales trends do not indicate that the Commission eliminates one or more of its current games. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission also disagrees with the comment regarding per capita spending. Per capita spending was higher in 2002.

One commenter indicated that the proposed changes are extremely unfair to the lottery players of Texas. The commenter questioned whom the changes will benefit and indicated that if Texans had wanted a Powerball lottery they would have voted for one in the beginning. The commenter suggests that the Commission put the changes to a vote, if not to the State, at least to all lottery players. The commenter hopes that the Commission does not make the changes until the Commission has further investigated the opinions of the majority of the players. Agency response: The Commission disagrees. The Commission does not believe the proposed game is unfair to lottery players. The proposed game is expected to create higher jackpots, improve the overall odds of winning any prize, increase the number of prize levels and create an approximate increase of 25% in the number of overall winners. The proposed rule is a two-field, bonus ball style matrix. This bonus ball play style is similar to Powerball, which is a multi state game. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. Additionally, the Commission disagrees with the comments in that the Commission has promulgated the rule changes in accordance with the Administrative Procedures Act. Statutory rulemaking procedures do not require that an agency "put rule changes to a vote" or "investigate the opinions of the majority of players"; but, do require the agency afford interested persons a reasonable opportunity to comment and consider the comment received. This rulemaking afforded interested persons an opportunity to comment and the Commission considered such comment in making its decision.

Two commenters indicated that when the Commission added the additional four balls, they reduced their spending and will stop playing completely if the Commission adopts the proposed matrix change. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games.

One commenter indicated that the change will make the game into a Powerball game and that will kill the lottery. The commenter indicated that the Commission should not be so greedy and leave the game alone. The commenter further indicated that she will quit playing and that she has talked to about 300 people in her general area and did so in connection with the last change to the Lotto Texas game. The commenter stated that of these people, only about 20 still play and those 20 also don't want a Powerball game. The commenter also suggested that several million people play the same numbers all the time and changing the game will make it impossible for them to play their numbers. Agency response: The Commission disagrees. The proposed rule is a two-field, bonus ball style matrix. This bonus ball play style is similar to Powerball, which is a multi state game. Mini-lab/focus group research does not show that this change will "kill the lottery." From the research, heavy spending players for Lotto Texas are in favor of the two-field matrix. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission does not make game changes in order to make it difficult for players to play their favorite numbers. The Commission, like any business enterprise, must respond to the ever-changing dynamic nature of the gaming industry. The Commission must make the best decision in the interest of the Texas Lottery and the State of Texas. The proposed game is anticipated to increase revenue to the State of Texas and at the same time provide players with additional benefits as well.

One commenter suggested the Commission get input from the Florida Lottery who has numbers 1 to 53 and pays much higher payouts for 5 of 6 and about the same for 4 of 6 and 3 of 6 numbers. The commenter indicated that the Florida Lottery has already accomplished what the Commission is trying without doubling the odds for the players. Agency response: The Commission disagrees. The Commission has analyzed games currently being played in other states and the sales trends in other states. The Commission makes decisions on its games and how those games are performing in the Texas marketplace. There are certain games that perform better in certain states or jurisdictions due to the demographics of the player base in that particular state or jurisdiction.

One commenter indicated that the Commission should remember that most players are not playing for nickels and dimes but playing for the jackpot. The commenter believes that the proposed changes will cut the odds of winning a jackpot about in half. The commenters believes that at first the Commission might have a few more players but the same people will soon go away in frustration when they don't win the jackpot. The commenter suggests that the Commission advertise the fact that $4 million is more than any average Texas will make in his lifetime. The commenter believes that lack of this sort of reminder, coupled with the games that are so much harder to win because the odds are so high, cause players to become frustrated and give up. The commenter indicates that when the big jackpots are available, the increase in number of players is because people buy together in groups. The commenter suggests that people want a greater chance to win a big pot full, not just a couple thousand dollars. The commenters wants the Commission to leave Lotto Texas alone and give him better odds of winning $4 or $5 million any day. Agency response: The Commission agrees that players are playing for the jackpot. The main intent of the proposed game is to generate higher jackpots more frequently. The Commission agrees that the proposed game will increase the odds of winning the jackpot prize from 1 in 25.8 million to 1 in 47.7 million. The Commission disagrees that it should advertise "$4 million is more than any average Texan will make in his lifetime." The Commission has run advertising about $4 million being "a lot of money" and also produced point-of-sale for lottery retailers that conveyed the same message. These efforts were not successful in increasing sales or player excitement about lower level jackpot amounts. Lotto Texas players report that they want to play for high level jackpot amounts because those jackpot amounts get them excited and interested in the game. The Commission agrees when big jackpots are available there is an increase in pool or group play. In addition, there are large numbers of individual players that join or only begin participating when the jackpot reaches approximately $20 million or above. The Commission agrees that people want to "win a big pot full." That is why the proposed game has been proposed. The Commission disagrees about giving the commenter "better odds of winning $4 or $5 million any day." If the Commission changes the current game so that the odds of winning the jackpot prize are improved, there is

the chance that the jackpot prize would be won even more frequently than currently experienced, causing the jackpot to roll to higher levels less frequently. The Commission believes that the decrease in Lotto Texas sales is due to the lack of high jackpots and consistent wins at the lower level jackpots. Lower jackpots do not cause the excitement that is necessary for a lottery jackpot game to be successful. Sales trends show that as the jackpot climbs, so do Lotto Texas sales.

One commenter indicates that everyone to whom she has spoken will not play if more numbers are added. The commenter further indicates that she has played the same numbers for Lotto Texas and Cash 5 for about four years and has only won three numbers on Lotto Texas and two numbers on Cash 5. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. An independent statistician who analyzes all of the data from all of the drawings certifies the Commission's on-line game drawings to be random. Playing the same numbers for any period of time does not guarantee that a player will win at any prize level.

Some commenters indicated they like playing the scratch offs more than Lotto Texas because they win a dollar or two occasionally. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games.

One commenter indicated that she will buy less tickets if it is harder to win. The commenter further indicated that the commenter will no longer buy tickets unless there is a very large jackpot. The commenter suggests the way to generate more interest is to make it easier to win and to make the prizes larger for matching three, four, or five numbers. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission agrees that this commenter and many other players currently begin playing Lotto Texas when there is a "very large jackpot." The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently. The Commission disagrees that "the way to generate more interest is to make it easier to win and to make the prizes larger for matching three, four of five numbers." If the Commission changes the current game so that the odds of winning the jackpot prize are improved, there is the chance that the jackpot prize would be won even more frequently than currently experienced, causing the jackpot to roll to higher levels less frequently. The Commission believes that the decrease in Lotto Texas sales is due to the lack of high jackpots and consistent wins at the lower level jackpots. Lower jackpots do not cause the excitement that is necessary for a lottery jackpot game to be successful. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales.

One commenter indicated that the consensus in his neighborhood is that the odds of winning should be improved, not decreased. The commenter believes that less participation is due to the total number of games now available in Texas and bordering states. The commenter further believes that these proposed changes will make it astronomically difficult to win. The commenter wants more winners winning the grand prize and believes this can be accomplished by increasing the odds of winning. The commenter believes that if advertised correctly, there would be greater participation in the game, producing more revenue. Agency response: The Commission disagrees. If the Commission changes the current game so that the odds of winning the jackpot prize are improved, there is the chance that the jackpot prize would be won even more frequently than currently experienced, causing the jackpot to roll to higher levels less frequently. The Commission believes that the decrease in Lotto Texas sales is due to the lack of high jackpots and consistent wins at the lower level jackpots. Lower jackpots do not cause the excitement that is necessary for a lottery jackpot game to be successful. Sales trends do not indicate that the Commission eliminates one or more of its current games. The Commission believes the proposed rule will generate higher Lotto Texas jackpots and prevent players from spending their dollars on games offered across state lines. The Commission believes it does advertise the Lotto Texas correctly. The Commission believes higher jackpots will increase participation in the game, increase sales and therefore, increase revenue for the State of Texas.

One commenter indicated that the commenter is opposed to the changes for two reasons. The commenter believes the odds are bad enough and the changes will only make them worse. The commenter does not like the bonus ball type games. The commenter is not opposed to adding more balls to the current lotto format and bumping the odds a little. The commenter indicates that most people the commenter talks with say their threshold for odds is in the 30-37 million to 1 range. The commenter's threshold is 1 in 35 million. The commenter is in a pool and indicates that 4 of the 5 people in the pool want the pool stopped if the proposed changes are made as the odds will just be too bad and not worth playing on a regular basis. The commenter indicated that the commenter will then go to a single drawing pool format when the jackpot exceeds $60-$70 million. Agency response: The Commission disagrees. The mini-lab/focus group research tested a 6/59 matrix. The research showed that the 5/44 +1/44 bonus ball style matrix was more appealing and ranked higher on many levels. With "likelihood to play" it was reported that this game was the more positive choice when choosing a change from the current Lotto Texas matrix. It is up to the individual player or groups of players to decide if they want to participate in any of the Commission's games and to establish their own comfort level with the odds of winning. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires.

One commenter indicates that it is an outrage to put the odds of winning the Lotto at 1 in 47 million. The commenter further indicated that she plays now even at low levels hoping she might stand an outside chance of winning. The commenter wants it fun to play, not impossible to win. Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The Commission agrees that it wants the Lotto Texas game to be fun to play. Sales trends show that players become excited and interested in the game when there are large jackpots. The Commission disagrees that the proposed game will be impossible to win.

One commenter indicated that it is a stupid idea to make it harder to win so that eventually there may be a larger lotto prize. The commenter further indicated that the Commission should realize that making it harder doesn't work, that the Commission has

done that and it didn't work. The commenter suggests the Commission try a different approach. Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The Commission believes that the Lotto Texas game should be changed at this time due to the lack of higher level jackpots and decreasing sales that have been experienced with the current game. The Commission believes the proposed game will generate higher jackpots. Sales trends show that players become excited and interested in the game when there are large jackpots. The Commission believes this is the correct approach based on mini-lab/focus group research, sales trends and industry experience.

One commenter, writing on behalf of 30 friends and business associates, indicates that the latest change for the lotto really sucks. The commenter further indicates that that if the change is made, the group will never play the lotto again. The commenter also indicates that the recent changes to Cash 5 are a joke and the group believes Cash 5 should return to the original method. The commenter's group also questions the drawing time changed so now the television stations can't televise the actual drawing, the phone number to check winning numbers has been deleted, and whether there's something shady going on in the lotto. Agency response: The Commission disagrees. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission disagrees with the comment about the Cash Five game. The Commission has experienced a substantial sales increase (over 20%) in the Cash Five game since making the changes to the Cash Five game. The drawing time was changed to make it more convenient for TV stations to air the drawings. The Commission's drawings are televised via satellite and available for all Texas TV stations to broadcast. It is up to each TV station to decide if they want to air the Commission's drawings. The Commission's 1-900 results number was discontinued due to provider indicating it would discontinue the billing services previously provided and due to projected costs associated with continuing the number. Players can obtain drawing results at the Commission's Web site, in local newspapers and at Texas Lottery retail locations all around the state. The Commission disagrees that there is something "shady going on in the lotto."

One commenter suggested legalizing casino gambling as a way to increase revenue for Texas. Agency response: The Commission disagrees with the comment. The purpose of the Commission is to operate the state lottery to generate revenue for Texas. Therefore, the Commission's focus is on performance of the state lottery. The Commission has no jurisdiction as to decisions regarding the legalization of casino gambling.

One commenter indicated that adding more numbers isn't going to help. Instead, the game needs more winners, small or big. Agency response: The Commission disagrees. The Commission believes the proposed game will generate higher level jackpots and therefore, increase Lotto Texas sales and revenue to the State of Texas. The Commission agrees that the game needs more winners. The new game will improve the overall odds of winning any prize to 1 in 57 and provide and approximate increase of 25% in the number of overall winners.

Two commenters attached a newspaper clipping from the Tyler Morning Telegraph in which the paper conducted a survey. One of the commenters pointed out that 75% of the people who responded do not favor changes that increase the odds of winning. One of the commenters suggested that the lottery is failing in sales not because of small jackpots but because bettors are getting fed up and tired of bucking astronomical odds and coming out losers. This commenter suggests getting more winners out there, not bigger winners, and people feel that they have at least a reasonable chance to win something. Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The Commission agrees that players are tired of small or lower level jackpots. The Commission believes the proposed game will generate higher level jackpots. The Commission agrees that the game needs more winners. The proposed game will improve the overall odds of winning any prize to 1 in 57 and provide and approximate increase of 25% in the number of overall winners.

One commenter indicated that the Commission should leave Lotto Texas as it is or take out the last four balls and lower the starting jackpot and also join a multi-state game. Agency response: The Commission disagrees. The Commission believes the current Lotto Texas game should be changed at this time due to the lack of higher jackpots and decreasing sales that have been experienced. The previous or original Lotto Texas matrix (6/50) had been in place for approximately eight years and was changed because it was no longer generating the jackpots, sales or revenue expected. Lowering the starting jackpot would cause a decrease in spending. The purpose of the Commission is to operate the state lottery to generate revenue for Texas. Therefore, the Commission's focus is on performance of the state lottery and the games currently authorized by the State Lottery Act. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law.

One commenter indicated that the pay-off for Lotto Texas and Cash 5 is disgusting. The commenter indicated that he talked to so many people and they all feel the way the commenter does. The commenter further indicated that the Commission doesn't pay enough for 3, 4 and 5 numbers and people are tired of the present pay-off. With regard to the Lotto Texas game, the commenter suggests making changes and paying $50 for 3 numbers, $1,500 for 4 numbers, $5,000 for 5 numbers and the balance for 6 numbers. With regard to Cash 5, the commenter suggests paying $150 for 3 numbers, $1,000 for 4 numbers, and the balance for 5 numbers. This commenter submitted additional comment in a separate subsequent mailing. The commenter indicated that the Commission just doesn't pay out enough for all the players that play but don't ever get but 3 or 4 numbers right. The commenter indicated that he has spent a lot of money trying to win but his luck is not like the lucky players that win the big pot. The commenter believes that if the Commission changes the odds of winning much harder, the Lottery may dry up. The commenter believes that leaving Lotto Texas at 54 numbers and Cash 5 at 37 numbers and pay out more for players that get just 3 or 4 numbers right, the Commission will see people start to play more. The commenter suggests that, for example, if the jackpot is $12 million on the regular Lotto and there is one winner, pay that winner $500,000 less and pay all the unlucky ones more. The commenter suggests that for persons that get 5 numbers right, $5,000, 4 numbers right, $1,000, and 3 numbers right, $100. For a Cash 5 jackpot that is $58,000, the Commission should use the same pay out accordingly: pay the player that gets all 5 numbers right, $56,000, 4 numbers right, $1,000, and 3 numbers right, $100. Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers

causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. The proposed game will increase the number of prize levels, the overall odds of winning any prize will improve to 1 in 57 and there will be an approximate increase of 25% in the number of overall winners. The Commission has experienced a substantial sales increase (over 20%) in the Cash Five game since making the changes to the Cash Five game. The Commission is not focusing on a change to the Cash Five game in this rule making but is focusing on improving the Lotto Texas game. The Commission does not believe that the "Lottery may dry up" because the odds of winning the jackpot prize are increasing. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The Commission cannot subtract prize dollars from the jackpot prize level and allocate those dollars to lower prize levels. The Commission operates the Lotto Texas game based on official on-line game rules. The software that runs the game is developed based on the official game rule. The suggestion would cause confusion for players regarding the amount of the jackpot prize and would contradict the pari-mutuel calculations of the prize levels as stated in the rule.

One commenter indicated that sales are off because of the economy. Agency response: The Commission disagrees. The Commission believes that Lotto Texas sales have been decreasing due to the lack of higher jackpots and consistent wins at the lower level jackpots.

One commenter indicated that the Commission thinks it is for the good of the State and the commenter can see that it would be good for the government of Texas but it is not good for the commenter. The commenter indicated that if the Commission takes advantage of the commenter to steal his dollars then the commenter sees that as the Commission taking advantage of the State. The commenter further indicated there a lot of people like him that make up Texas and Lotto Texas already gets a large amount of his voluntary contribution. The commenter further indicated that he plays Lotto Texas only for the chance for the upper tier prizes. The commenter wants the Commission to ask gamblers about the rule changes as opposed to GTECH. The commenter believes the Commission and GTECH are like the house in gambling, they always have the odds in their favor. Agency response: The Commission disagrees. The Commission does not believe it is stealing dollars from players nor is it taking advantage of the state. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games and to establish his/her own comfort level with the odds of winning. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. The Commission believes the proposed game will generate higher jackpots, increase Lotto Texas sales and therefore, increase revenue to the State of Texas. The proposed changes are estimated to bring an additional $56.4 million to the State within the first full fiscal year. The Commission conducted mini-lab/focus group research with Lotto Texas players in Houston and Dallas. The Commission agrees that many players play Lotto Texas to win the jackpot or upper tier prizes.

One commenter indicated the proposed change to Lotto Texas is inherently unfair and blatantly immoral and is no doubt being pushed behind the scene by politicians who have no real interest in the economic welfare of everyday citizens. Based on the premise that the Commission has not provided details of a survey indicating that lottery players want a lotto game they are unlikely to win, the commenter believes it's all one big sham. The commenter would like to know who and how many people participated in the survey and the details of any information the Commission provided about the proposed game. The commenter believes that the Commission has consistently denied players all of the information they need to know about the various lottery products and therefore believes the Commission orchestrated the surveys in ways to achieve the desired outcome. The commenter indicated that while large jackpots do attract players who are otherwise smart enough not to gamble, the Commission's position that these periodic increases in sales justifies a harder to win lotto is dishonest, and the Commission knows it. The commenter believes that the Commission's statement that lottery players want fresh and exciting games is an outright lie. The commenter indicated that the players are not demanding a change, the Commission is. Agency response: The Commission disagrees. The Commission does not believe there is anything "unfair and blatantly immoral" about the proposed game. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games and to establish his/her own comfort level with the odds of winning. Mini-lab/focus group research was conducted with Lotto Texas players in Houston and Dallas. A summary of the research findings were presented in public at the January 31, 2003 Texas Lottery Commission meeting at the Commission's headquarters in Austin, Texas. This meeting was properly noticed in accordance with the Texas Open Meetings Act and the agenda for this meeting indicated that the Commission may consider proposing a new Lotto Texas rule. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Additionally, an interested person may request information from the Commission in accordance with the Texas Public Information Act for information that is not exempt from disclosure. The Commission complies with open government laws and will provide the information requested, to the extent such information is not exempt from disclosure. The Commission does believe that players want fresh and exciting games and believes past game changes and the sales increases associated with those changes illustrate that point. The Commission does not believe it is being dishonest about any aspect of this proposed game. Additionally, the Commission has promulgated the rule changes in accordance with the Administrative Procedures Act. As part of the rulemaking process, the Commission indicated its reasons for proposing the changes. The rulemaking process requires the agency afford interested persons a reasonable opportunity to comment and consider the comment received. This rulemaking afforded interested persons an opportunity to comment and the Commission considered such comment in making its decision. The Commission published the rule in the Texas Register, conducted two public comment hearings, and received public comment through mail and fax. The Commission believes players are demanding a change based on their spending and based on a review of sales trends.

One commenter indicated that he has played Lotto Texas since it started and he put his numbers in the computer to see how they are doing. The commenter further indicated he had to buy a new computer in 2000, then had to get new programs because

they wouldn't do the date right. When the Commission added four balls, the commenter had to dump the drawing list, change it to 54 balls and put them back in. The commenter indicated it was a lot of trouble but he stayed with it in the hope that he would win some day. The commenter indicated he will stop playing if the changes are adopted. The commenter suggests keeping the current lotto game and also start the new one so people can play what they want. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. An independent statistician who analyzes all of the data from all of the drawings certifies the Commission's on-line game drawings to be random. Trending the numbers drawn in previous drawings is no indication that those same numbers or combination of those numbers will be drawn in future drawings. The Commission does not believe two in-state Lotto Texas games would be successful.

One commenter indicated that he plays the same numbers every time. The commenter would play even if the jackpot was only one million dollars or less. The commenter said he played when the Commission added the four balls but may have quit if the changes are made. The commenter indicated he was in two pools and plays several sets of numbers. The commenter suggested the Commission check with Louisiana and Colorado Lotteries. The commenter believes these states have a good lottery with 40 and 42 balls and they also have Powerball for the people that want to win big. The commenter indicated he just wants to win and the change will just make it harder. The commenter also suggests the Lotto Texas game go back to 50 balls and start the jackpot at one or two million dollars and join Powerball. The commenter indicated he would play both. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission has analyzed games currently being played in other states and the sales trends in other states. The Commission makes decisions on its games and how those games are performing in the Texas marketplace. There are certain games that perform better in certain states or jurisdictions due to the demographics of the player base in that particular state or jurisdiction. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. The Commission disagrees with going back to the previous "50 balls" or the original game matrix. The original matrix (6-of-50) had been in place for approximately eight years and was no longer generating the jackpots, sales or revenue expected.

One commenter indicated that people are buying "hope" when the buy a lotto ticket. When the odds go up to "hopeless", all incentive to buy goes away. The commenter believes two things has caused interest to drop on the lotto: raising the numbers to 54 and the television stations no longer showing the actual drawings. The commenter people buy into the big pots but they buy more consistently on the $4 to $10 million levels. The commenter suggests that if the numbers are increased, wiser buyers will simply switch to a game with better odds and more money will go out of Texas to lotteries with better odds. The commenter advised not to change the game; instead, lower the numbers, get more winners and see if interest doesn't increase, not lessen. Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. The Commission believes interest in the Lotto Texas game has dropped due to the lack of higher jackpots and consistent wins at lower level jackpots. The Commission's drawings are televised via satellite and available for all Texas TV stations to broadcast. It is up to each TV station to decide if it wants to air the Commission's drawings. The Commission agrees that there are consistent Lotto Texas players that play the game regardless of the jackpot amount. The Commission believes that lower jackpots do not cause the excitement necessary for a lottery jackpot game to be successful. The Commission believes this proposed game will generate higher jackpots, increased sales and at the same time provide players with increased prize levels, improved overall odds of winning any prize and an approximate increase of 25% in the number of overall winners.

One commenter indicated the commenter wants the game to stay as it is. The commenter also indicated that the only change the commenter would want is to go from 25 annual payments to 20 annual payments. Agency response: The Commission disagrees. Mini-lab/focus group research was conducted with Lotto Texas players in Houston and Dallas and the proposed 5/44 +1/44 bonus ball matrix was tested against the current matrix. The research shows increased spending on the proposed matrix compared to the existing matrix. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. The Commission disagrees with changing the annual payments from 25 payments to 20. The Commission is not considering a change to the annual payment option in this rule making.

One commenter indicated he is at a loss to understand how a person would not see that $4 million is a life-altering experience and instead to hold out for only when the pot is "big". The commenter indicated if the Commission catered to that belief the commenter will stop playing and he suspects there more like him. Agency response: The Commission disagrees. The Commission has run advertising about $4 million being "a lot of money" and also produced point-of-sale for lottery retailers that conveyed the same message. These efforts were not successful in increasing sales or player excitement about lower level jackpot amounts. Lotto Texas players report that they want to play for high level jackpot amounts because those jackpot amounts get them excited and interested in the game. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games

One commenter indicated that the Commission gives the general public little, if any, consideration for being somewhat intelligent. The commenter believes the numbers are not drawn randomly; instead, the commenter believes the numbers are drawn 15 minutes after the "cut-off" ticket purchasing time" in order for the Commission to scan the entire to see what numbers are drawn and then draw a set of numbers that have not been purchased. The commenter believes that since the commenter has played the same numbers from the inception and has a hard time believing that these numbers would not have been drawn if the system was fair. The commenter believes the whole system is "fixed" and adding more numbers will only have a negative impact on sales. Agency response: The Commission disagrees. The Commission's on-line game drawings are witnessed by a Certified Public Accountant and certified to be random by an independent statistician who analyzes all of the data from all of the drawings. Playing the same numbers for any period of time does not guarantee that a player will win at any prize level. Wagering for the night drawings stops at 10:00 p.m. and the on-line

game drawing takes place at 10:12 p.m. During this time period, Lottery Security staff verify that all wagering for the games being drawn that night have ceased and they then prepare to conduct the drawings broadcast. Lottery Security has an extensive checklist they follow before every drawing broadcast including pre-tests that ensure the machines and ball sets being used are returning random results. All of the Commission's drawings are open to the public. Based on research and sales trends, the Commission does not believe the proposed game will have a negative impact on sales.

One commenter suggested having all television stations show the numbers as they are drawn out makes people feel the game is honest and not rigged. The commenter also wants the stations to show the numbers when they are drawn and not have to wait until 10:25 to see the numbers, then just flash the numbers, not giving a person time to write them down or wait for the paper to come to get the numbers. The commenter believes that 54 numbers makes the odds to great for anyone to win very often and that more winners makes more players. Agency response: The Commission agrees with the commenter about TV stations showing the Commission's drawings. The Commission's drawings are televised via satellite and available for all Texas TV stations to broadcast. It is up to each TV station to decide if it wants to air the Commission's drawings. Some TV stations opt to show a graphic during their news broadcast that shows the numbers drawn rather than airing the entire drawing broadcast. The Commission disagrees about 54 numbers making the odds too great for anyone to win. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. The Commission believes that the proposed game will create an approximate increase of 25% in the number of overall winners.

One commenter, commenting on behalf of his company, indicated the Commission should not make the change as proposed but instead the commenter offers an alternative proposal. The commenter indicated that the alternative proposal will have as profound an impact on lottery organizations' sales and income as did the introduction of online systems and multi-priced instant lottery tickets; estimates increasing State income through FY 07 from the projected ticket sales; is a tool for Commission game development that will restore player value and excitement to lotto play regardless of the matrix chosen by the Commission-minimum $16-$20 million jackpot prize pools for weekly 6/54 draws and $50 million for holiday draws, or $25 million weekly, $60 million holiday draws or a 5/44 +1/44 matrix; has a basis, methodology and player marketability that will rapidly be a worldwide industry standard whose benefits and implementation are irrefutably supported by both industry and Commission play and other gaming segments. The commenter suggests that his company's proposal will be provided to the Commission, transparently to Texas players, at no cost and no risk supported by an absolute AAA+ guarantee and participation by world leaders in the private sector. The commenter believes the proposed rule is driven by the overwhelming limitations of the existing pari-mutuel prize structure of the worldwide lotto industry. The commenter believes that adoption of the proposed rule on a comparative basis propels Lotto Texas to the worst odds State lotto game in the nation. The commenter suggests that its only escalation beyond that would be Texas joining Powerball or MegaMillions and that move would require either of these lotteries to move to 150-170 million tone odds. The commenter does not believe either of these alternatives is something the Commission wants for the Texas players who have loyally supported lotto play over the years. The commenter indicted that the proposed matrix change is not warranted given Lotto Texas sales and play characteristics; is not justified by any meaningful comparison to other jurisdictions; and implementation will cause an accelerated deterioration of both confidence and play in Lotto Texas. The commenter believes that all discussions and media regarding the matrix change has been specifically focused on only two claimed player benefits to be achieved-higher jackpots and 25% more wining tickets. The commenter believes there will be a negative residual effect of this change on future Texas lotto play and therefore, believes a full assessment of this proposed matrix change should be evaluated. The commenter indicated that he has conducted a comparison of all existing State lotto games and odds to win each on a $1.00 play, implementing a 5/44 + 1/44 matrix would give Texas lotto players the worst odds lottery in the nation at 47.8 million to 1. The commenter also indicated that his company evaluated the total sales volume in Texas lotto play in combination with characteristics of play and Texas population base versus other jurisdictions. The commenter applies two states' data, California and Florida, to conclude there is no reason that emerges that would justify the Texas proposal. Instead, the commenter suggests the proposed change is probably a reaction to the abnormal win cycles experienced by the Texas Lottery in calendar year 2002. The commenter suggests that this is what really should be looked at, not just dismissing it with an arbitrary matrix change. The commenter agrees that the proposed matrix change should generate larger jackpots as a consequence of almost doubling the odds to win. The commenter also agrees that the added prize levels of the proposed matrix change should add 25% more winning tickets. The commenter believes that in fairness, evaluation should extend to the consequences of this matrix change beyond these two publicized aspects. The commenter is critical of reliance on the same people who projected three to four jackpots between $65 million and $100 million during a 52 week period to project jackpot behavior for this proposed matrix. The commenter believes that what is really being proposed is the exchange rate is being changed to effect an exchange of $.52 for every $1.00 from Texas players from the current exchange of $.55 for every dollar. The commenter believes Texas players would take a 5.5% "hit" on their total return. The commenter agrees with this change given the budget situation within the State. The commenter does not disagree on the matrix prize levels producing 25% more winning tickets but believes there is also a very negative aspect to the matrix proposal-a 42% reduction in average prize awards that has not been made a part of the discussion process for this matrix change. The commenter indicates that what the new matrix would produce is a virtual doubling of the rollover cycles and one other major effect-it would cut the number of jackpot winners in half versus the current game. The commenter believes that there will be a deterioration in core play that will accelerate the problems the lotto game has not only through this new matrix but or future play and changes as well. The commenter suggests an alternative that the commenter believes addresses the changing dynamics of lotto play worldwide. The commenter submitted information that the commenter believes shows the effects of substituting a probability based lotto prize structure, i.e., a large up-front guaranteed minimum jackpot prize pool in expectation of a level of future ticket sales within a rollover or win cycle, and, with these jackpot levels, being able for the first time in lotto play to offer multiple priced tickets within one lotto game. The commenter believes the commenter's proposal provides a probability based prize structure that gives the player

immediate value for his purchase, heightened excitement and attendant increased play, and its marketability is irrefutably proven both in multi-priced instant lottery play and in other gaming applications. The commenter also believes that the commenter's proposal provides a multiple priced ticket entry that will dramatically increase Lottery and State income as proven by the incremental revenue generated by multi-priced instant tickets-the single greatest contributing factor to overall Texas Lottery profitability in the past 4 to 5 years. The commenter reiterates opposition to the implementation of the proposed matrix. The commenter believes the same economic benefits to the State and all other participants can be achieved by retaining the current 6/54 matrix with a $16 to $20 million minimum prize pool for weekly draws and four $50 million minimum holiday draws. Agency response: The Commission disagrees. The Commission believes that decreasing sales and lack of player interest and excitement due to consistent wins at the lower level jackpots does warrant a matrix change at this time. The Commission disagrees that the proposed matrix will cause deterioration of confidence and play in Lotto Texas. Research conducted shows increased spending on the proposed matrix compared to the existing matrix. The Commission disagrees that data from California and Florida conclude there is no reason to justify the current proposal. The Commission makes decisions on its games and how those games are performing in the Texas marketplace. Focus group research tested matrices that were similar to the current matrices in California, Florida, and New York. Trends experienced with the performance of a specific matrix in Florida or any other state are no guarantee that similar results would be experienced in Texas. The Commission believes that it is necessary to strengthen the in-state lotto jackpot game, as there is potential legislation that would authorize the commission to introduce a multi-state game such as Powerball or Mega Millions. While the Commission is uncertain as to whether clear statutory authority to operate or participate in a multi-state game will be enacted, it believes the in-state lotto game should be as strong and viable as possible to minimize cannibalization if a multi-state game is authorized. The Commission disagrees that the discussions and media regarding the matrix have been focused on higher jackpots and the approximate 25% increase in the number of winning tickets. The Commission feels there are other positive features of the proposal. The overall odds of winning the proposed game are 1 in 57 as compared to 1 in 71 for the current game. The familiarity with bonus ball style games is also a positive feature. The Commission disagrees with the commenter's criticism of reliance on the same people who previously noted similar jackpot projections. The Commission relies on numerous sources of information and has worked with the contracted vendor responsible for sales and jackpot projections for the proposed matrix. In addition, the Commission's independent statistical consultant has reviewed and calculated the odds needed at the jackpot tier to create longer roll cycles and generate higher level jackpots. The Commission disagrees with the comment regarding the negative aspect of the reduction in the average prize awards. Research shows that players play the Lotto Texas game to win large, multi-million jackpot prizes. That is what players want from the Lotto Texas game and that is how the game is positioned in the product mix. The proposed matrix was tested against the current matrix and the proposed matrix was the favorite choice among research participants. The main goal in the design of the proposed matrix was to generate higher jackpots that would create excitement and revitalize the game. The Commission agrees that the proposed game should provide larger jackpots and add 25% more winning tickets. The Commission does not agree with the commenter's suggested game alternative. The Commission does not believe that multiple priced tickets within one game are a positive feature as a previous on-line game with a $2 price point was not well received in the marketplace. The Commission feels the game alternative is confusing and would be difficult for retailers and players to comprehend. Research shows that players are not interested in playing for 25%, or 50% of a jackpot prize as suggested by the commenter. The Commission is confused as to how the prize pool is funded for the game alternative and also about why the commenter would put forth a suggested game that has odds of 1 in 95.6 million when the commenter previously criticized the commission for considering a game with odds of 1 in 47.7 million. The Commission does not understand how the commenter shows increasing revenue to the state, retailers, Lottery and GTECH each year, over a five year period, even as projected sales for each of those years decreases.

One commenter indicated that twice previously, the Commission put forth two proposals to increase the odds of Lotto Texas. The first was a "bonus ball" style matrix of approximately 25 million to 1 and it was rejected after minimal pubic comment. The second proposal was put forth five months later and was adopted, the current 6 of 54 matrix. The commenter indicated that the Commission is promoting this matrix to decrease the number of jackpot winners and thus increase jackpot peaks, encouraging more money to be spent on the game. The commenter believes this is a false business model because it unfairly encourages consumers to spend more money for less return (or chance of return) and it is indisputable that "more ways to win" was one of the design criteria for this new game. The commenter indicated that because two of the new prize tiers are guaranteed $5 each, and one is guaranteed $3, the net effect is to create more unclaimed prize money, both from excessive percentage of prizes $5 and below, and from the increased complexity of player ticket validation. The commenter also believes that the matrix is obviously designed to allow positive statements to be made even though they contradict the value chart presented in the commenter's comments. The commenter wants the Commission to review the following facts: the odds to win any prize do reduce from 1 in 71 to 1 in 57, however the dollar value toward winning the jackpot (exclusive of rollover) as well as the aggregate value of the lower prizes decreases in relation to both the 6/50 and 6/54 matrix; the prize level does not increase from 4 to 8, rather there are 2 guaranteed $5 levels-for a total of 7 levels; and, representing 25% more overall winners, while the dollar return to the consumer (exclusive of rollover) has decreased as shown on the comments submitted by the commenter. The commenter believes the Commission is making misleading statements about the proposed game to influence future ticket purchase. The commenter believes this appears to be a violation of §466.110, Prohibited Advertisements. The commenter believes the Commission is relying on a false business model and when players see fewer jackpots being won and when neither they nor others they know have positive winning experiences, sales will decrease. The commenter believes the matrix is doomed prior to implementation and bases his conclusion on performance of the 6/50 matrix that lasted 8 years. The commenter suggests that the Commission has a fiduciary responsibility to insure the lack of negative consequences of their actions-especially since a monopoly is being operated based on the police powers of the state, which should the public welfare foremost. The commenter also offered comments on Powerball. The commenter indicated that the very high odds Lotto game and Powerball has the "bonus ball" element now being proposed is no match in our region for Lotto Texas. The commenter also urges

that everyone wishing to have an informed opinion and especially those in decision-making positions do their own research. The commenter further indicated there are a lot of figures being touted that may be well intended and assumed to be true, that on close inspection would make Enron proud. The commenter indicated that the figures used came from GTECH and it has its own agenda and are not an impartial source. The commenter also indicated that the Commission did a study in 1998 and determined that, at most, entry into a multi-state game would increase sales by 1% and that this more than offset by loss of local control. The commenter wants the Commission and the legislature to make the Commission a consumer responsive organization. The commenter believes that regarding the Commission and all other forms of gambling, the Commission should pass two tests: test of negative impact on society and test of valid business model. Agency response: The Commission agrees with the commenter regarding previous rule proposals. The Commission agrees that this game proposal is generated to increase jackpots and therefore, increase sales and revenue to the State of Texas. The Commission disagrees that the proposed game is a "false business model." The Commission believes it is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission believes that there are more ways to win in the proposed game. The Commission believes all of the following to be true regarding the current and the proposed game: the current game has four prize levels; the proposed game has eight prize levels. The proposed game has improved overall odds of winning any prize of 1 in 57; the current game has overall odds of winning any prize of 1 in 71; the proposed game will generate an approximate increase of 25% in the number of overall winners; there are three guaranteed prize levels in the proposed game; the prize pool for the proposed game is 52% of sales; the prize pool for the current game is 55% of sales. The Commission disagrees that the net effect is to create more unclaimed prize money. The Commission does not create unclaimed prize money. Players not cashing in winning tickets during the 180-day validation period creates unclaimed prizes. The Commission does not believe there will be "increased complexity of player ticket validation." The Commission already operates a bonus ball style game, Texas Two Step. Lottery players in Texas are familiar with this play style. Lottery players are also familiar with bonus ball play style games due to the awareness of multi state games like Powerball and Mega Millions. The Commission disagrees that sales will decrease in regards to the proposed rule. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. The Commission disagrees that proposed game is "doomed prior to implementation." Mini-lab/focus group research was conducted with Lotto Texas players in Houston and Dallas and the proposed 5/44 +1/44 bonus ball matrix was tested against the current matrix. The research shows increased spending on the proposed matrix compared to the existing matrix. With "likelihood to play" it was reported that this game was the more positive choice when choosing a change from the current Lotto Texas matrix. The Powerball game is not the focus of this rule making. Additionally, the Commission disagrees with comments regarding the assertion that the Commission is making misleading statements about the proposed game. The Commission has indicated that the changes are intended to generate revenue for the State. The purpose of the Commission is to operate the state lottery to generate revenue for Texas. The Commission's focus is on performance of the state lottery and ways the lottery games can be enhanced or created to for successful performance of the state lottery. The Commission believes the changes to the Lotto Texas game will result in a positive consequence-increased revenue to the State. The Commission believes the Lotto Texas game is intended for players who want big jackpots. The changes to the game are intended to create opportunities for big jackpots.

One commenter appeared at the March 7, 2003 hearing and also submitted written comment. The commenter indicated that his family won't play as much even when the pots get bigger because of the changes. The commenter indicated that he might get a quick pick or two when the pots get over $20 to $30 million range, a little bit different than getting $5 of the quick picks every time it's over $10 million. The commenter indicated his family believes in the philosophy that you can't win if you don't play but the Commission is trying to take that option away from the serious players. The commenter believes that he might as well sit outside in the yard during thunderstorms playing with tin poles to see what numbers come to mind. The commenter represents a family of four players and also a group from work of about 10 or so. The commenter suggests that asking for consumer support to contact the appropriate representatives to push the issue to add the Powerball game. The commenter suggests as another option to just cut Lotto Texas back to one drawing a week, allowing more people to go and spend just the $5 during the week. The commenter indicated that his family was spending approximately $300 a month to play all the Texas Lottery games and when the jackpots went up, they would buy additional tickets outside of their regular allotted format. The commenter indicated with the winning percentage being so low, they cut back due to lack of return profits. The commenter suggests finding ways to televise the drawings and more people would be willing to part with their money. The commenter is also in a group from work and they play faithfully when the pots are over $10 million or above the limits they set. Other people join in at $20 and $30 million levels. The commenter indicated that they can't afford to put in $10 each on a weekly basis to maybe win back $5. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games and to decide on the amount of money he/she feels comfortable wagering. The Commission agrees that "you can't win if you don't play." The Commission disagrees that it is trying to take "that option away from the serious player." The Commission believes that the Lotto Texas game should be changed at this time due to the lack of higher jackpots and decreasing sales that have been experienced with the current game. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. The Commission disagrees that a drawing once a week would be a benefit. This would be confusing for players and retailers and would not create the customer/player traffic that retailers are accustomed to with the current twice-per-week drawing schedule. This would also slow down the growth or building of jackpots. As Lotto Texas jackpots grow, so do Lotto Texas sales. Slowing this process down would not be beneficial for sales. The Commission's drawings are televised via satellite and available for all Texas TV stations to broadcast. It is up to each TV station to decide if they want to air the Commission's drawings. The Commission agrees that "other people join in at $20 and $30 million levels." The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently.

One commenter appeared and offered comment at the March 7, 2003 hearing, submitted written comment on March 14, 2003 by mail, and sent via facsimile additional comment on March 16, 2003. When the commenter submitted her comment on March 14, 2003 and March 16, 2003, she also included comment she had received from other persons. The comment from other persons is characterized by the commenter as responses to feed back forms the commenter placed on her web site for completion by other people. The commenter indicated that she placed a feedback form on her web site because she believes the Commission has done only the minimum as required by law to receive comment. The commenter indicated that if the Commission truly wanted comments, the Commission would have used other methods to receive comment such as its web site, its *Winning* publication, *PlayerConnect* email, and its retailers to generate comment. The commenter believes this was not done because the Commission knows this is not what the people want. She further indicated that she did this because she feels strongly that the people of Texas have a right to know what's going on and it was obvious to her, the Commission intended to keep this rule change the best kept secret in Texas. In connection with the comment the commenter collected from other people, the commenter also indicated that she had placed petitions in lottery retailer locations and a GTECH representative threw them in the trash at one retailer location. The commenter indicated she didn't need those petitions anyway because she had over 3,000 comments or letters written that she intended to give the Commission from the people but not at the time she testified at the March 7, 2003 hearing. The commenter indicated that she did not appear at the hearing because it would do any good but to go through the process. The commenter was critical of how comment in connection with past rulemakings was summarized. The commenter also indicated she had no faith in the Commission since the Commission proposed the rule and believes the Commission's interest only lies with the State and the income that could be derived as a result of such a game being played and offered in Texas. The commenter indicated she has a little faith in Texas legislators because they're voted into office and when they hear from people in their areas, they'll listen. The commenter also indicated she has a little bit of faith in the retailers, they care about their customers and their competition is fierce. The commenter referenced intent in connection with the various lottery on-line games. The commenter indicated that there's not a person in Texas who goes to the store to buy a lotto ticket that doesn't intend to win the jackpot. The commenter suggested that nobody goes to buy a lotto ticket with the intention of winning 3 of 6 numbers, 4 or 5 of 6 numbers. The commenter indicated the players' share of sales is wasted on meaningless prizes. The commenter believes the Commission wants to offer such prizes ($3 and $5) is to enable the Commission to advertise how many "winners", thus, the Commission is enticing sales to the poor and gullible. The commenter suggested that the Commission should be forced to clarify what the players "won" in their advertising strategies to increase sales. The commenter indicated that another reason the $3 and $5 prizes are being offered is so the Commission can promote this rule change as being "good". The commenter indicated that the Commission has stated, "an increase of 25% more 'overall' winners" yet-the truth is, the allocated funds that "more winners" will divide has been reduced. The commenter believes this is misleading and that no one should get $3 for matching 2 numbers-a total waste and self-serving. The commenter believes that if they don't hit the big one, then it's nice to have the small one; but, that's not their intention when they buy the ticket. They buy these tickets in good faith, in honor and belief in the integrity of the Texas Lottery. The commenter believes that when the Texas Lottery started out, they had good intentions, paid fairly, paid right, didn't hurt anybody. The commenter indicated that the Commission started changing the games in 1999 because sales went down a bit and leveled off. The commenter believes that's when the Commission started going downhill. The commenter believes that the sole intent of this rule is to make it impossible or very difficult for anybody to win the jackpot. The commenter indicated that the Commission decided the only way it can make more money is to give the consumer a game the consumer cannot win until $40 to $50 to $60 million dollars in sales in a three-day period are reached. The commenter believes this is very wrong. The commenter indicated the Commission will make more money if the Commission adopts the rule. The commenter indicated that sales will initially drop down to about $2 million. The commenter further indicated that when the jackpot reaches the $30, $40, $50, $80 million level, the Commission will make enough to offset that where it averages out where you'll make more money. The commenter believes the Commission's intent to give the people an unfair game with a population of 21 million and odds of 47.7 million to 1 is terrible, wrong. The commenter believes that by offering such a game, the Commission is not only taking advantage of the consumers but retailers as well. The commenter indicated the Commission is taking advantage of the retailers with this rule change as well. The commenter indicated that if this rule change is implemented, there will be fewer winners and for retailers, this means fewer retailers will receive bonuses. The commenter believes retailers will make less money until the jackpot rises but the additional revenues will then be used to cover overtime, added staff and security. The commenter believes the sales increase might offset their losses for stolen inventory, property damage that could result from an over abundance of customers and lawsuits derived from employees who might be killed or injured by criminals as the stores will become a prime target for burglaries due to the suspected value of cash on hand. The commenter indicated that a retailer will not receive more than $500,000 for selling a winning ticket-yet the jackpots can and will be $60 million to $100+ million-just another way for the Commission and GTECH to come out ahead at the expense of the hard work provided by those that serve the Commission. The commenter believes that, worse yet, the Commission will be asking 17,000 retailers to sell (scam) the majority of its customers a useless piece of paper. The commenter believes there are only two organizations that will come out ahead with this plan, the State and GTECH. The commenter indicated that because she's so opposed to this aspect of the game, the other points in question are minute to her. The commenter indicated she opposes the proposed change for Lotto Texas for a number of reasons. The commenter is opposed to the requirement that players choose their option for payment in the event the jackpot is won at the time of purchase of the ticket. The commenter believes the only reason the Commission doesn't want to offer the option at another time is because the Commission is going to take advantage of somebody who accidentally marks his ticket with an annual pay and can't change his mind, so the Commission gets to purchase the annuities. The commenter believes the players aren't always receiving everything that's been invested on their behalf. The commenter also believes the rule as written doesn't guarantee the players their percentage of sales. The commenter indicated that the proposed rule allows the State to keep more than the State's share of sales. The commenter indicated that the Commission is withholding a percentage of sales in reserve just in case it's needed to pay the guaranteed prizes while the Commission advertises the game to

be pari-mutuel. The commenter indicated that the proposed rule does not protect the people, nor does the current rule. The commenter indicated that both rules allow the Commission to retain a portion of the players' share of sales via the reserve fund and the guaranteed prizes. The commenter indicated that the only way players would ever be guaranteed to receive their share of sales is if all prizes were "pari-mutuel" which they are not-yet the game is promoted as such. The commenter believes this is false advertising. The commenter believes that the Commission overpaid people. The commenter is opposed to not guaranteeing the players their share of money. The commenter doesn't want the rule to allow rounding down of prizes. The commenter indicated that she had done everything in her power to stop the people from talking about the other on-line lottery games and to address only the proposed Lotto Texas rule. The commenter indicated that other commenters give ides or suggestions and some of the suggestions are not possible. The commenter indicated that the Commission doesn't want comment and does anything in its power to keep from getting comment. The commenter criticized the Commission's web site because the proposed rule isn't visible on the web site and people have to click to Legal to locate the rule. The commenter further indicated the Commission's intent is to make money at any cost, by any means, no matter if it is robbing the people and giving the people an unfair game. The commenter wants to know why they can't have an honest lottery-and one with integrity-integrity being defined as offering the people a "fair" game of chance that might enhance a citizen's lifestyle if won and the proceeds should be split 50/50. Agency response: The Commission agrees that when people play Lotto Texas, they are playing to win the jackpot. The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these desires. The Commission believes all of the following to be true regarding the current and the proposed game: the current game has four prize levels; the proposed game has eight prize levels; the proposed game has improved overall odds of winning any prize of 1 in 57; the current game has overall odds of winning any prize of 1 in 71; the proposed game will generate an approximate increase of 25% in the number of overall winners; there are three guaranteed prize levels in the proposed game; the prize pool for the proposed game is 52% of sales; the prize pool for the current game is 55% of sales. The 5/44 + 1/44 player benefits are: higher jackpots, increased number of prize levels, overall odds of winning any prize are 1 in 57, approximate increase of 25% in the number of overall winners and familiar bonus ball play style. The Commission disagrees that it is trying to "make it impossible or very difficult for anybody to win the jackpot." The Commission believes that the Lotto Texas game should be changed at this time due to the lack of higher jackpots and decreasing sales that have been experienced with the current game. The Commission agrees the proposed game will increase Lotto Texas sales and therefore, increase revenue to the State of Texas. The Commission does not agree that the proposed is an "unfair game." Mini-lab/focus group research was conducted with Lotto Texas players in Houston and Dallas and the proposed 5/44 + 1/44 bonus ball matrix was tested against the current matrix. With "likelihood to play" it was reported that the proposed game was the more positive choice when choosing a change from the current Lotto Texas matrix. The Commission disagrees with the comments regarding retailers. The Commission disagrees that it is asking retailers to "scam" customers. The Commission is proposing a change to the Lotto Texas game that will increase Lotto Texas sales. The more Lotto Texas tickets retailer sell, the more commission they earn. The Commission disagrees with the comment that the "rule as written doesn't guarantee the players their percentage of sales." 52% of draw sales are allocated to the prize pool for each Lotto Texas drawing. Of that 52%, 1.93% is allocated to a prize reserve fund. That prize reserve fund may be increased or decreased by paying Lotto Texas prizes. The Lotto Texas prize reserve fund is used only for the Lotto Texas game. A reserve fund is a common practice on jackpot style lotto games in some states. Other states have the ability to utilize unclaimed prizes to achieve the same objective. Unclaimed prizes are not available to the Commission for this purpose. The Commission disagrees with the commenter regarding the pari-mutuel prizes. A pari-mutuel prize is a prize category or prize level that is divided equally among multiple winners. The proposed game has five pari-mutuel prize levels and three guaranteed prize levels. The Commission conducted an investigation regarding the commenter's allegation that the Commission "overpaid" people. The report was made public and a copy was provided to the commenter. The report indicated that winners were paid in accordance with the rule and applicable procedures. The Commission rounds down prizes so prizes can be paid in multiples of whole dollars. This has been the Commission's standard practice for over ten years. The Commission does not pay prizes in dollars and cents. The Commission disagrees that players do not receive "their share of the money." The prize pool was discussed above. The Commission agrees that "commenter's give ideas or suggestions and some of the suggestions are not possible." Many of the commenter's comments are redundant to other comment submitted and summarized in this rule. The agency responses provided to that comment is incorporated here as if fully set out. With regard to the process use to promulgate this rule, the Commission, as a state agency, must comply with the rulemaking procedural requirements of the Administrative Procedures Act. The Commission, in promulgating this rule, did so. The proposed rule was authorized by the Commission for publication at its noticed January 31, 2003 Commission meeting. The proposal was published in the February 14, 2003 issue of the Texas Register. The Commission afforded interested persons a reasonable opportunity to comment. Comment was received, has been considered, summarized in this document, and agency responses to the comment have been provided.

As previously indicated, comment was also submitted in the form of responses to a feedback form, such form generated by another commenter and submitted by this commenter. The generic form appears to allow a person to indicate whether the person is opposed to of the proposed rule to increase the odds to 47.7 million-to-one and the play style (5/44 & 1/44-88 balls total) because the person plays to win the jackpot or in favor of the proposed rule because the person would like to see fewer jackpots so the pots can climb; to indicate whether the style of play is discriminatory towards the consumer-it increases the complexity of play and only serves to increase the unclaimed prize fund; and whether the person represents a group or an organization. With regard to forms that indicated the person identified on each of the forms represents a group or association, in most of the completed forms, the form does not indicate the name of the group or association. The majority of the forms submitted indicated that the person completing the form is opposed to the proposed rule to increase the odds to 47.7 million-to-one and the play style (5/44 & 1/44-88 balls total) because it makes winning the top prize harder to win and the person plays to win the

jackpot and that the person believes this style of play is discriminatory towards the consumer-it increases the complexity of play and only serves to increase the unclaimed prize fund. Another group of feedback forms completed by persons appear to have additional optional responses. These subjects and respective comments are: "Offering a powerball type game & increasing the odds of winning the top prize: I'm OPPOSED to the odds, play style and 88 balls proposed because it makes winning the top prize harder to win. I play to WIN the jackpot."; "Selecting payment options at time of draw: I oppose this because it's a decision that should be made after players have had an opportunity to see what's best for them as individuals."; "Allocating a set percentage of sales to pay guaranteed prizes: I oppose having a set percentage of sales allocated for guaranteed prizes. This could result in short changing the players and/or the state. A risk I oppose."; "About the prize structure: I oppose the prize structure too. The prizes offered are meager sums and an insult to lottery players."; and, "Rounding down prize amounts: I oppose 'rounding down' prize amounts. Each drawing is an independent event and prizes should include the cents we won for the draw." Many commenters submitted comment in this format by selecting one or more of these optional responses. While some of the commenters indicated opposition by clicking on the prepared responses created, in other categories these commenters indicated, in connection with the subject "About the prize structure", the response "I like the prizes offered." Some other commenters indicated, in connection with the subject "Selecting payment options at time of draw", the response "I'm FOR having to make this decision before I win". The Commission disagrees with the comments indicating opposition to rule changes in the form of the standardized statements included in the feed back form based on the reasons stated for the opposition for the reasons the Commission has provided as its agency response in this document. The form also allows a person to submit additional comment. In connection with this additional comment, agency response will follow after the specific comment. This additional comment consisted of commenters indicating: Comment: wanting to keep the Lotto Texas game the same; Agency response: The Commission disagrees. The Commission believes that the Lotto Texas game should be changed at this time due to the lack of higher jackpots and decreasing sales that have been experienced with the current game. Comment: not wanting a huge jackpot but winners of smaller jackpots more often; Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: not playing anymore or reducing the level or amount of money spent on the game or all games; Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. Comment: inquiring as to what numbers will be for a future drawing, making the 2nd ball 1 to 25; Agency response: The Commission's on-line game drawings are certified to be random by an independent statistician who analyzes all of the date from all of the drawings. No person knows what the numbers will be for a future drawing. Comment: the prizes are just right for Texas Two Step but the lottery needs to pay more for three numbers and this would increase the tickets sold; Agency response: The Commission disagrees. This rule making is focusing on the Lotto Texas game. Comment: there should be more chances to win with lower prizes; Agency response: The Commission agrees. The proposed game increases the number of prize levels from four prize levels to eight prize levels. The proposed game also has improved overall odds of winning of 1 in 57. Comment: make it easier to win the jackpot; Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: unclaimed prizes should go back into the jackpot; Agency response: The Commission does not have the authority to decide how unclaimed prize money should be used. State law requires that unclaimed prize be deposited to the credit of the Texas Department of Health state-owned multi-categorical teaching hospital account or the tertiary care facility account. Comment: it's already too hard to win the jackpot; Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: the Commission is already too greedy and this will only make it more so; Agency response: The Commission believes its role is to generate revenue for the State. With regard to this responsibility, the Commission must review game performance and make decisions regarding such performance. To that end, the Commission reviewed the performance of the Lotto Texas game and determined the game was not performing at the levels the Commission expected. The Commission conducted player research to determine the best approach to enhance the game in order to generate revenue. The Commission proposed the new rule for public comment, has received comment, and has considered the comment received. The Commission believes the process has been fair. The Commission also believes the new features of the Lotto Texas game do afford meaningful opportunities to players to win prizes, including the jackpot prize. Comment: inquiring why the Commission just doesn't join Powerball and get rid of Lotto Texas because the lottery was sold as a way to keep property taxes from increasing while funding schools and this hasn't happened; Agency response: The Commission disagrees with the comment. The purpose of the Commission is to operate the state lottery to generate revenue for Texas. Therefore, the Commission's focus is on performance of the state lottery and the games currently authorized by the State Lottery Act. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. Comment: the Texas Senate has certain officials that are against the lottery because of their religion and are purposely trying to ruin the Lotto program; Agency response: The Commission disagrees with the comment. The Commission makes its decisions based on game performance and its responsibility to generate revenue for the State. Comment: wanting Lotto Texas to go back to one drawing on Saturdays; Agency response: The Commission disagrees. This would be confusing for players and retailers and would not create the customer/player traffic that retailers are accustomed to with the current twice-per-week drawing schedule. This would also slow the growth or building of jackpots. As Lotto Texas jackpots grow, so do Lotto Texas sales. Slowing this process down would not be beneficial for sales. Comment: just another way that Lotto Texas holds onto more of the money and sales have dropped because of less play since the changes were made to the game; Agency response: The Commission is confused by the comment that "Lotto Texas holds onto more of the money." The Commission agrees that sales have dropped and that is the reason the Commission believes that the Lotto Texas game should be changed at this time. The Commission believes the proposed matrix will generate higher jackpots and therefore increase Lotto Texas sales and corresponding revenue to the State.

Additional comment in this feedback format with agency response to comment is the following: Comment: it is unfair to punish regular players in an attempt to attract those who play only if the Lotto is a big number, the solution lies in providing more publicity and more media attention to those that do win; Agency response: The Commission disagrees. The Commission cannot force jackpot winners to participate in publicity or speak to the media. The Commission does not feel it is punishing any players. The Commission believes there are player benefits in the proposed game. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: go back to 50 numbers; more people will play the games of Texas if the amounts and frequency of play are increased; Agency response: The Commission disagrees. The original matrix (6/50) had been in place for approximately eight years and was no longer generating the jackpots, sales or revenue expected. Comment: maybe the game is boring-questions whether there are different types of high end games; Agency response: The Commission agrees that lack of higher jackpots may have some players bored. The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently. Comment: haven't played the Lotto recently but once in a while when the jackpot is high, will play; better to guarantee having a $4 million prize and a winner each week; Agency response: The Commission agrees that not only the commenter but many other players will only play when the jackpot is high. The Commission disagrees about guaranteeing a $4 million prize winner each week. The Commission cannot guarantee a winner. The Commission's on-line game drawings are random. Lotto Texas would not be a rolling jackpot game if it had a winner every week or every draw. Lotto Texas is a jackpot driven game. Sales increase as the jackpot increases. Preventing the jackpot from rolling or increasing would be detrimental to sales and to the main intent of the game. Comment: need more winners even if it means lowering the top prize money; Agency response: The Commission disagrees. The proposed game is expected to generate higher jackpots and at the same time there will be an approximate increase of 25% in the number of overall winners. The Commission feels this proposed game will achieve both objectives. Comment: the Commission is corrupt, when any organization gets too top heavy in management, loss of profit is always the issue; Agency response: The Commission disagrees with the comment. The issue is not loss of profits; instead, the issue is operating a state lottery to generate revenue for the State. Comment: increase the amount to $10 million from $4 million, increase the numbers to 60, and more people will want to play; Agency response: The Commission disagrees. Sales would not support a starting jackpot of $10 million and would create too much risk for the Commission. The mini-lab/focus group research did test a one field, 6/59 matrix. Players were asked to rate each matrix on various attributes as well as report potential spending on each matrix. All attributes and spending were asked of and compared to the current Lotto Texas matrix. Of the matrices tested the most beneficial matrix change is the 5/44 + 1/44, two-field matrix. With "likelihood to play" it was reported that this game was the more positive choice when choosing a change from the current Lotto Texas matrix. Comment: reducing the jackpot amount will reduce the amount of players; Agency response: The Commission agrees. The Commission intends for the starting Lotto Texas jackpot amount to remain at $4 million for the proposed game. Comment: make new games that pay moderate sums; word of mouth and people actually winning stimulates participation; Agency response: The Commission agrees that "word of mouth and people actually winning stimulates participation." The proposed game has improved overall odds of winning of 1 in 57. The proposed game will also have an approximate increase of 25% in the number of overall winners. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires.

Comment: the lower prize awards should be raised; Agency response: The Commission disagrees. Increasing the prize amounts for the lower prize tiers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: just like to match 5 once, never mind 6; Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. Comment: have another lotto with the odds higher for that huge win and call it "As Big As Texas", $2 to buy in, one or two drawings a month, higher odds; Agency response: The Commission disagrees. The Commission does not believe two in-state lotto style games would be successful. The Commission does not believe that "$2 to buy in" would be successful as a previous on-line game with a $2 price point was not well received in the marketplace. A drawing once a month would be confusing for players and retailers and would not create the customer/player traffic retailers are accustomed to with a more frequent drawing schedule. The Commission does agree that higher odds to win the jackpot prize are appropriate. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: lottery is rigged, show the lottery on TV and have someone other a lottery person each and every draw oversee the drawing; Agency response: The Commission disagrees with the comment. The Commission's independent drawings auditor attends every drawing and the auditor's function is to ensure the integrity of the drawings. Additionally, the Commission's independent statistician reviews the results of each drawing and pretest drawings to ensure the randomness of the drawings. Comment: even with the odds now there's no chance that out of 100 tickets the commenter would get no numbers; Agency response: It is up to the individual player or groups of players to decide if they want to participate in any of the Commission's games and to establish their own comfort level with the odds of winning. Comment: consider legalizing casino gambling if not making enough money from the lottery; Agency response: The Commission disagrees with the comment. The purpose of the Commission is to operate the state lottery to generate revenue for Texas. Therefore, the Commission's focus is on performance of the state lottery. The Commission has no jurisdiction as to decisions regarding the legalization of casino gambling. Comment: number of games seems to be out of hand, should only enhance the ones now available; Agency response: The Commission disagrees. The proposed game is an enhancement of the current Lotto Texas game. Sales trends do not indicate that the Commission is currently offering too many games. Comment: lotto was making more money when the odds were less with 50 numbers; Agency response: The Commission disagrees. The original matrix (6/50) had been in place for eight years and was no longer generating the jackpots,

sales or revenue expected. Comment: look at the operator and check his cost, maybe that's what needs to be changed; Agency response: The Commission disagrees with the comment. The issue presented by the proposed game change is revenue to the State and performance of the Lotto Texas game. Comment: increase the 2nd and 3rd prizes, especially the prize for 5 correct, so more people will want to play; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: start the jackpot at $8 million; Agency response: The Commission disagrees. Sales would not support a starting jackpot of $8 million and would create too much risk for the commission. Comment: the 4 and 5 number winners should get more percentage than they are getting now, this would help more people; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: take the unclaimed prize money plus "raking" an amount from each biweekly drawing when there were no winners and use that money to add to the minimum jackpot amounts, more people would play from the beginning and the players, as well as the state would benefit; Agency response: The Commission does not have the authority to decide how unclaimed prize money should be used. State law requires that unclaimed prize be deposited to the credit of the Texas Department of Health state-owned multi-categorical teaching hospital account or the tertiary care facility account. Comment: it's already too hard to win the jackpot; should be the same amount of winners but the top winner should not get as much, for example, in a $15 million pot-6 numbers should get $13 million, 5 numbers should get $50,000 each or more, 4 numbers should get $1,500 or more, and 3 numbers should get $30 or more; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: reduce the number of balls to 46, making it easier to win, a jackpot of $2 to $3 million and odds of 12 or 13 million to one will get more players believing they can win; Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: increase the 3, 4, and 5 number prizes, and, it would be worth the increase in the odds, right now the 5 number payoff is an insult; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: the state is presently receiving 66% of the prize money consumers put into the lottery, the new style of play will increase the amount the state recovers; Agency response: The Commission is responsible for operating a state lottery to generate revenue for the State. Currently, the State receives approximately 30% of lottery sales. Comment: from a retailer standpoint, promised money for 6/54, none of the retailers have seen an increase in lottery sales but have seen angry customers who no longer buy from retailers because they have no reason to shop at a convenience store; Agency response: The Commission disagrees. The first full year of the 6/54 matrix did realize an increase in Lotto Texas sales. The Commission believes its role is to generate revenue for the State. With regard to this responsibility, the Commission must review game performance and make decisions regarding such performance. The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently. Comment: will vote against any and all politicians who have a hand in this change during the next election; Agency response: The purpose of the Commission is to operate the state lottery to generate revenue for the State. The Commission is the entity that determines the game product and mix, subject to the statutory authority established through its enabling law, that best generates such revenue. Comment: questions whether the Commission has lost sight of its purpose; Agency response: The Commission believes its role is to generate revenue for the State. With regard to this responsibility, the Commission must review game performance and make decisions regarding such performance. To that end, the Commission reviewed the performance of the Lotto Texas game and determined the game was not performing at the levels the Commission expected. The Commission conducted player research to determine the best approach to enhance the game in order to generate revenue. The Commission proposed the new rule for public comment, has received comment, and has considered the comment received. The Commission believes the process has been fair. The Commission also believes the new features of the Lotto Texas game do afford meaningful opportunities to players to win prizes, including the jackpot prize. Comment: problem is that state has gotten too dependent upon getting more money from the lottery. Agency response: The Commission believes that the revenue generated by lottery sales is a source of income for the State but recognizes that it is based on discretionary dollars spent by players. Comment: there are less lotto players because the market is saturated with games, the average person can't afford to play all of these games so they pick to one or ones they like best (lotto may not be one of them); Agency response: The Commission disagrees. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission believes that there has been a decrease in Lotto Texas sales due to the lack of higher jackpots. Comment: considers scratch offs and lotto a waste of time and money; Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. Comment: if you want to increase ticket sales, start the jackpot out at a higher value; Agency response: The Commission disagrees. Sales would not support a higher starting jackpot and would create too much risk for the commission. Comment: prefer smaller jackpots, do not play at all when the jackpot grows to great heights; Agency response: It is up to the individual player to determine the amount of money he/she spends and at what jackpot level he/she chooses to enter

the game. Comment: abolish the games and ask the people of Texas to make donations to the State; Agency response: The Commission is responsible for operating a state lottery to generate revenue for the State. The Commission is not the entity that has the authority to abolish the games and ask Texans for donations. The focus of this rulemaking is to make changes to the Lotto Texas game. Comment: choose a different time of day to run it instead of night, maybe noon time; Agency response: The Commission disagrees. The Commission believes night drawings are most appropriate for the Lotto Texas game. The night drawing time allows players more time to purchase tickets, especially on the drawing days, Wednesdays and Saturdays, when ticket sales are typically the highest. The Commission does draw its Pick 3 game every Monday through Saturday at 12:27 p.m. Comment: this proposal simply converts Lotto Texas into a larger version of Texas Two Step, bad idea; Agency response: The Commission disagrees. Lotto Texas is seen as the Commission's premiere on-line game and the Lotto Texas game is synonymous with the Commission itself. The Lotto Texas product and the Texas Two Step product are positioned entirely differently in the product mix. The proposed Lotto Texas rule does offer the same play style as the Texas Two Step game does. Comment: does not play unless the jackpot is larger than $27 million, this change would cause the commenter to not buy until the jackpot is at least $47.7 million; Agency response: It is up to the individual player to determine the amount of money he/she spends and at what jackpot level he/she chooses to enter the game. Comment: increases complexity of the game, instead increase the payout on the "second place" slot to about 2.5 times what it is now; Agency response: The Commission disagrees. The Commission already operates a bonus ball style game, Texas Two Step. Lottery players in Texas are familiar with this play style. Lottery players are also familiar with bonus ball play style games due to the awareness of multi state games like Powerball and Mega Millions. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: let the jackpots scale with the play instead of raising the odds; should have 365 days to claim the prize like every other state; Agency response: State law sets the period of time at 180 days, the Commission does not have the discretion to change the time period. Comment: more likely that the only folks who could get that huge pot when it finally arrives would be some lotto group who purchases thousands of tickets at one time; Agency response: The Commission disagrees. A jackpot prize can be won with the purchase of a $1 wager. Comment: if the game is going to be harder and the prize higher, then the percentage that goes to public schools need to be dramatically increased; Agency response: The Commission, in creating and operating its games, balances the amount paid in prizes with the amount transferred to the Foundation School Fund. Comment: if number of balls are increased, will recommend to people to consider Keno; Agency response: The Commission is focused on enhancements to the Lotto Texas game in connection with this rulemaking. At this point, there is a question as to whether Keno is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. Comment: when it gets to $20 million and over, have more than one drawing for a winner, split the pot so there are more millionaires in Texas; Agency response: The Commission disagrees. Lotto Texas is a jackpot driven game. Sales increase as the jackpot increases. Preventing the jackpot from rolling or increasing would be detrimental to sales and to the main intent of the game. Comment: start the jackpot at $5 million and increase it by $5 million or more anytime there is no winner; Agency response: The Commission disagrees. Sales would not support a starting jackpot of $5 million and would create too much risk for the commission. The jackpot increases or rolls based on draw sales not on a pre-determined roll amount. Comment: state's lottery revenue went to 8-liners, if you can't get rid of the 8-liners, have to open gaming rooms or pay lottery players better; Agency response: The Commission is focused on enhancements to the Lotto Texas game in connection with this rulemaking. Under current Texas law, gambling devices that pay out cash are illegal. Comment: start at $6 million and increase respectively each week until a winner is picked; Agency response: The Commission disagrees. Sales would not support a starting jackpot of $6 million and would create too much risk for the commission. The Commission does increase or roll the jackpot based on draw sales until a jackpot ticket is sold. Comment: give 20 $1 million prizes instead of one $20 million prize; Agency response: The Commission disagrees. Lotto Texas is a jackpot driven game. Sales increase as the jackpot increases. Preventing the jackpot from rolling or increasing would be detrimental to sales and to the main intent of the game. Comment: should be a ceiling on the amount of "reserve" money that is held back, should be a drawing to give back to the consumer the "reserve" money that was held back the previous fiscal year; Agency response: The Commission disagrees. Out of the 52% prize pool, the proposed rule allocates 1.93% to the prize reserve fund. The reserve fund may be increased or decreased by paying Lotto Texas prizes. The Lotto Texas prize reserve fund may be used only for the Lotto Texas game. A drawing would deplete the reserve. That is not the intent of the reserve fund. Comment: opposed to the practice drawings, it decreases chances by 6 times; Agency response: The Commission disagrees. The Commission's on-line game drawings are certified to be random. Practice drawings or pre-tests do not alter the randomness of the live drawing. Practice drawings are a means to detect whether machines and/or balls are not functioning randomly. Comment: if lotto goes over $10 million, maybe about 5 players could win $500,000; Agency response: The Commission disagrees. Lotto Texas is a jackpot driven game. Sales increase as the jackpot increases. Preventing the jackpot from rolling or increasing would be detrimental to sales and to the main intent of the game. Comment: do a pick four instead; Agency response: The Commission is always evaluating game performance. The Commission believes game enhancements should be implemented to keep the on-line product mix fresh and exciting. Comment: lotto is always won on the coast or in the larger cities or suburbs, what about the smaller towns; Agency response: The Commission disagrees. The Commission's drawings are certified to be random. The Commission cannot place winners in any geographic area. The number of winners that come from a particular geographic region depends on the number of players in that region which, in turn, is related to the area's population size. The more players that live in an area, the more likely it will be that winners will occur in that area. Comment: payoff for getting 3 of 6 should pay $10 or 3 of 6 pays 5% of the pot, 4 of 6 pays 8% of the pot, 5 of 6 pays 12% of the pot, 6 of 6 pays 75% of the pot, size of the pot is less whatever the operating costs are of the game, all unclaimed money goes to public purposes; Agency response: The Commission

disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: a static $5 million jackpot should remain eligible for winning each time there is a drawing until there is a winner; Agency response: The Commission disagrees. Lotto Texas is a jackpot driven game. Sales increase as the jackpot increases. Preventing the jackpot from rolling or increasing would be detrimental to sales and to the main intent of the game. Comment: Colorado only has 45 numbers; Agency response: The Commission is focused on its game and their performance in the Texas marketplace. While the Commission does review game approach and performance in other states, it must make decisions based on the make up of Texas. Comment: won't play until the jackpot exceeds $50 million; Agency response: It is up to the individual player to determine the amount of money the/she spends and at what jackpot level he/she chooses to enter the game. Comment: substantially lower the top prize and substantially increase the lower prizes; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: eliminate the lower prizes and make the 5/6 $50,000 or $100,000; Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: make the 6 number pay off $1 million, 5 number $500,000, 4 number $5,000, and 3 number $50; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: would play if the extra money was earmarked for schools, doesn't seem to be any accountability for the money lotto is generating now; Agency response: Current law requires proceeds from lottery sales to be transferred to the Foundation School Fund. The State Lottery Act requires an independent financial audit of all accounts and transactions of the lottery. Comment: increase the prize pool on the other games, state would benefit in increased revenue by attracting more players to games with more prizes, state revenue would be increased by quantity; Agency response: The Commission is always evaluating its product mix and how its games can be enhanced. The Commission believes its role is to generate revenue for the State. With regard to this responsibility, the Commission must review game performance and make decisions regarding such performance. Comment: make the jackpot what is advertised, nothing less; Agency response: In the game, for the first four Lotto Texas drawings in the roll cycle, the jackpot amount will be the greater of either the advertised jackpot or the jackpot based on sales, determined in part by the applicable interest rate factor. For all subsequent Lotto Texas drawings in the roll cycle, the jackpot amount will be the jackpot based on sales, determined in part by the applicable interest rate factor. Comment: people will go out of state to play games in neighboring state, including casinos and lotteries; Agency response: People should make their own decisions as to how they spend their money. Comment: decrease the numbers and lower the initial jackpot to $1 million, maybe 200 winners a drawing could each get $100,000; Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: all money left over or not claimed should be transferred equally to all school districts to be used for teacher incentives; Agency response: State law dictates how the proceeds of lottery sales is used by the State, the Commission has no discretion regarding how such proceeds are used. Comment: too much money is spent promoting the lottery, put up billboards at the state lines to let others know and save some bucks; Agency response: The Commission believes it advertises and promotes its games appropriately. The focus of this rule making is the Lotto Texas game. Comment: drawings should be completed within one minute of closing the lotto ticket machines, there is no real reason for waiting 12 or 15 minutes to draw numbers after ticket machines shut down; Agency response: The Commission disagrees. Wagering for the night drawings stops at 10:00 p.m. and the on-line game drawing takes place at 10:12 p.m. During this time period, Lottery Security staff verify that all wagering for the games being drawn that night have ceased and they then prepare to conduct the drawings broadcast. Comment: this is a ploy to increase revenue since more people play when the jackpots are larger; Agency response: The Commission believes that the proposed game will create higher jackpots, increase Lotto Texas sales and therefore, revenue to the State of Texas. Comment: all games need to be fair, honest, and winnable, with full disclosure of odds at point of sale; Agency response: The Commission believes all games are fair, honest, and winnable and the odds of winning are disclosed at the point of sale. However, the games are intended and designed to appeal to a different type of player. Additionally, the lottery paper roll stock for each on-line game has the odds on the back of the paper stock. Comment: new game separate from this one with 4 numbers and a power ball or five numbers with a power ball; Agency response: The Commission disagrees. The Commission's Texas Two Step game is a 45/35 +1/35 bonus ball style matrix. The proposed game is a 5/44 + 1/44 bonus ball style matrix. Comment: Texas doesn't need a "powerball" type lotto, will only serve to bolster rarely won, inflated jackpots, causing hype and hysteria, while inviting residents of other states to play, this is not what Lotto Texas was started for; Agency response: The Commission disagrees. The Commission believes its role is to generate revenue for the State. With regard to this responsibility, the Commission must review game performance and make decisions regarding such performance. Comment: double the lotto prize after no one won for the particular drawing; Agency response: The Commission disagrees. The jackpot increases or rolls based on draw sales not on a pre-determined roll amount. Comment: most people want the bigger winnings for getting 4 or 5 matching numbers, only time commenter spends money now is when jackpot is over $25 million, decreased amount of play because of change from 50 to 54 numbers; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the

Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. It is up to the individual player to determine the amount of money he/she spends and at what jackpot level he/she chooses to enter the game. The Commission believes there has been a sales decrease due to the lack of higher jackpots. Comment: increase the 3 ball winners to $10 and the rest accordingly, many people will not play unless the pot is above $20 million; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. The Commission agrees that many players join or participate after the "pot is above $20 million." The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently. Comment: rather play Cash 5 or Texas Two Step and leave the big lotto to the other players; Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. Comment: multiple winner system, begin with one drawing, if no winner, draw two sets of numbers for the next drawing, if no winner, draw three sets of numbers; Agency response: The Commission disagrees. The Commission believes that it is appropriate to draw one set of winning numbers per drawing. Drawing multiple sets of winning numbers would increase the odds of split jackpots and therefore, smaller jackpots for 6 of 6 winners. Additionally, Commission's liability for a drawing with regard to the prizes, including guaranteed prizes, would potentially increase which could create an adverse impact on the prize reserve fund. Comment: people quit playing the lotto because it's hard to win anyway; Agency response: The Commission disagrees. The Commission believes sales have declined due to the lack of higher jackpots. Comment: look at Michigan's game, when people start to see jackpots of $20 million or more, they will play; Agency response: While the Commission reviews other states' games for approach and performance, the Commission must make its decisions based on anticipated performance of a game in Texas. Comment in the form of responses to the feedback form that was in support of the rule changes was also submitted by the commenter who created the feedback form. In contrast to the comment submitted in opposition to the rule changes, this comment was minimal. The feedback form contained the following subject and response: Comment: "Offering a powerball type game & increasing the odds of winning the top prize: I am FOR the proposed rule 16 TAC 401.305. I would like to see fewer jackpots so the pots can climb."; Agency response: The Commission agrees. Many of the persons completing these forms also offered the following comments: Comment: commenter is after the big money and if the new way could produce pay outs like the powerball's $200 million, commenter is all for it as long as it can be won, commenter thinks the Commission is messing up by only going from 4>5>6>8>10, liked the rolls when they went from 4>6>9>12>15; Agency response: The Commission disagrees that it is "messing up" in jackpot rolls. The Commission rolls or increases the jackpot based on draw sales. Comment: would like the jackpot to grow and have fewer winners and since the adding of the 51-54 didn't work, hopes this will work; Agency response: The Commission agrees. Comment: it's bigger pots or prefers adding Powerball, joining other states in this would reduce our surpluses, both would be ideal, a painless way to avoid state income taxes; Agency response: At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. Comment: wants Powerball, Texas Two Step just is not big enough prizes; there are plenty of games offering better odds of winning smaller prizes, rather have a small chance of winning a big prize; Agency response: At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. Texas Two Step is positioned as a rolling jackpot game with a better chance to win a smaller jackpot. Comment: instead of giving multi-million dollars to one person, why not have a game plan to have multiple winners of $1 million each, the numbers that did not have a winning claimant would roll over to the next drawing; Agency response: The Commission disagrees with having multiple winners of $1 million each. The Commission believes that the decrease in Lotto Texas sales is due to the lack of high jackpots and consistent wins at the lower level jackpots. Lower jackpots do not cause the excitement that is necessary for a lottery jackpot game to be successful. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: wants to see a change in selecting the pay off, instead of selecting cash option or 25 payments at time of ticket purchase, select which you want when you claim your prize, Powerball does it this way; Agency response: Amendments to the federal law in 1998 allow some taxpayers, but not all, to rely upon a special rule for cash options in lottery winnings. Because there is uncertainty in the application of the possible IRS tax provision and because of the impact on the players and winners, which may include the impact on the annual installments paid based on fluctuating interest rates between the time the Commission knows a 6 of 6 match occurred for a particular draw and the time the claimant would choose payment method, if the Commission was to implement a change, the Commission has not chosen to change its existing structure that requires the player to choose, at time of purchase, whether the prize will be in the form of a one time payment or annual installments over 25 years. At this time, the choice remains within the discretion of the Commission and at this time, the Commission chooses to continue with its existing practice. Comment: the prizes matching other winnings besides the top prize need to have higher payouts, several states such as Florida pay several thousand more for hitting 5 numbers, if the change occurs, hitting 5 numbers without the lucky ball needs to have a substantial amount, $75,000-$100,000 should be minimal; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: don't mind the grand prize odds being more stringent but wants to see the smaller prizes increase significantly; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots

when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales.

Also, as a part of this feedback form, a person was able to indicate whether them represented a group or organization by clicking the response: "Yes, I am speaking for my family, a group and/or an organization." But, the form did not require the person to disclose or identify the group or association. Therefore, many of the feed back forms indicating that the person providing comment was speaking for his/her family, a group and/or organization do not disclose or identify the group or association. Each of these individuals will be listed in the preamble of this rule as representing an unidentified group or association.

Other comment was in the form of email messages to another commenter who submitted this email comment as part of the commenter's comment. Generally, these email messages indicated opposition to the changes to the Lotto Texas game. Other comment was in the form of petitions completed indicating agreement with the statement on the petition: "I oppose proposed rule, 16 TAC 401.305, because it makes winning the Lotto Texas jackpot (1st prize) harder to win and I play to win the jackpot. I feel the Texas Lottery is taking advantage of the people of Texas by proposing such a game." This comment was also submitted by the same commenter who submitted the feed back forms and the email comment addressed to the commenter. The Commission disagrees with the comments indicating opposition based on the reasons stated in the standardized statements contained in the feed back forms for the reasons the Commission has provided as its agency response in this document.

Groups or associations opposed to the rule are: Individuals that indicated they are speaking for their family, a group and/or an organization: Carolyn Bevills, Delores Metcalf, Lynn L. Dillingham, Henrik Risvang, Eugenio Ramos, Shannon Magnus, Joe Oliver, David Lowenberg, Brain W. Wing, Wendell Hernandez, Michael Hughes, Greg Alban, Jimmy last name unknown, Angela Whitmire, Mary L. Harris, Vickey Derleth, Cynthia Rothermel, L.D. Sherman, John Gray, Anielia Stephens, Steven Longcor, Michael McKinney, Susan Young, Susan Tiffin, Renee Kidd, Tuan Nguyen, Rodney Pendley, Roger Pierre Nealy, Mike Morrison, Shay Khan, Uroosa Khan, Richard Lawson, Tony DeJacimo, Deborah last name unknown, Nancy last name unknown, Tom Buck, Fred Gola, Billy Parker, Dalton Slape, William Harrison, Jeff Reeh, Eugene C. Campbell, Ronnie C. Williams, Josh Neff, Paul Goins, Art Wharton, Chuck Tark, Porsla Duszynski, Darren Lilie, Richard Schaffer, Brandon last name unknown, Z. Ray Richter, Jerry Goldfarb, George Molina, Scott Crosland, Joyce Shepherd, Marti Thornton, Richard Nieman, Joao Mio Mao, Jeri Thompson, Bobby Eaton, Daniel Deleon, Christy Sly, J. Smith, Courtney McCullough, Carmen Norwood, Leo Moorer, Robert Miller, Bob Jorgenson, Anthony Mondrey, Nate Miller, Wayne Duke, Gordon Rountree, TK Lane, Ken Savage, R. D. Hamel, Frank Clanton, Brenda Long, Lisa Watts, Frank S. Kopta, M. Carey, Peggy Wilson, Sharon Sweeney, Mario Cmet, Bob Moore, Gene Kottke, Mickey McCarley, Justin Jauer, Ronnie Pfeil, Jeanie Morris, Diana Butler, Daniel Denson, Billie Harrison, James Creagh, Karl Johnson, Elvin Meadows, Ben Hicks, Jesus Cabrera, Martin Kennedy, Jaime Sandoval, Lanny Ramay, Anita Ramay, Marilyn Mosley, Ken McFarlin, Sarah Gaunt, David Robertson, K.J. Keppner, Steve Coweart, Tena Martin, Elan Turner, Tina Bess, Anthony Bess, Chet Hodgins, Gerald Nicholson, Cliff Smith, Beverly last name unknown, Susan Orner, Tim Robinson, Wayne Bennett, Earnest Young, Jennifer Tidwell, K M Rouse, Solomon Hawkins, BJ Trammeell, Jonathan Endicott, Aaron Starling, Lonnie Williams, Richard Laughlin, Jason Worley, Ed last name unknown, Richard Forsythe, Buddy Christopher, Fernando Granda, Jenifer last name unknown, Valencia Gandara, Jesse Rodriguez, Kris Michael, Roby Benedict, Ed Sanchez, Barbara Walton, Rik Musia, Keith Johnston, Stephen McCravy, Cathy Piaczynski, Ronnie Whatley, Donal Parker, Rena Whitlock, Robert McCullion, Charlie Piland, Dustie Cates, Edward Wallace, Bill Prikryl, Lymon Washington, Jr., Richard Flashnick, Terri Fulton, Chris Thomas, JoAnn Justice, Jose Dominguez, Hank last name unknown, McNeil Smith, Thomas Marton, John Glover, Matt Cason, Nancy Bernard, Michael Byington, Billy Blackwell, Kory last name unknown, Dallas Dleay, Cindy Dought, Sharlene Chaney, Daniel Manchester, Chandler last name unknown, Ilene Campbell, Jesse Duckett, Stacy Kaupas, Michael Smith, Rose Garcia, Erika Lucas, Nye Cooper, Andy Richardson, L. Durst, Debbie Don, Beverly Whetsell, Doug Stone, Jamie last name unknown, Karen Smith, William Looney, Larry Bilbay, Karl Sears, Charles Stanley, Ellie Kriebel, Tom Smith, Alan Lampin, Jane Gordon, Lynn Dicken, Tom Warner, Richard Teichman, Kevin Jones, Rodney Nix, Tommy Portwood, Sammy L. Curry, Ilenda Ortiz, Mark last name unknown, Addam Smith, LuAnn Taylor, G. K. Jochec, James Herron, Eric Tabone, Russell Minton, Bill last name unknown, Patrick Dvorak, Patrick Moran, George McCann, Fernando Marrufo, Joe Hnandez, Carlos last name unknown, Jerome S Kari, Luis Navas, Robert Pollok, Ginnette Taylor, Nina Saunders, Janie last name unknown, Royce Smith, John Williams, Landen Fredrick, Terry Parker, D. Parnell, Harvey Patton, Brian Walker, Allen Easley, Tom Castillon, Russell Grider, Donald Jones, Barry Sullivan, Alfredo H. Delpin, Thomas Kelly, J Netherton, Don Reynolds, Tom Lawson, B.G. McCurdy, Terry Damman, Iraida last name unknown, Shawn Quigley, David Hofer, Kim Peters, Bruce Prihoda, David Tonn, B. Lawson, Susan Hassel, Debbie Erb, Sharon Rancour, Jo Ann Hudson, Chuck Richter, Matt McClure, Tommy Carpenter, Ann Chapman, Jeff Baskett, Teresa Core, Rodney Sullivan, Henry Frost, Joseph last name unknown, Ray Smith, RB Phemister, Linda Lunday, Jerry Kennedy, Sally Henson, George Bartlett, Mike Murehead, W.C. Coulter, Tena Murphy, Bobby L. Williams, Robert Rexroat, Ruth Piland, Tissie Ford, Sam Sharp, Jerry Moore, Jerry Hinds, Elsie and Van Kroussakis, Robert Oliver, Daniel last name unknown, Amy McGilvray, Walter E. Livingston, Marianne Westmoreland, Annette Jones, Edwin S. Rigsby, Michael Moses, Marisa Lucio, S.M. Hines, Sherrie Acker, Max Gibbs, Leon Crenshaw, Lolly Wylds, Jack Rosenbaum, Louise Acton, Jason Sanchez, Linda Morgan, Gary Coley, Erica s. Worthy, Claudia Goldberg, Ambrose Charvis, Steve Floyd, Dan Nolan, Henry Lee Kraatz Jr., Javie Ruiz, Ken Gound, Sarah Poole, Mark Kingfish, J Stubblefield, James King, Johnny Garner, Stephen Trout, Peggy Boors, Douglas F. Carr, D. White, P. Burch, Will Zapalac, Jeff Moore, John Burton, Suzy Mena, Marc Randall, Elaine King, Chris Cochran, Anthony Ignatious, Michael Carmichae, Yermek Tynyshbayev, Gus Guevara Jr., Victoria McGinley, Jay last name unknown, Joseph Frenza, Mike Jass, Chane Overland, Walter A. Green, Qui Ly, Mitchell Jones, Jaime Munoz, Kenneth smith, Paul Crockett, Taufik Subroto, Meri Montgomery, Patrick Chu, Priscilla Miranda, Mike Simmons, Sheila Harrison, Mark Gifford, Christopher Colbert, David Foreman, James Wood, Stan Devlin, Anthony Alexander, Pedro Martinez, Lee Brown, Thea singer, Debil Donthelli, Steve Pontiff, Justin Nguyen, Carrie last name unknown, Anseth Steinberg, Randel Anderson, Brandon Whittle, Keith Abernathy, Mark Mancha, C. Henk, Merlin Sojo, Jonas Thiemer, John Smiley, Jim Shaver, C.L. Smith, Charles Schulz, Rachel Cannon, Jim Cannon, James Westmoreland, Harley

Tittle, Norman Reola, Jack M. Smith, Angela Perdue, Joseph Yentzen, Tim Ray, Kathleen smith, Jeff Wade, Mike Farris, Cindy Pospisil, Roger Varathar, Brian DeFiore, Bill McCown, Kay Milder, Kevin Chaka, Kathy Railey, S. Jeppesen, Jeffrey Jones, James H. Spearman, Ronald Trowbridge, Tim Molnes, Thad Carson, Ricky last name unknown, Tammy Tucker, Chris Blurton, Steve Havard, Paul McGuire III, Betty Smith, Anne Roberts, Karen Templeton, Audie Templeton, Aubrey Futch, Nancy Wilson, Mildred Arbuckle, David L. Secrest, Sandra Speaks, Ray Newman, Sylvia Segovia, David Zuniga, Al Newman, Stephen Paulson, Raymond H. Richardson, Dick Daley, Danial Martinez, Mary Ann Young, Michael Shaw, Ed Clark, Joe Cox, Brad Damron, Phillip Daniel, Dorothy Caldwell, Kathy M. Samson, Gloria Sharp, Bill Wischkaemper, Harvie last name unknown, Norman F. Schuetz, Larry Liles, Melissa Ausburn, Jerone Anderson, Stacy Washburn, Lisa Cortasie, Kenneth Knopp, Pam Richards, Barnie Malcolm, Marvin Reams, Jeff McCarty L.S. Allen, Jason TeBeest, Larry Grimes, Will Stewart, Glen Cranford, Chuck Kelly, Denise last name unknown, Tonya Lanham, Kim Davis, Betty Rabie, Janet Anders, Jim Snyder, Andrew Cocker, Carol Campbell, K.W. Adams, Dolores Thomson, Joe Narro, Art Salinas, Susan Mullins, Vilma Irizarry, Janet Croom, Dempsey Sawyer, M. Jones, DR Lewis, Claire Sindone, Larry Gardner, Adams last name unknown, Mr. Bin Koshy, LaMar Booker, BJ Bounds, Kathy Hamm, Ortho Parker, Robert McNaughton, Roger Kelly, David Rawlings, Kay last name unknown, Nick Noor, Royce Wilcox, Santos Ortiz, Devona Hinsdale, Truett Hunter, W.M. Pursley, Claudia Stockton, Martha McDonald, Sarah Farley, Robert McGuffey, Mohammad Salehpour, Jeannie Ingram, Roger A. Nassif, John S. Whitford, Bryan Dubose, Rexx Behring, Doris Herron, Dorston Fontenot, James A. Hall, Linda last name unknown, Jack Hall, S. David Wiest, Louie Wilkerson, Neil Coffee, Ron Waterhouse, Cindy Bauer, Jack Means, J. Kilpatrick, Henry P. Ryan, V.I. Guidry, AH Glass, A. Garcia, Ken Sims, Dixie Sims, Kevin Davis, Tommy Cross, Forrest Dean Salmon, Beth Durland, Karen J Herrick, Steve Kasmiersky, Julie Phillips, Glenda Charrier, Star Moses, Bill Burt, Cheryl White, DC Bonney, Christy Tanner, J.W. Hardy, Harriet Mikus, Eric W Smith, Dale Robbins, Michael Wilson, Marcos Resendiz, Erin Canada, Prasad Nekkanti, J. Dudley, Alex White, Pat Stratton, TS last name unknown, Tad Daniel, Brain Wallace, Troy Donahue, James M. Brown, Jay B. Jackson, Hazel Rambo, John Robinson, Lance Solomon, Richard Adcock, Paulette last name unknown, Peggy Tilson, Rose Guel, Kevin Carroll, Jennifer Presson, Alvin Walls, Claud Dockrey, Craig Meacham, Jason Murphy, Michelle Ramirez, Gail Dowell, Deborah Walton, Clint Edmundson, Garie Littleton, Kenneth Hood, John Hollinshead, Michael Korelc, Yvette Fanestiel, Jeramy Tunnell, Krisy Devillier, David Hicks, Bill Newsom, Terry Faubion, Richard McClanahan, Susan Lawrence, Davis Ellis, David C. Loera, A. Schmalbach, Katie Holman, Merritt Larson, Tonia Lacy, Lita Conner, William Pryor, John Gutierrez, Robert Gratteau, Gordon Lieb, Randy Cunniff, Tim Gerrish, Bob Adamson, Jim Payne, Keith B., Collin Strickland, William L Heiner, Bryce Wanless David Valentine, RD Daugherty, Bill Melton, M Gibbons, Michael Boatman, Gladys McGuire, Jim Capell, Brenda Webb, J Bilicek, Jimmie Grokett, Randy P. Shirley, Debra Bennett, Herman L. Minter, Tom Burns, Waylon last name unknown, Billy Lindsey, Benny Dadidycus, Mary Lewis, Eva Day, Eva Kesckemeti, Bill Sussen, Merle Bass, Eddy Knapp, Tom Scanlan, Karen Kmoch, Mike Trocko, Lee Scott, Vernice Sonnier, Richard Ard, Jim Bridges, Jonas Tinkler, Terri Cranford, Robert L. Russell, Tammy Hudson, Janet Cogburn, Harry Wilkinson, Matthew Janak, Kevin Phillips, Roy Stover, Rebecca last name unknown, Henry R. Head, Jo Robinson, Pat Willis, Connie Brian, Christi Coffey, William Campbell, Samantha Nelson, Leslie Pierce, Jason last name unknown, CF Shelton, Gene Shelton, Kathy Conner, James Beasley, Mary Montee, Christine Palmer, Robert Flores, E.J. Raley, Jason Cooley, Jack Grigsby, M. Bailey, Grover Pippin, SJ Jackson, Melvin Bradford, Danny Huser, Paul Kates, Gail Dobson, Nhien Nguyen, Les Heath, Lonnie Barrington, Robert Evenbly, Joe Enber Jr., Betty C. Lanasa, Bennie Anderson, Carol White, Eunice Giolley, Jean Ross, Conner Sturdivant, C. Hebert, Roger Powell, Rick Frasier, Ilia Hall, Annamarie Mootz, Dora White, Terry Short, Randy Cunniff, Mike last name unknown, Connie McKinney, Jim King, Darlene Cotner, Rod Vaugh, Sue Aldrich, Rosa Owens, Anita Nicholson, Gary Grant, C.L. Cowan Jr, Randy Burgfield, Tim Danforth, Maricela De La Cruz, Neon Gonzales, T Thomas, Gayla O'Neall, Shah Syed, James last name unknown, Linda Goodman, David Reyes, Roger Pierce, Rick Ruckman, Mark Stockdale, Thomas Shirley, Cheryl Davidson, Tom Concklin, Sheron Skaggs, Fred Trimyer, Dennis Field, Dr. Vincent, Beverly Atner, Ernie Harris, Larry Foster, Robert Fuoco, Just Justin, Al Ranayk, Blaine Byers, Amado E. Chaheine, Jackie Benner, Greg last name unknown, John Thompson, Mark Painter, Horatio Arce, Amanda Clark, Gerald Sobecky,Kathy Anderson, Charles Wright, Glenda Wright, Patti Cox, Stephen Zapalac, Sherry Phipps, O.E. Buzzaird, R Worley, Daniel L. Lott, Clara Helmbright, Lance Polson, Richard Hart, Ralf Miller, Teresa Ennis, Gault last name unknown, David Williams, Kevin Scott, Brian Burton, William Bright, Dominic Lepore, Dale Evans, Jo Hammons, Raymond Woodruff, Donis Westmoreland, Eileen Strand, Billy Ballard, Bryan A. Blake, James Gossett, James Hight, Dee Robinson, Ann Muncy, Jim Ricketts, Larry Dickey, Robert Engish, Jeff Joyce, Larry J. Johnson, Duane Johnson, Rose Gibson, Kelly last name unknown, Dewayne Johnson, Miguel R. Cortinas, James Smith, Lyndelle last name unknown, Jennifer Burkhalter, Glenda Michaels, David Sauter, Theda Rowlett, John Stitt, Mike Hernandez, Amanda Duffin, John D. Kelly, Jerimy L. Harris, Stephen Broll, Russell Dillard, Patrick Pulliam, Tlindley last name unknown, Laura Cason, Jessica Johnson, Rod Mills, mm last name unknown, Karen Germany, Robert Machen, Debie Ferrell, Nancy Fahey, Pedro Garcia, Roy Rogers, Felice Williams, Leland Roberson, Shawn Kelly, Earnest Oldham, Louis Sandefer, William T. Stockman, Richard Tucker, Robin Newton, Rene Gregg, Robert R. Levesque, Joann Brito, Thomas last name unknown, Lola Morton & family, John Holmes, Amy Parker, Early Goodson, Chuck Ruth, Joseph Talban, Annie Frenza, Todd Richards, Zack Levitt, Terry Overton, Angela Holder, Kenneth Pope, Steve last name unknown, Susan Williams, James Page, Joe Salazar, Louis R. Perrin, Daniel Dovalina, R. Lee, Edie Stebbins, John M. Hall, Becky McClung, M. Saxon, David Linsay, Ted last name unknown, Ronnie last name unknown, Jennie Huddleston, Rex Naylor, James Tuucker, Dale Powell, Brenda Anthony, Gloria Lundeen, John Farrow, William N Jonas, Maria Jones, Gene Leavaell, John Marckstein, Anthony Cabrera, Gererdo Hidalgo, Brian R. Dixon, Dave Stone, Mario Canales, Rogelio Paniagua, Lucy Nesbit, Debbie Moore, Robert Bernard, Dianne Harwood, Jon Nancy, Joel Brock, Martha Garcia, Travis Tucker, Tony Panaytumi, Sue Ann Robertson, Michael last name unknown, James Sowell, Sirilio Falcon, Mitch Francis, Betty Marvin, Charles and Barbara Bearn, Tony last name unknown, D.T. Turner, Anadelia Rodriguez, Kara Clairborne, Mark Puckett, Andrew Scott, Genie Smart, Verie Theriot, Darla Maimbourg, Brenda Roden, Fay Bayres, Ron Palmer, Vicotria Reglin, Peter Block, Bill Ingram, Kathy Varner, Anthony Cox, D.W. Scott, George Robinson,

Jerry W. Duke, Jayna last name unknown, Robbie Riggs, JT last name unknown, Fred Grupe, Jim Smith, Diane Babb, Jerilyn last name unknown, B G Lawless, Fred Gola, Alvin Kinder, Richard Schaffer, Lisa Wicks, Louis G. Goodall, Cherisse Huddleston, Dennis Galliera, Nita Baldridge, Rejane Keonig, Diane Johnson, Nathan Oujezdsky, Larry Crabb, Wesley Ghormley, Robert Knabe, Danny Nichols, Kenneth Enloe, James E. Groves, RD Hamel, Michelle McNabb, Doris L. Curry, Robert Rath, M. Mosley, Mike McElveen, Glenda Fryer, Ruben Chavez, Rob & JoEddy Busby, Kenneth Brady, Richard Cox, George Spain, Brad Giannini, Jack Duffie, Norman Barnhill, Ernie Jordan, Jim Cox, Charles R. Cox Jr., Martha Gomez, Peggy Taiclet, Bob Brown, Marsha Barbato, John T. Opincar, Frank Turney, E.B. Reddoch, William Boatwright, Anne Thomas, L Recio, Marilyn Wallace, Michael Smith, James Pearson, Nell Dedman, Greg Pannell, Rosemary Watson, Richard Crandall, James Wallace, Tim Hansen, Luis Valdez, Mike Blanton, Michael Craig, Roger Fritz, Kristin Reynolds, Alan Richards, Cindy Simpton, Britany Taylor, Howard Harris, Betty Jo Mican, Craig Mabry, Chris Rogers, Diefino Moreno III, Pat Hogan, Darlene Huckaby, Don Stagner, Joe Spradlin, Jim Baradziej, Karen Watson, James K. Pack, Sandra Jenkins, Paul Holtz, Adan Garcia Hernandez, Tim Larson, Frank Orges, John Shepherd, Tara Earl, Gloria Eggert, Jim Wilkie, L. Reason, Todd Rufner, Tim Larson, Klaus D. Meybaum, Robert Chaney, M.A. Martin, Bob Martin, J.P. Seyler, Terrie Seyler, Chad Links, Chris Links, John Cofey, Vaidren A. Trotti, Guy Parks, Charlie Muery, Charles Turney, Travis King, Matthew Easterling, Therssia McDaniel, Billy Hughes, Irvin Hosie, Bobby Lawter, Betty Fessenden, Matt Henry, James Sanders, Steve Perkins, James Tullos, Jason Bowden, R Jones, John Steven Lira, Mihael Meche, Kevin Gilmore, R.P. Campbell, Joseph C. Dorsey, Gary Raufeisen, Dan Drummond, Jim Sands, Tom last name unknown, Keith Brenton, Shelia Rogerson, Alvin Hebert, Eav last name unknown, Myra Cole, William Machnski, Zackary Odom, G. Stutes, Brandon Silver, E. J. Updegrove, Carol Atkinson, Glenn Lacey, Bill Shaffer, Larry Presser, Mamie Robinson, Sherri Butler, Nella F. Cook, Vickye Reaves, Julie Carlson, Mark Haler, Gary Anderson, Joel Scott, Kay Foster, Stephanie Tobin, Ryan Alsobrook, Fred Koppe, Larry R. Leek, Daniel last name unknown, Dale Eicker, David t. Newman, Joe Grant, Jay Birdsong, Sondra Neiman, Bert Furr, Bobby last name unknown, John Price, Rose Feazell, Cal Schooley, Brian last name unknown, Keenan Cruce, Alfred Sanderson, Larry Grimes, Diana Garza, Nancy Barr, Hubert Stevens, Patsy Lenderman, Pamela Sutter, Karen Latona, Joel R. Jordan, Richard A. Bryant, Patty Jacobs, James Hall, James Lowney, John Christie, Veronica last name unknown, C.R. Anderson, S. Snow, Darla Snow, Ralph and Shirley last name unknown, Howard R. Hanna, Eddie Upchurch, David E. Childs, Ron Odom, George Howard, Donald McCullough, John Freemyer, John Stamps, Mary Burrow, Rich Lively, Aaron Smith, Ronnie Henson, Dewitt Brown III, Dale Guidry, Patsy Mahone, Brenda Bretzke, Fondon Ellison, Alice Dickson, L.J. Middleton, Lewis Haymes, Jenny Wade-Lycan, Karen Taylor, Theresa Lawrence, Nancy K. Oliver, James Lofton, Angela Walderon, Eric Willard, Phillip Adams, Wayne Freeman, Ron Matthis, James Carpenter, Ethel C. Mundy, Stan Wallace, Beverly Shipman, Verne R King, Robert E. Lordon, Ken Hanes, Anthony B. Miller, Jim Benbrook, Kathleen Hill, Michael Grauman, Jerry Buzek, Amber Anderson, Cyndie Nunn, William Graves, John McCloskey, Scott Alan Cole, Joyce Lipp, Donald E. Broeren, Phillip Satterwhite, Cathy McCool, E. Funderburk, Bob Adamson, Andy last name unknown, Pamela Cook, S. Brown, Robert P. Wagener, Estela G. Lomax, Cynthia Hawkins, Joe Moralez, Terri Gray, John Walker, Linda Contreras, Eileen Corrigan McFadyen, Jim Miller, Brian Busenlehner, Bill Zabicki, Parkhill last name unknown, Fred Stevens, Michael J. Kriegel, James Claridge, Gregory Bailey, Sarah Perkins, David McCurrin, Shelby last name unknown, William Perritt, Eugene Delp, Elaine last name unknown, William Birkenfield, Sue Davis, Bob Russell, Parvin Gidvani, Higy Singh, Bob Kukla, Dina Bassett, DM Janssen, Beverly Gomez, Richard Robinson, Cathy Guignet, Lois Hamby, Benny Carter, Ron Wheeler, John Haynes, Catherine Umphers, E.J. Ward, Michael Greer, Bobby Lee Williams, Ron Reed, Gaye Callicoat, Milt Jones, Lynette Samuel, Alice Anderson, Richard Canty, J.Z. last name unknown, Scott last name unknown, Jim McCrary, G. Hargrove, Carloyn Humphries, Don Paquin, Kelly and Linda Christian, James E. Wheeler, Thomas Tucker, Burl Huggins, Reeves Huie, Ph.D., Fran Mathis, Robert Chesire Jr., Dwight Latta, Debbie Cackler, Mike Switzer, Jim Stafford, Mike Gibbs, Pamela Stewart, Linda Ownby, Dixie Ranallo, Vlad Andrus, M.R. Knott, Randy Reynolds, Adolfo D. Chavez, Paul Pierce, J. Henry, Robert Gooden, Jim Boyer, Thomas Vincens, and Maudane Hamilton.

Groups or associations opposed to the rule: The Lotto Report; Burmingham & Son; AT& Wilcox's Mechanical; Mobil; Wholesale Lumber; General Hospital; A.G. Edwards; Texaco; Kroger's; Pager Sales & Services; Teacher Retirement System; Old San Francisco Steak House; Kinko's; Ezrabrook6; Coca Cola; Ford Motor Company; Krafy Korner Ceramics; E-Fix; Diamond Shamrock Corner Stores; Holloman Corporation; Re-Max Realtors; Kwik Copy; Woodland Farm; Bush Contractors; Sons of DeWitt Colony Texas; U-Haul Rentals; G&C Electric; Holmes Builders; Texas Department of Protective & Regulatory Service; ALPA; Cataract Institute; R S Consulting; The Puckett Corporation; Sears; Lyle Professional Services; Paragon Engineering Services; Channelview Retirement Fund; McDonalds; Roses Deli and Catering; Gold & Silver; McDonald Insurance; White Hat Trucking; Engineer Group; Mervyn's; City of Mineral Wells; Al's Sports Apparel; Texas Rangers; Test Data Systems; Albertson's; Allstate Insurance; Sheppard Air Force Base; American Airlines; Clayton's, Inc.; 7-11; Imperial Auto; Indian Oaks Neighborhood; Dycus Holdings, Inc.; LaQuinta; Mobile Homes; Friday's; Hamilton Electric; Firemans Group; Southwest Airlines; MCI; Dvorak Trucking; Surf City Productions; AlcatelUSA; Lockheed Martin; Sabre; AAA Rental; Dart; Significant Images. Groups or associations in favor of the rule are: Individuals that indicated they are speaking for their family, a group and/or an organization: Don Iden MD, Jeff Walter, Steven Mayhue, Donald Stephenson, David Miller, and Robert Hamill.

The repeal is adopted under Government Code, §466.015 which authorizes the Commission to adopt all rules necessary to administer the State Lottery Act and to adopt rules governing the establishment and operation of the lottery, and under Government Code, §467.102 which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

The repeal implements Government Code, Chapter 466.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302156

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: May 3, 2003
Proposal publication date: February 14, 2003
For further information, please call: (512) 344-5113

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16 TAC §401.305

The Texas Lottery Commission adopts new rule 16 TAC §401.305 relating to Lotto Texas on-line game rule without changes to the proposed text as published in the February 14, 2003, issue of the *Texas Register* (28 TexReg 1317) and will not be republished. The new rule is being adopted concurrently with the adoption of the repeal of the existing 16 TAC §401.305. The Commission adopts the new rule rather than adopting amendments to the existing rule to lessen confusion regarding the changes to the Lotto Texas on-line game rule.

The new rule provides for an on-line game that has a different game matrix than the current Lotto Texas game. The proposed new rule contains a two field matrix of 44 numbers in each field, establishes the prize pool for Lotto Texas prizes to be a minimum of 52% of Lotto Texas sales, explains the type and method of play for the game, creates eight prize categories, specifies the jackpot amount for a Lotto Texas drawing in a roll cycle, and eliminates redundant or obsolete language.

The purpose of the new rule and changes to the Lotto Texas game is to generate additional revenue for the state of Texas, clarify that the jackpot amount for a Lotto Texas drawing within the first four Lotto Texas drawings in a roll cycle will be the greater of the advertised jackpot amount or the jackpot amount based on sales determined in part by the applicable interest rate factor, clarify that the jackpot amount for a Lotto Texas drawing that is not within the first four Lotto Texas drawings in a roll cycle is the jackpot based on sales determined in part by the applicable interest rate factor, and eliminates redundant or obsolete language. With regard to the timing of the implementation and application of the provisions of this rule and the repeal of the Lotto Texas rule adopted concurrently with the adoption of this rule, all tickets purchased under the provisions of the repealed Lotto Texas rule and claims for prizes made based on tickets purchased under the provisions of the repealed Lotto Texas rule are subject to and construed under the provisions of the repealed Lotto Texas rule. Likewise, tickets purchased under the provisions of the new Lotto Texas rule and claims for prizes made based on tickets purchased under the provisions of the new Lotto Texas rule are subject to and construed under the provisions of the new Lotto Texas rule. Any prize breakage or roll-over remaining in the top four prize categories at the termination of the 6/54 Lotto Texas game will roll or be applied respectively to the top four prize categories in the new 5/44 + 1/44 Lotto Texas game. The prize reserve fund for the 6/54 Lotto Texas game will become the prize reserve fund for the new 5/44 + 1/44 Lotto Texas game.

Three different matrices and the current game matrix were tested with current Lotto Texas players in Houston and Dallas, using a min-lab/focus group format. The matrices tested were 5/44 and 1/44, two field matrix; 6/59 with a bonus ball, and 6/59. Players were asked to rate each matrix on various attributes as well as report potential spending on each matrix. All attributes and spending were asked of and compared to the current Lotto Texas matrix. Of the matrices tested, the most beneficial matrix change is the 5/44 plus 1/44, two-field matrix. From the research, heavy spending players for Lotto Texas are in favor of the two-field matrix. The spending on all lottery games is similar when including either the 5/44 plus 1/44 matrix or the 6/59 plus bonus ball matrix. More importantly, however, is the increased individual spending on the 5/44 plus 1/44 matrix over all other matrices tested, including the 6/59 plus bonus ball matrix. Heavy players reported spending was higher for the 5/44 plus 1/44 matrix tested. The percentage of light/moderate players that would play this matrix was higher than for the current matrix. In comparing the two games, the 5/44 plus 1/44 matrix saw more appeal and ranked higher on many levels. With "likelihood to play" it was reported that this game was the more positive choice when choosing a change from the current Lotto Texas matrix. The 5/44 plus 1/44 player benefits are: higher jackpots, increased number of prize levels, overall odds of winning any prize are 1 in 57, approximate increase of 25% in the number of overall winners, and familiar bonus ball play style.

Comments were received by the Texas Lottery Commission. The Commission conducted two comment hearings to receive comment on the proposed new rule and the proposed repeal of rule 16 TAC §401.305. The first hearing was held on February 26, 2003 at 9:00 a.m. at the Commission auditorium, 611 E. Sixth Street, Austin, Texas. No person appeared to provide comment. On February 26, 2003, Austin, Texas encountered inclement weather that may have prevented persons from being able to attend the hearing. The Commission noticed an additional hearing to afford persons an opportunity to comment on the proposed rulemakings. The second hearing was held on Friday, March 7, 2003 at 9:00 a.m. at the Commission auditorium, 611 E. Sixth Street, Austin, Texas. Two persons appeared at the March 7, 2003 hearing and provided comment. Additionally, the Commission received written comment during the comment period. Comment received was considered and summarized in this rule. To the extent required, an agency response is provided. Comment contained may appear to be redundant to other comment. Agency responses that appear elsewhere in response to comment are to be applied, where appropriate, to the redundant comment, as if fully set out for that comment.

Generally, most of the commenters indicated opposition to changing the Lotto Texas matrix. Commenters indicated that they are opposed to the addition of the "power number" or Powerball format. Many commenters indicated that they will stop playing if the matrix is changed or will spend less. Commenters also indicated that, in the event the change is made, they will only play when the jackpots are higher. Commenters also indicated they opposed the change to the Lotto Texas game the last time and that it didn't work then and questions why the Commission thinks it would be any different this time. Commenters indicated that they spent less when the last change to the Lotto Texas game was made and will stop spending money if the proposed changes are made. Some commenters believe the reason for the decrease in sales is the economy. Some commenters indicated that the Commission should be fair and not greedy. Some commenters indicated they want the game to return to the original matrix and join the multi-state lottery to satisfy the high rollers. Agency response: The Commission disagrees with the comment. Mini-lab/focus group research was conducted with Lotto Texas players in Houston and Dallas and the proposed 5/44 +1/44 bonus ball matrix was tested against the current matrix. The research shows increased spending on the proposed matrix compared to the existing matrix. The main intent of the proposed game is to generate higher jackpots more

frequently so more people will participate in the Lotto Texas game more frequently. Like any business enterprise, the Lottery must be able to respond to the ever-changing dynamic nature of the gaming industry. Lottery sales are closely monitored to track the projected success of the Commission's products. In order to keep the on-line games fresh and exciting, game enhancements should be implemented. The Commission believes that the Lotto Texas game should be changed at this time due to the lack of higher jackpots and decreasing sales that have been experienced with the current game. The Commission believes this matrix will generate higher jackpots and therefore increase Lotto Texas sales. It is up to the individual player to determine the amount of money he/she spends and at what jackpot level he/she chooses to enter the game. The Commission believes the decrease in Lotto Texas sales is due to the lack of higher jackpots and consistent wins at the lower level jackpots. Lower jackpots do not cause the excitement necessary for a lottery jackpot game to be successful. The proposed game is anticipated to increase revenue to the State of Texas. The original matrix (6-of-50) had been in place for approximately eight years and was no longer generating the jackpots, sales or revenue expected. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. Additionally, the Commission disagrees with the comment that the Commission should be fair and not greedy. The Commission believes its role is to generate revenue for the State. With regard to this responsibility, the Commission must review game performance and make decisions regarding such performance. To that end, the Commission reviewed the performance of the Lotto Texas game and determined the game was not performing at the levels the Commission expected. The Commission conducted player research to determine the best approach to enhance the game in order to generate revenue. The Commission proposed the new rule for public comment, has received comment, and has considered the comment received. The Commission believes the process has been fair. The Commission also believes the new features of the Lotto Texas game do afford meaningful opportunities to players to win prizes, including the jackpot prize.

One commenter indicated that he stopped playing the game because the prizes won at the lower levels is not enough money. The commenter indicated that anyone in business knows that "you can not make money if you do not give something back to your customers." The commenter believes that people are waiting until the amount is high and it is not because people playing think they are going to win, but they hope they can win something more than five dollars. The commenter suggests the Commission conduct a survey and ask the people who play the lottery and not the people sitting in the Commission's office. The commenter believes the proposed rule will only cause people to wait until the amount is high. Agency response: The Commission disagrees. The proposed rule will "give something back" to Lotto Texas players as the proposed game has improved overall odds of winning any prize and will create an approximate increase of 25% in the number of overall winners. Mini-lab/focus group research was conducted with Lotto Texas players and the proposed 5/44+1/44 bonus ball matrix was tested against the current matrix. The Commission agrees that people/players are waiting until the jackpot is high before they begin playing. Higher jackpots are the main reason this new game has been proposed.

One commenter indicated that the proposed changes to the Lotto Texas game mimic the style of play in Powerball and Megamillions and, if so, the commenter suggests joining one of these games. The commenter also suggests raising the starting prize from $4 million to $10 million because it will generate enthusiasm and higher prize pools. The commenter also suggests a game that draws once monthly and is based on some percentage of all the revenue generated. Agency response: The Commission disagrees. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. Sales would not support a starting jackpot of $10 million and would create too much risk for the Commission. Lotto style games are usually drawn twice per week. A drawing once a month would be confusing for players and retailers and would not create the customer/player traffic retailers are accustomed to with the current twice-per-week drawing schedule.

One commenter considers the Lottery a voluntary tax and it allows the commenter to dream of winning some day. The commenter suggests adding balls to the mix but leaving the basic premise of the game alone. The commenter believes that there are only so many gambling dollars available in Texas and neighboring states and Texas has added many new games. The commenter suggests eliminating one or more of the games. The commenter indicates that the commenter will stop buying Lotto Texas tickets if Powerball or other drastic changes are introduced. The commenter believes that the per capita money spent in 2002 compared to 1992 is the same but just spread out over more games. Agency response: The Commission disagrees. The mini-lab/focus group research tested a 6/59 matrix. The research showed that the 5/44 +1/44 matrix was more appealing and ranked higher on many levels. With "likelihood to play" it was reported that this game was the more positive choice when choosing a change from the current Lotto Texas matrix. Sales trends do not indicate that the Commission eliminates one or more of its current games. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission also disagrees with the comment regarding per capita spending. Per capita spending was higher in 2002.

One commenter indicated that the proposed changes are extremely unfair to the lottery players of Texas. The commenter questioned whom the changes will benefit and indicated that if Texans had wanted a Powerball lottery they would have voted for one in the beginning. The commenter suggests that the Commission put the changes to a vote, if not to the State, at least to all lottery players. The commenter hopes that the Commission does not make the changes until the Commission has further investigated the opinions of the majority of the players. Agency response: The Commission disagrees. The Commission does not believe the proposed game is unfair to lottery players. The proposed game is expected to create higher jackpots, improve the overall odds of winning any prize, increase the number of prize levels and create an approximate increase of 25% in the number of overall winners. The proposed rule is a two-field, bonus ball style matrix. This bonus ball play style is similar to Powerball, which is a multi state game. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. Additionally, the Commission disagrees with the comments in that the Commission has promulgated the rule changes in accordance

with the Administrative Procedures Act. Statutory rulemaking procedures do not require that an agency "put rule changes to a vote" or "investigate the opinions of the majority of players"; but, do require the agency afford interested persons a reasonable opportunity to comment and consider the comment received. This rulemaking afforded interested persons an opportunity to comment and the Commission considered such comment in making its decision.

Two commenters indicated that when the Commission added the additional four balls, they reduced their spending and will stop playing completely if the Commission adopts the proposed matrix change. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games.

One commenter indicated that the change will make the game into a Powerball game and that will kill the lottery. The commenter indicated that the Commission should not be so greedy and leave the game alone. The commenter further indicated that she will quit playing and that she has talked to about 300 people in her general area and did so in connection with the last change to the Lotto Texas game. The commenter stated that of these people, only about 20 still play and those 20 also don't want a Powerball game. The commenter also suggested that several million people play the same numbers all the time and changing the game will make it impossible for them to play their numbers. Agency response: The Commission disagrees. The proposed rule is a two-field, bonus ball style matrix. This bonus ball play style is similar to Powerball, which is a multi state game. Mini-lab/focus group research does not show that this change will "kill the lottery." From the research, heavy spending players for Lotto Texas are in favor of the two-field matrix. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission does not make game changes in order to make it difficult for players to play their favorite numbers. The Commission, like any business enterprise, must respond to the ever-changing dynamic nature of the gaming industry. The Commission must make the best decision in the interest of the Texas Lottery and the State of Texas. The proposed game is anticipated to increase revenue to the State of Texas and at the same time provide players with additional benefits as well.

One commenter suggested the Commission get input from the Florida Lottery who has numbers 1 to 53 and pays much higher payouts for 5 of 6 and about the same for 4 of 6 and 3 of 6 numbers. The commenter indicated that the Florida Lottery has already accomplished what the Commission is trying without doubling the odds for the players. Agency response: The Commission disagrees. The Commission has analyzed games currently being played in other states and the sales trends in other states. The Commission makes decisions on its games and how those games are performing in the Texas marketplace. There are certain games that perform better in certain states or jurisdictions due to the demographics of the player base in that particular state or jurisdiction.

One commenter indicated that the Commission should remember that most players are not playing for nickels and dimes but playing for the jackpot. The commenter believes that the proposed changes will cut the odds of winning a jackpot about in half. The commenters believes that at first the Commission might have a few more players but the same people will soon go away in frustration when they don't win the jackpot. The commenter suggests that the Commission advertise the fact that $4 million is more than any average Texas will make in his lifetime. The commenter believes that lack of this sort of reminder, coupled with the games that are so much harder to win because the odds are so high, cause players to become frustrated and give up. The commenter indicates that when the big jackpots are available, the increase in number of players is because people buy together in groups. The commenter suggests that people want a greater chance to win a big pot full, not just a couple thousand dollars. The commenters wants the Commission to leave Lotto Texas alone and give him better odds of winning $4 or $5 million any day. Agency response: The Commission agrees that players are playing for the jackpot. The main intent of the proposed game is to generate higher jackpots more frequently. The Commission agrees that the proposed game will increase the odds of winning the jackpot prize from 1 in 25.8 million to 1 in 47.7 million. The Commission disagrees that it should advertise "$4 million is more than any average Texan will make in his lifetime." The Commission has run advertising about $4 million being "a lot of money" and also produced point-of-sale for lottery retailers that conveyed the same message. These efforts were not successful in increasing sales or player excitement about lower level jackpot amounts. Lotto Texas players report that they want to play for high level jackpot amounts because those jackpot amounts get them excited and interested in the game. The Commission agrees when big jackpots are available there is an increase in pool or group play. In addition, there are large numbers of individual players that join or only begin participating when the jackpot reaches approximately $20 million or above. The Commission agrees that people want to "win a big pot full." That is why the proposed game has been proposed. The Commission disagrees about giving the commenter "better odds of winning $4 or $5 million any day." If the Commission changes the current game so that the odds of winning the jackpot prize are improved, there is the chance that the jackpot prize would be won even more frequently than currently experienced, causing the jackpot to roll to higher levels less frequently. The Commission believes that the decrease in Lotto Texas sales is due to the lack of high jackpots and consistent wins at the lower level jackpots. Lower jackpots do not cause the excitement that is necessary for a lottery jackpot game to be successful. Sales trends show that as the jackpot climbs, so do Lotto Texas sales.

One commenter indicates that everyone to whom she has spoken will not play if more numbers are added. The commenter further indicates that she has played the same numbers for Lotto Texas and Cash 5 for about four years and has only won three numbers on Lotto Texas and two numbers on Cash 5. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. An independent statistician who analyzes all of the data from all of the drawings certifies the Commission's on-line game drawings to be random. Playing the same numbers for any period of time does not guarantee that a player will win at any prize level.

Some commenters indicated they like playing the scratch offs more than Lotto Texas because they win a dollar or two occasionally. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games.

One commenter indicated that she will buy less tickets if it is harder to win. The commenter further indicated that the commenter will no longer buy tickets unless there is a very large jackpot. The commenter suggests the way to generate more interest is to make it easier to win and to make the prizes larger for matching three, four, or five numbers. Agency response: It is up

to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission agrees that this commenter and many other players currently begin playing Lotto Texas when there is a "very large jackpot." The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently. The Commission disagrees that "the way to generate more interest is to make it easier to win and to make the prizes larger for matching three, four of five numbers." If the Commission changes the current game so that the odds of winning the jackpot prize are improved, there is the chance that the jackpot prize would be won even more frequently than currently experienced, causing the jackpot to roll to higher levels less frequently. The Commission believes that the decrease in Lotto Texas sales is due to the lack of high jackpots and consistent wins at the lower level jackpots. Lower jackpots do not cause the excitement that is necessary for a lottery jackpot game to be successful. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales.

One commenter indicated that the consensus in his neighborhood is that the odds of winning should be improved, not decreased. The commenter believes that less participation is due to the total number of games now available in Texas and bordering states. The commenter further believes that these proposed changes will make it astronomically difficult to win. The commenter wants more winners winning the grand prize and believes this can be accomplished by increasing the odds of winning. The commenter believes that if advertised correctly, there would be greater participation in the game, producing more revenue. Agency response: The Commission disagrees. If the Commission changes the current game so that the odds of winning the jackpot prize are improved, there is the chance that the jackpot prize would be won even more frequently than currently experienced, causing the jackpot to roll to higher levels less frequently. The Commission believes that the decrease in Lotto Texas sales is due to the lack of high jackpots and consistent wins at the lower level jackpots. Lower jackpots do not cause the excitement that is necessary for a lottery jackpot game to be successful. Sales trends do not indicate that the Commission eliminates one or more of its current games. The Commission believes the proposed rule will generate higher Lotto Texas jackpots and prevent players from spending their dollars on games offered across state lines. The Commission believes it does advertise the Lotto Texas correctly. The Commission believes higher jackpots will increase participation in the game, increase sales and therefore, increase revenue for the State of Texas.

One commenter indicated that the commenter is opposed to the changes for two reasons. The commenter believes the odds are bad enough and the changes will only make them worse. The commenter does not like the bonus ball type games. The commenter is not opposed to adding more balls to the current lotto format and bumping the odds a little. The commenter indicates that most people the commenter talks with say their threshold for odds is in the 30-37 million to 1 range. The commenter's threshold is 1 in 35 million. The commenter is in a pool and indicates that 4 of the 5 people in the pool want the pool stopped if the proposed changes are made as the odds will just be too bad and not worth playing on a regular basis. The commenter indicated that the commenter will then go to a single drawing pool format when the jackpot exceeds $60-$70 million. Agency response: The Commission disagrees. The mini-lab/focus group research tested a 6/59 matrix. The research showed that the 5/44 +1/44 bonus ball style matrix was more appealing and ranked higher on many levels. With "likelihood to play" it was reported that this game was the more positive choice when choosing a change from the current Lotto Texas matrix. It is up to the individual player or groups of players to decide if they want to participate in any of the Commission's games and to establish their own comfort level with the odds of winning. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires.

One commenter indicates that it is an outrage to put the odds of winning the Lotto at 1 in 47 million. The commenter further indicated that she plays now even at low levels hoping she might stand an outside chance of winning. The commenter wants it fun to play, not impossible to win. Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The Commission agrees that it wants the Lotto Texas game to be fun to play. Sales trends show that players become excited and interested in the game when there are large jackpots. The Commission disagrees that the proposed game will be impossible to win.

One commenter indicated that it is a stupid idea to make it harder to win so that eventually there may be a larger lotto prize. The commenter further indicated that the Commission should realize that making it harder doesn't work, that the Commission has done that and it didn't work. The commenter suggests the Commission try a different approach. Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The Commission believes that the Lotto Texas game should be changed at this time due to the lack of higher level jackpots and decreasing sales that have been experienced with the current game. The Commission believes the proposed game will generate higher jackpots. Sales trends show that players become excited and interested in the game when there are large jackpots. The Commission believes this is the correct approach based on mini-lab/focus group research, sales trends and industry experience.

One commenter, writing on behalf of 30 friends and business associates, indicates that the latest change for the lotto really sucks. The commenter further indicates that that if the change is made, the group will never play the lotto again. The commenter also indicates that the recent changes to Cash 5 are a joke and the group believes Cash 5 should return to the original method. The commenter's group also questions the drawing time changed so now the television stations can't televise the actual drawing, the phone number to check winning numbers has been deleted, and whether there's something shady going on in the lotto. Agency response: The Commission disagrees. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission disagrees with the comment about the Cash Five game. The Commission has experienced a substantial sales increase (over 20%) in the Cash Five game since making the changes to the Cash Five game. The drawing time was changed to make it more convenient for TV stations to air the drawings. The Commission's drawings are televised via satellite and available for all Texas TV stations to broadcast. It is up to each TV station to decide if

they want to air the Commission's drawings. The Commission's 1-900 results number was discontinued due to provider indicating it would discontinue the billing services previously provided and due to projected costs associated with continuing the number. Players can obtain drawing results at the Commission's Web site, in local newspapers and at Texas Lottery retail locations all around the state. The Commission disagrees that there is something "shady going on in the lotto."

One commenter suggested legalizing casino gambling as a way to increase revenue for Texas. Agency response: The Commission disagrees with the comment. The purpose of the Commission is to operate the state lottery to generate revenue for Texas. Therefore, the Commission's focus is on performance of the state lottery. The Commission has no jurisdiction as to decisions regarding the legalization of casino gambling.

One commenter indicated that adding more numbers isn't going to help. Instead, the game needs more winners, small or big. Agency response: The Commission disagrees. The Commission believes the proposed game will generate higher level jackpots and therefore, increase Lotto Texas sales and revenue to the State of Texas. The Commission agrees that the game needs more winners. The new game will improve the overall odds of winning any prize to 1 in 57 and provide and approximate increase of 25% in the number of overall winners.

Two commenters attached a newspaper clipping from the Tyler Morning Telegraph in which the paper conducted a survey. One of the commenters pointed out that 75% of the people who responded do not favor changes that increase the odds of winning. One of the commenters suggested that the lottery is failing in sales not because of small jackpots but because bettors are getting fed up and tired of bucking astronomical odds and coming out losers. This commenter suggests getting more winners out there, not bigger winners, and people feel that they have at least a reasonable chance to win something. Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The Commission agrees that players are tired of small or lower level jackpots. The Commission believes the proposed game will generate higher level jackpots. The Commission agrees that the game needs more winners. The proposed game will improve the overall odds of winning any prize to 1 in 57 and provide and approximate increase of 25% in the number of overall winners.

One commenter indicated that the Commission should leave Lotto Texas as it is or take out the last four balls and lower the starting jackpot and also join a multi-state game. Agency response: The Commission disagrees. The Commission believes the current Lotto Texas game should be changed at this time due to the lack of higher jackpots and decreasing sales that have been experienced. The previous or original Lotto Texas matrix (6/50) had been in place for approximately eight years and was changed because it was no longer generating the jackpots, sales or revenue expected. Lowering the starting jackpot would cause a decrease in spending. The purpose of the Commission is to operate the state lottery to generate revenue for Texas. Therefore, the Commission's focus is on performance of the state lottery and the games currently authorized by the State Lottery Act. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law.

One commenter indicated that the pay-off for Lotto Texas and Cash 5 is disgusting. The commenter indicated that he talked to so many people and they all feel the way the commenter does. The commenter further indicated that the Commission doesn't pay enough for 3, 4 and 5 numbers and people are tired of the present pay-off. With regard to the Lotto Texas game, the commenter suggests making changes and paying $50 for 3 numbers, $1,500 for 4 numbers, $5,000 for 5 numbers and the balance for 6 numbers. With regard to Cash 5, the commenter suggests paying $150 for 3 numbers, $1,000 for 4 numbers, and the balance for 5 numbers. This commenter submitted additional comment in a separate subsequent mailing. The commenter indicated that the Commission just doesn't pay out enough for all the players that play but don't ever get but 3 or 4 numbers right. The commenter indicated that he has spent a lot of money trying to win but his luck is not like the lucky players that win the big pot. The commenter believes that if the Commission changes the odds of winning much harder, the Lottery may dry up. The commenter believes that leaving Lotto Texas at 54 numbers and Cash 5 at 37 numbers and pay out more for players that get just 3 or 4 numbers right, the Commission will see people start to play more. The commenter suggests that, for example, if the jackpot is $12 million on the regular Lotto and there is one winner, pay that winner $500,000 less and pay all the unlucky ones more. The commenter suggests that for persons that get 5 numbers right, $5,000, 4 numbers right, $1,000, and 3 numbers right, $100. For a Cash 5 jackpot that is $58,000, the Commission should use the same pay out accordingly: pay the player that gets all 5 numbers right, $56,000, 4 numbers right, $1,000, and 3 numbers right, $100. Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. The proposed game will increase the number of prize levels, the overall odds of winning any prize will improve to 1 in 57 and there will be an approximate increase of 25% in the number of overall winners. The Commission has experienced a substantial sales increase (over 20%) in the Cash Five game since making the changes to the Cash Five game. The Commission is not focusing on a change to the Cash Five game in this rule making but is focusing on improving the Lotto Texas game. The Commission does not believe that the "Lottery may dry up" because the odds of winning the jackpot prize are increasing. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The Commission cannot subtract prize dollars from the jackpot prize level and allocate those dollars to lower prize levels. The Commission operates the Lotto Texas game based on official on-line game rules. The software that runs the game is developed based on the official game rule. The suggestion would cause confusion for players regarding the amount of the jackpot prize and would contradict the pari-mutuel calculations of the prize levels as stated in the rule.

One commenter indicated that sales are off because of the economy. Agency response: The Commission disagrees. The Commission believes that Lotto Texas sales have been decreasing due to the lack of higher jackpots and consistent wins at the lower level jackpots.

One commenter indicated that the Commission thinks it is for the good of the State and the commenter can see that it would

be good for the government of Texas but it is not good for the commenter. The commenter indicated that if the Commission takes advantage of the commenter to steal his dollars then the commenter sees that as the Commission taking advantage of the State. The commenter further indicated there a lot of people like him that make up Texas and Lotto Texas already gets a large amount of his voluntary contribution. The commenter further indicated that he plays Lotto Texas only for the chance for the upper tier prizes. The commenter wants the Commission to ask gamblers about the rule changes as opposed to GTECH. The commenter believes the Commission and GTECH are like the house in gambling, they always have the odds in their favor. Agency response: The Commission disagrees. The Commission does not believe it is stealing dollars from players nor is it taking advantage of the state. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games and to establish his/her own comfort level with the odds of winning. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. The Commission believes the proposed game will generate higher jackpots, increase Lotto Texas sales and therefore, increase revenue to the State of Texas. The proposed changes are estimated to bring an additional $56.4 million to the State within the first full fiscal year. The Commission conducted mini-lab/focus group research with Lotto Texas players in Houston and Dallas. The Commission agrees that many players play Lotto Texas to win the jackpot or upper tier prizes.

One commenter indicated the proposed change to Lotto Texas is inherently unfair and blatantly immoral and is no doubt being pushed behind the scene by politicians who have no real interest in the economic welfare of everyday citizens. Based on the premise that the Commission has not provided details of a survey indicating that lottery players want a lotto game they are unlikely to win, the commenter believes it's all one big sham. The commenter would like to know who and how many people participated in the survey and the details of any information the Commission provided about the proposed game. The commenter believes that the Commission has consistently denied players all of the information they need to know about the various lottery products and therefore believes the Commission orchestrated the surveys in ways to achieve the desired outcome. The commenter indicated that while large jackpots do attract players who are otherwise smart enough not to gamble, the Commission's position that these periodic increases in sales justifies a harder to win lotto is dishonest, and the Commission knows it. The commenter believes that the Commission's statement that lottery players want fresh and exciting games is an outright lie. The commenter indicated that the players are not demanding a change, the Commission is. Agency response: The Commission disagrees. The Commission does not believe there is anything "unfair and blatantly immoral" about the proposed game. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games and to establish his/her own comfort level with the odds of winning. Mini-lab/focus group research was conducted with Lotto Texas players in Houston and Dallas. A summary of the research findings were presented in public at the January 31, 2003 Texas Lottery Commission meeting at the Commission's headquarters in Austin, Texas. This meeting was properly noticed in accordance with the Texas Open Meetings Act and the agenda for this meeting indicated that the Commission may consider proposing a new Lotto Texas rule. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Additionally, an interested person may request information from the Commission in accordance with the Texas Public Information Act for information that is not exempt from disclosure. The Commission complies with open government laws and will provide the information requested, to the extent such information is not exempt from disclosure. The Commission does believe that players want fresh and exciting games and believes past game changes and the sales increases associated with those changes illustrate that point. The Commission does not believe it is being dishonest about any aspect of this proposed game. Additionally, the Commission has promulgated the rule changes in accordance with the Administrative Procedures Act. As part of the rulemaking process, the Commission indicated its reasons for proposing the changes. The rulemaking process requires the agency afford interested persons a reasonable opportunity to comment and consider the comment received. This rulemaking afforded interested persons an opportunity to comment and the Commission considered such comment in making its decision. The Commission published the rule in the Texas Register, conducted two public comment hearings, and received public comment through mail and fax. The Commission believes players are demanding a change based on their spending and based on a review of sales trends.

One commenter indicated that he has played Lotto Texas since it started and he put his numbers in the computer to see how they are doing. The commenter further indicated he had to buy a new computer in 2000, then had to get new programs because they wouldn't do the date right. When the Commission added four balls, the commenter had to dump the drawing list, change it to 54 balls and put them back in. The commenter indicated it was a lot of trouble but he stayed with it in the hope that he would win some day. The commenter indicated he will stop playing if the changes are adopted. The commenter suggests keeping the current lotto game and also start the new one so people can play what they want. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. An independent statistician who analyzes all of the data from all of the drawings certifies the Commission's on-line game drawings to be random. Trending the numbers drawn in previous drawings is no indication that those same numbers or combination of those numbers will be drawn in future drawings. The Commission does not believe two in-state Lotto Texas games would be successful.

One commenter indicated that he plays the same numbers every time. The commenter would play even if the jackpot was only one million dollars or less. The commenter said he played when the Commission added the four balls but may have quit if the changes are made. The commenter indicated he was in two pools and plays several sets of numbers. The commenter suggested the Commission check with Louisiana and Colorado Lotteries. The commenter believes these states have a good lottery with 40 and 42 balls and they also have Powerball for the people that want to win big. The commenter indicated he just wants to win and the change will just make it harder. The commenter also suggests the Lotto Texas game go back to 50 balls and start the jackpot at one or two million dollars and join Powerball. The commenter indicated he would play both. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission has analyzed games currently being played in other states and the sales trends in other states. The Commission makes decisions on its games and how those games are performing in the Texas

marketplace. There are certain games that perform better in certain states or jurisdictions due to the demographics of the player base in that particular state or jurisdiction. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. The Commission disagrees with going back to the previous "50 balls" or the original game matrix. The original matrix (6-of-50) had been in place for approximately eight years and was no longer generating the jackpots, sales or revenue expected.

One commenter indicated that people are buying "hope" when the buy a lotto ticket. When the odds go up to "hopeless", all incentive to buy goes away. The commenter believes two things has caused interest to drop on the lotto: raising the numbers to 54 and the television stations no longer showing the actual drawings. The commenter people buy into the big pots but they buy more consistently on the $4 to $10 million levels. The commenter suggests that if the numbers are increased, wiser buyers will simply switch to a game with better odds and more money will go out of Texas to lotteries with better odds. The commenter advised not to change the game; instead, lower the numbers, get more winners and see if interest doesn't increase, not lessen. Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. The Commission believes interest in the Lotto Texas game has dropped due to the lack of higher jackpots and consistent wins at lower level jackpots. The Commission's drawings are televised via satellite and available for all Texas TV stations to broadcast. It is up to each TV station to decide if it wants to air the Commission's drawings. The Commission agrees that there are consistent Lotto Texas players that play the game regardless of the jackpot amount. The Commission believes that lower jackpots do not cause the excitement necessary for a lottery jackpot game to be successful. The Commission believes this proposed game will generate higher jackpots, increased sales and at the same time provide players with increased prize levels, improved overall odds of winning any prize and an approximate increase of 25% in the number of overall winners.

One commenter indicated the commenter wants the game to stay as it is. The commenter also indicated that the only change the commenter would want is to go from 25 annual payments to 20 annual payments. Agency response: The Commission disagrees. Mini-lab/focus group research was conducted with Lotto Texas players in Houston and Dallas and the proposed 5/44 +1/44 bonus ball matrix was tested against the current matrix. The research shows increased spending on the proposed matrix compared to the existing matrix. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. The Commission disagrees with changing the annual payments from 25 payments to 20. The Commission is not considering a change to the annual payment option in this rule making.

One commenter indicated he is at a loss to understand how a person would not see that $4 million is a life-altering experience and instead to hold out for only when the pot is "big". The commenter indicated if the Commission catered to that belief the commenter will stop playing and he suspects there more like him. Agency response: The Commission disagrees. The Commission has run advertising about $4 million being "a lot of money" and also produced point-of-sale for lottery retailers that conveyed the same message. These efforts were not successful in increasing sales or player excitement about lower level jackpot amounts. Lotto Texas players report that they want to play for high level jackpot amounts because those jackpot amounts get them excited and interested in the game. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games

One commenter indicated that the Commission gives the general public little, if any, consideration for being somewhat intelligent. The commenter believes the numbers are not drawn randomly; instead, the commenter believes the numbers are drawn 15 minutes after the "cut-off" ticket purchasing time" in order for the Commission to scan the entire to see what numbers are drawn and then draw a set of numbers that have not been purchased. The commenter believes that since the commenter has played the same numbers from the inception and has a hard time believing that these numbers would not have been drawn if the system was fair. The commenter believes the whole system is "fixed" and adding more numbers will only have a negative impact on sales. Agency response: The Commission disagrees. The Commission's on-line game drawings are witnessed by a Certified Public Accountant and certified to be random by an independent statistician who analyzes all of the data from all of the drawings. Playing the same numbers for any period of time does not guarantee that a player will win at any prize level. Wagering for the night drawings stops at 10:00 p.m. and the on-line game drawing takes place at 10:12 p.m. During this time period, Lottery Security staff verify that all wagering for the games being drawn that night have ceased and they then prepare to conduct the drawings broadcast. Lottery Security has an extensive checklist they follow before every drawing broadcast including pre-tests that ensure the machines and ball sets being used are returning random results. All of the Commission's drawings are open to the public. Based on research and sales trends, the Commission does not believe the proposed game will have a negative impact on sales.

One commenter suggested having all television stations show the numbers as they are drawn out makes people feel the game is honest and not rigged. The commenter also wants the stations to show the numbers when they are drawn and not have to wait until 10:25 to see the numbers, then just flash the numbers, not giving a person time to write them down or wait for the paper to come to get the numbers. The commenter believes that 54 numbers makes the odds to great for anyone to win very often and that more winners makes more players. Agency response: The Commission agrees with the commenter about TV stations showing the Commission's drawings. The Commission's drawings are televised via satellite and available for all Texas TV stations to broadcast. It is up to each TV station to decide if it wants to air the Commission's drawings. Some TV stations opt to show a graphic during their news broadcast that shows the numbers drawn rather than airing the entire drawing broadcast. The Commission disagrees about 54 numbers making the odds too great for anyone to win. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. The Commission believes that the proposed game will create an approximate increase of 25% in the number of overall winners.

One commenter, commenting on behalf of his company, indicated the Commission should not make the change as proposed but instead the commenter offers an alternative proposal. The

commenter indicated that the alternative proposal will have as profound an impact on lottery organizations' sales and income as did the introduction of online systems and multi-priced instant lottery tickets; estimates increasing State income through FY 07 from the projected ticket sales; is a tool for Commission game development that will restore player value and excitement to lotto play regardless of the matrix chosen by the Commission-minimum $16-$20 million jackpot prize pools for weekly 6/54 draws and $50 million for holiday draws, or $25 million weekly, $60 million holiday draws or a 5/44 +1/44 matrix; has a basis, methodology and player marketability that will rapidly be a worldwide industry standard whose benefits and implementation are irrefutably supported by both industry and Commission play and other gaming segments. The commenter suggests that his company's proposal will be provided to the Commission, transparently to Texas players, at no cost and no risk supported by an absolute AAA+ guarantee and participation by world leaders in the private sector. The commenter believes the proposed rule is driven by the overwhelming limitations of the existing pari-mutuel prize structure of the worldwide lotto industry. The commenter believes that adoption of the proposed rule on a comparative basis propels Lotto Texas to the worst odds State lotto game in the nation. The commenter suggests that its only escalation beyond that would be Texas joining Powerball or MegaMillions and that move would require either of these lotteries to move to 150-170 million tone odds. The commenter does not believe either of these alternatives is something the Commission wants for the Texas players who have loyally supported lotto play over the years. The commenter indicted that the proposed matrix change is not warranted given Lotto Texas sales and play characteristics; is not justified by any meaningful comparison to other jurisdictions; and implementation will cause an accelerated deterioration of both confidence and play in Lotto Texas. The commenter believes that all discussions and media regarding the matrix change has been specifically focused on only two claimed player benefits to be achieved-higher jackpots and 25% more wining tickets. The commenter believes there will be a negative residual effect of this change on future Texas lotto play and therefore, believes a full assessment of this proposed matrix change should be evaluated. The commenter indicated that he has conducted a comparison of all existing State lotto games and odds to win each on a $1.00 play, implementing a 5/44 + 1/44 matrix would give Texas lotto players the worst odds lottery in the nation at 47.8 million to 1. The commenter also indicated that his company evaluated the total sales volume in Texas lotto play in combination with characteristics of play and Texas population base versus other jurisdictions. The commenter applies two states' data, California and Florida, to conclude there is no reason that emerges that would justify the Texas proposal. Instead, the commenter suggests the proposed change is probably a reaction to the abnormal win cycles experienced by the Texas Lottery in calendar year 2002. The commenter suggests that this is what really should be looked at, not just dismissing it with an arbitrary matrix change. The commenter agrees that the proposed matrix change should generate larger jackpots as a consequence of almost doubling the odds to win. The commenter also agrees that the added prize levels of the proposed matrix change should add 25% more winning tickets. The commenter believes that in fairness, evaluation should extend to the consequences of this matrix change beyond these two publicized aspects. The commenter is critical of reliance on the same people who projected three to four jackpots between $65 million and $100 million during a 52 week period to project jackpot behavior for this proposed matrix. The commenter believes that what is really being proposed is the exchange rate is being changed to effect an exchange of $.52 for every $1.00 from Texas players from the current exchange of $.55 for every dollar. The commenter believes Texas players would take a 5.5% "hit" on their total return. The commenter agrees with this change given the budget situation within the State. The commenter does not disagree on the matrix prize levels producing 25% more winning tickets but believes there is also a very negative aspect to the matrix proposal-a 42% reduction in average prize awards that has not been made a part of the discussion process for this matrix change. The commenter indicates that what the new matrix would produce is a virtual doubling of the rollover cycles and one other major effect-it would cut the number of jackpot winners in half versus the current game. The commenter believes that there will be a deterioration in core play that will accelerate the problems the lotto game has not only through this new matrix but or future play and changes as well. The commenter suggests an alternative that the commenter believes addresses the changing dynamics of lotto play worldwide. The commenter submitted information that the commenter believes shows the effects of substituting a probability based lotto prize structure, i.e., a large up-front guaranteed minimum jackpot prize pool in expectation of a level of future ticket sales within a rollover or win cycle, and, with these jackpot levels, being able for the first time in lotto play to offer multiple priced tickets within one lotto game. The commenter believes the commenter's proposal provides a probability based prize structure that gives the player immediate value for his purchase, heightened excitement and attendant increased play, and its marketability is irrefutably proven both in multi-priced instant lottery play and in other gaming applications. The commenter also believes that the commenter's proposal provides a multiple priced ticket entry that will dramatically increase Lottery and State income as proven by the incremental revenue generated by multi-priced instant tickets-the single greatest contributing factor to overall Texas Lottery profitability in the past 4 to 5 years. The commenter reiterates opposition to the implementation of the proposed matrix. The commenter believes the same economic benefits to the State and all other participants can be achieved by retaining the current 6/54 matrix with a $16 to $20 million minimum prize pool for weekly draws and four $50 million minimum holiday draws. Agency response: The Commission disagrees. The Commission believes that decreasing sales and lack of player interest and excitement due to consistent wins at the lower level jackpots does warrant a matrix change at this time. The Commission disagrees that the proposed matrix will cause deterioration of confidence and play in Lotto Texas. Research conducted shows increased spending on the proposed matrix compared to the existing matrix. The Commission disagrees that data from California and Florida conclude there is no reason to justify the current proposal. The Commission makes decisions on its games and how those games are performing in the Texas marketplace. Focus group research tested matrices that were similar to the current matrices in California, Florida, and New York. Trends experienced with the performance of a specific matrix in Florida or any other state are no guarantee that similar results would be experienced in Texas. The Commission believes that it is necessary to strengthen the in-state lotto jackpot game, as there is potential legislation that would authorize the commission to introduce a multi-state game such as Powerball or Mega Millions. While the Commission is uncertain as to whether clear statutory authority to operate or participate in a multi-state game will be enacted, it believes the in-state lotto game should be as strong and viable as possible to minimize cannibalization if a multi-state game is authorized.

The Commission disagrees that the discussions and media regarding the matrix have been focused on higher jackpots and the approximate 25% increase in the number of winning tickets. The Commission feels there are other positive features of the proposal. The overall odds of winning the proposed game are 1 in 57 as compared to 1 in 71 for the current game. The familiarity with bonus ball style games is also a positive feature. The Commission disagrees with the commenter's criticism of reliance on the same people who previously noted similar jackpot projections. The Commission relies on numerous sources of information and has worked with the contracted vendor responsible for sales and jackpot projections for the proposed matrix. In addition, the Commission's independent statistical consultant has reviewed and calculated the odds needed at the jackpot tier to create longer roll cycles and generate higher level jackpots. The Commission disagrees with the comment regarding the negative aspect of the reduction in the average prize awards. Research shows that players play the Lotto Texas game to win large, multi-million jackpot prizes. That is what players want from the Lotto Texas game and that is how the game is positioned in the product mix. The proposed matrix was tested against the current matrix and the proposed matrix was the favorite choice among research participants. The main goal in the design of the proposed matrix was to generate higher jackpots that would create excitement and revitalize the game. The Commission agrees that the proposed game should provide larger jackpots and add 25% more winning tickets. The Commission does not agree with the commenter's suggested game alternative. The Commission does not believe that multiple priced tickets within one game are a positive feature as a previous on-line game with a $2 price point was not well received in the marketplace. The Commission feels the game alternative is confusing and would be difficult for retailers and players to comprehend. Research shows that players are not interested in playing for 25%, or 50% of a jackpot prize as suggested by the commenter. The Commission is confused as to how the prize pool is funded for the game alternative and also about why the commenter would put forth a suggested game that has odds of 1 in 95.6 million when the commenter previously criticized the commission for considering a game with odds of 1 in 47.7 million. The Commission does not understand how the commenter shows increasing revenue to the state, retailers, Lottery and GTECH each year, over a five year period, even as projected sales for each of those years decreases.

One commenter indicated that twice previously, the Commission put forth two proposals to increase the odds of Lotto Texas. The first was a "bonus ball" style matrix of approximately 25 million to 1 and it was rejected after minimal pubic comment. The second proposal was put forth five months later and was adopted, the current 6 of 54 matrix. The commenter indicated that the Commission is promoting this matrix to decrease the number of jackpot winners and thus increase jackpot peaks, encouraging more money to be spent on the game. The commenter believes this is a false business model because it unfairly encourages consumers to spend more money for less return (or chance of return) and it is indisputable that "more ways to win" was one of the design criteria for this new game. The commenter indicated that because two of the new prize tiers are guaranteed $5 each, and one is guaranteed $3, the net effect is to create more unclaimed prize money, both from excessive percentage of prizes $5 and below, and from the increased complexity of player ticket validation. The commenter also believes that the matrix is obviously designed to allow positive statements to be made even though they contradict the value chart presented in the commenter's comments. The commenter wants the Commission to review the following facts: the odds to win any prize do reduce from 1 in 71 to 1 in 57, however the dollar value toward winning the jackpot (exclusive of rollover) as well as the aggregate value of the lower prizes decreases in relation to both the 6/50 and 6/54 matrix; the prize level does not increase from 4 to 8, rather there are 2 guaranteed $5 levels-for a total of 7 levels; and, representing 25% more overall winners, while the dollar return to the consumer (exclusive of rollover) has decreased as shown on the comments submitted by the commenter. The commenter believes the Commission is making misleading statements about the proposed game to influence future ticket purchase. The commenter believes this appears to be a violation of §466.110, Prohibited Advertisements. The commenter believes the Commission is relying on a false business model and when players see fewer jackpots being won and when neither they nor others they know have positive winning experiences, sales will decrease. The commenter believes the matrix is doomed prior to implementation and bases his conclusion on performance of the 6/50 matrix that lasted 8 years. The commenter suggests that the Commission has a fiduciary responsibility to insure the lack of negative consequences of their actions-especially since a monopoly is being operated based on the police powers of the state, which should the public welfare foremost. The commenter also offered comments on Powerball. The commenter indicated that the very high odds Lotto game and Powerball has the "bonus ball" element now being proposed is no match in our region for Lotto Texas. The commenter also urges that everyone wishing to have an informed opinion and especially those in decision-making positions do their own research. The commenter further indicated there are a lot of figures being touted that may be well intended and assumed to be true, that on close inspection would make Enron proud. The commenter indicated that the figures used came from GTECH and it has its own agenda and are not an impartial source. The commenter also indicated that the Commission did a study in 1998 and determined that, at most, entry into a multi-state game would increase sales by 1% and that this more than offset by loss of local control. The commenter wants the Commission and the legislature to make the Commission a consumer responsive organization. The commenter believes that regarding the Commission and all other forms of gambling, the Commission should pass two tests: test of negative impact on society and test of valid business model. Agency response: The Commission agrees with the commenter regarding previous rule proposals. The Commission agrees that this game proposal is generated to increase jackpots and therefore, increase sales and revenue to the State of Texas. The Commission disagrees that the proposed game is a "false business model." The Commission believes it is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission believes that there are more ways to win in the proposed game. The Commission believes all of the following to be true regarding the current and the proposed game: the current game has four prize levels; the proposed game has eight prize levels. The proposed game has improved overall odds of winning any prize of 1 in 57; the current game has overall odds of winning any prize of 1 in 71; the proposed game will generate an approximate increase of 25% in the number of overall winners; there are three guaranteed prize levels in the proposed game; the prize pool for the proposed game is 52% of sales; the prize pool for the current game is 55% of sales. The Commission disagrees that the net effect is to create more unclaimed prize money. The Commission does not create unclaimed prize money. Players not cashing in winning tickets during the 180-day validation period creates unclaimed prizes. The Commission does not believe there will be

"increased complexity of player ticket validation." The Commission already operates a bonus ball style game, Texas Two Step. Lottery players in Texas are familiar with this play style. Lottery players are also familiar with bonus ball play style games due to the awareness of multi state games like Powerball and Mega Millions. The Commission disagrees that sales will decrease in regards to the proposed rule. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. The Commission disagrees that proposed game is "doomed prior to implementation." Mini-lab/focus group research was conducted with Lotto Texas players in Houston and Dallas and the proposed 5/44 +1/44 bonus ball matrix was tested against the current matrix. The research shows increased spending on the proposed matrix compared to the existing matrix. With "likelihood to play" it was reported that this game was the more positive choice when choosing a change from the current Lotto Texas matrix. The Powerball game is not the focus of this rule making. Additionally, the Commission disagrees with comments regarding the assertion that the Commission is making misleading statements about the proposed game. The Commission has indicated that the changes are intended to generate revenue for the State. The purpose of the Commission is to operate the state lottery to generate revenue for Texas. The Commission's focus is on performance of the state lottery and ways the lottery games can be enhanced or created to for successful performance of the state lottery. The Commission believes the changes to the Lotto Texas game will result in a positive consequence-increased revenue to the State. The Commission believes the Lotto Texas game is intended for players who want big jackpots. The changes to the game are intended to create opportunities for big jackpots.

One commenter appeared at the March 7, 2003 hearing and also submitted written comment. The commenter indicated that his family won't play as much even when the pots get bigger because of the changes. The commenter indicated that he might get a quick pick or two when the pots get over $20 to $30 million range, a little bit different than getting $5 of the quick picks every time it's over $10 million. The commenter indicated his family believes in the philosophy that you can't win if you don't play but the Commission is trying to take that option away from the serious players. The commenter believes that he might as well sit outside in the yard during thunderstorms playing with tin poles to see what numbers come to mind. The commenter represents a family of four players and also a group from work of about 10 or so. The commenter suggests that asking for consumer support to contact the appropriate representatives to push the issue to add the Powerball game. The commenter suggests as another option to just cut Lotto Texas back to one drawing a week, allowing more people to go and spend just the $5 during the week. The commenter indicated that his family was spending approximately $300 a month to play all the Texas Lottery games and when the jackpots went up, they would buy additional tickets outside of their regular allotted format. The commenter indicated with the winning percentage being so low, they cut back due to lack of return profits. The commenter suggests finding ways to televise the drawings and more people would be willing to part with their money. The commenter is also in a group from work and they play faithfully when the pots are over $10 million or above the limits they set. Other people join in at $20 and $30 million levels. The commenter indicated that they can't afford to put in $10 each on a weekly basis to maybe win back $5. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games and to decide on the amount of money he/she feels comfortable wagering. The Commission agrees that "you can't win if you don't play." The Commission disagrees that it is trying to take "that option away from the serious player." The Commission believes that the Lotto Texas game should be changed at this time due to the lack of higher jackpots and decreasing sales that have been experienced with the current game. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. The Commission disagrees that a drawing once a week would be a benefit. This would be confusing for players and retailers and would not create the customer/player traffic that retailers are accustomed to with the current twice-per-week drawing schedule. This would also slow down the growth or building of jackpots. As Lotto Texas jackpots grow, so do Lotto Texas sales. Slowing this process down would not be beneficial for sales. The Commission's drawings are televised via satellite and available for all Texas TV stations to broadcast. It is up to each TV station to decide if they want to air the Commission's drawings. The Commission agrees that "other people join in at $20 and $30 million levels." The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently.

One commenter appeared and offered comment at the March 7, 2003 hearing, submitted written comment on March 14, 2003 by mail, and sent via facsimile additional comment on March 16, 2003. When the commenter submitted her comment on March 14, 2003 and March 16, 2003, she also included comment she had received from other persons. The comment from other persons is characterized by the commenter as responses to feed back forms the commenter placed on her web site for completion by other people. The commenter indicated that she placed a feedback form on her web site because she believes the Commission has done only the minimum as required by law to receive comment. The commenter indicated that if the Commission truly wanted comments, the Commission would have used other methods to receive comment such as its web site, its *Winning* publication, *PlayerConnect* email, and its retailers to generate comment. The commenter believes this was not done because the Commission knows this is not what the people want. She further indicated that she did this because she feels strongly that the people of Texas have a right to know what's going on and it was obvious to her, the Commission intended to keep this rule change the best kept secret in Texas. In connection with the comment the commenter collected from other people, the commenter also indicated that she had placed petitions in lottery retailer locations and a GTECH representative threw them in the trash at one retailer location. The commenter indicated she didn't need those petitions anyway because she had over 3,000 comments or letters written that she intended to give the Commission from the people but not at the time she testified at the March 7, 2003 hearing. The commenter indicated that she did not appear at the hearing because it would do any good but to go through the process. The commenter was critical of how comment in connection with past rulemakings was summarized. The commenter also indicated she had no faith in the Commission since the Commission proposed the rule and believes the Commission's interest only lies with the State and the income that could be derived as a result of such a game being played and offered in Texas. The commenter indicated she has a little faith in Texas legislators because they're voted into office and when they hear from people in their areas, they'll listen. The

commenter also indicated she has a little bit of faith in the retailers, they care about their customers and their competition is fierce. The commenter referenced intent in connection with the various lottery on-line games. The commenter indicated that there's not a person in Texas who goes to the store to buy a lotto ticket that doesn't intend to win the jackpot. The commenter suggested that nobody goes to buy a lotto ticket with the intention of winning 3 of 6 numbers, 4 or 5 of 6 numbers. The commenter indicated the players' share of sales is wasted on meaningless prizes. The commenter believes the Commission wants to offer such prizes ($3 and $5) is to enable the Commission to advertise how many "winners", thus, the Commission is enticing sales to the poor and gullible. The commenter suggested that the Commission should be forced to clarify what the players "won" in their advertising strategies to increase sales. The commenter indicated that another reason the $3 and $5 prizes are being offered is so the Commission can promote this rule change as being "good". The commenter indicated that the Commission has stated, "an increase of 25% more 'overall' winners" yet-the truth is, the allocated funds that "more winners" will divide has been reduced. The commenter believes this is misleading and that no one should get $3 for matching 2 numbers-a total waste and self-serving. The commenter believes that if they don't hit the big one, then it's nice to have the small one; but, that's not their intention when they buy the ticket. They buy these tickets in good faith, in honor and belief in the integrity of the Texas Lottery. The commenter believes that when the Texas Lottery started out, they had good intentions, paid fairly, paid right, didn't hurt anybody. The commenter indicated that the Commission started changing the games in 1999 because sales went down a bit and leveled off. The commenter believes that's when the Commission started going downhill. The commenter believes that the sole intent of this rule is to make it impossible or very difficult for anybody to win the jackpot. The commenter indicated that the Commission decided the only way it can make more money is to give the consumer a game the consumer cannot win until $40 to $50 to $60 million dollars in sales in a three-day period are reached. The commenter believes this is very wrong. The commenter indicated the Commission will make more money if the Commission adopts the rule. The commenter indicated that sales will initially drop down to about $2 million. The commenter further indicated that when the jackpot reaches the $30, $40, $50, $80 million level, the Commission will make enough to offset that where it averages out where you'll make more money. The commenter believes the Commission's intent to give the people an unfair game with a population of 21 million and odds of 47.7 million to 1 is terrible, wrong. The commenter believes that by offering such a game, the Commission is not only taking advantage of the consumers but retailers as well. The commenter indicated the Commission is taking advantage of the retailers with this rule change as well. The commenter indicated that if this rule change is implemented, there will be fewer winners and for retailers, this means fewer retailers will receive bonuses. The commenter believes retailers will make less money until the jackpot rises but the additional revenues will then be used to cover overtime, added staff and security. The commenter believes the sales increase might offset their losses for stolen inventory, property damage that could result from an over abundance of customers and lawsuits derived from employees who might be killed or injured by criminals as the stores will become a prime target for burglaries due to the suspected value of cash on hand. The commenter indicated that a retailer will not receive more than $500,000 for selling a winning ticket-yet the jackpots can and will be $60 million to $100+ million-just another way for the Commission and GTECH to come out ahead at the expense of the hard work provided by those that serve the Commission. The commenter believes that, worse yet, the Commission will be asking 17,000 retailers to sell (scam) the majority of its customers a useless piece of paper. The commenter believes there are only two organizations that will come out ahead with this plan, the State and GTECH. The commenter indicated that because she's so opposed to this aspect of the game, the other points in question are minute to her. The commenter indicated she opposes the proposed change for Lotto Texas for a number of reasons. The commenter is opposed to the requirement that players choose their option for payment in the event the jackpot is won at the time of purchase of the ticket. The commenter believes the only reason the Commission doesn't want to offer the option at another time is because the Commission is going to take advantage of somebody who accidentally marks his ticket with an annual pay and can't change his mind, so the Commission gets to purchase the annuities. The commenter believes the players aren't always receiving everything that's been invested on their behalf. The commenter also believes the rule as written doesn't guarantee the players their percentage of sales. The commenter indicated that the proposed rule allows the State to keep more than the State's share of sales. The commenter indicated that the Commission is withholding a percentage of sales in reserve just in case it's needed to pay the guaranteed prizes while the Commission advertises the game to be pari-mutuel. The commenter indicated that the proposed rule does not protect the people, nor does the current rule. The commenter indicated that both rules allow the Commission to retain a portion of the players' share of sales via the reserve fund and the guaranteed prizes. The commenter indicated that the only way players would ever be guaranteed to receive their share of sales is if all prizes were "pari-mutuel" which they are not-yet the game is promoted as such. The commenter believes this is false advertising. The commenter believes that the Commission overpaid people. The commenter is opposed to not guaranteeing the players their share of money. The commenter doesn't want the rule to allow rounding down of prizes. The commenter indicated that she had done everything in her power to stop the people from talking about the other on-line lottery games and to address only the proposed Lotto Texas rule. The commenter indicated that other commenters give ides or suggestions and some of the suggestions are not possible. The commenter indicated that the Commission doesn't want comment and does anything in its power to keep from getting comment. The commenter criticized the Commission's web site because the proposed rule isn't visible on the web site and people have to click to Legal to locate the rule. The commenter further indicated the Commission's intent is to make money at any cost, by any means, no matter if it is robbing the people and giving the people an unfair game. The commenter wants to know why they can't have an honest lottery-and one with integrity-integrity being defined as offering the people a "fair" game of chance that might enhance a citizen's lifestyle if won and the proceeds should be split 50/50. Agency response: The Commission agrees that when people play Lotto Texas, they are playing to win the jackpot. The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these desires. The Commission believes all of the following to be true regarding the current and the proposed game: the current game has four prize levels; the proposed game has eight prize levels; the proposed game has improved overall odds

of winning any prize of 1 in 57; the current game has overall odds of winning any prize of 1 in 71; the proposed game will generate an approximate increase of 25% in the number of overall winners; there are three guaranteed prize levels in the proposed game; the prize pool for the proposed game is 52% of sales; the prize pool for the current game is 55% of sales. The 5/44 + 1/44 player benefits are: higher jackpots, increased number of prize levels, overall odds of winning any prize are 1 in 57, approximate increase of 25% in the number of overall winners and familiar bonus ball play style. The Commission disagrees that it is trying to "make it impossible or very difficult for anybody to win the jackpot." The Commission believes that the Lotto Texas game should be changed at this time due to the lack of higher jackpots and decreasing sales that have been experienced with the current game. The Commission agrees the proposed game will increase Lotto Texas sales and therefore, increase revenue to the State of Texas. The Commission does not agree that the proposed is an "unfair game." Mini-lab/focus group research was conducted with Lotto Texas players in Houston and Dallas and the proposed 5/44 + 1/44 bonus ball matrix was tested against the current matrix. With "likelihood to play" it was reported that the proposed game was the more positive choice when choosing a change from the current Lotto Texas matrix. The Commission disagrees with the comments regarding retailers. The Commission disagrees that it is asking retailers to "scam" customers. The Commission is proposing a change to the Lotto Texas game that will increase Lotto Texas sales. The more Lotto Texas tickets retailer sell, the more commission they earn. The Commission disagrees with the comment that the "rule as written doesn't guarantee the players their percentage of sales." 52% of draw sales are allocated to the prize pool for each Lotto Texas drawing. Of that 52%, 1.93% is allocated to a prize reserve fund. That prize reserve fund may be increased or decreased by paying Lotto Texas prizes. The Lotto Texas prize reserve fund is used only for the Lotto Texas game. A reserve fund is a common practice on jackpot style lotto games in some states. Other states have the ability to utilize unclaimed prizes to achieve the same objective. Unclaimed prizes are not available to the Commission for this purpose. The Commission disagrees with the commenter regarding the pari-mutuel prizes. A pari-mutuel prize is a prize category or prize level that is divided equally among multiple winners. The proposed game has five pari-mutuel prize levels and three guaranteed prize levels. The Commission conducted an investigation regarding the commenter's allegation that the Commission "overpaid" people. The report was made public and a copy was provided to the commenter. The report indicated that winners were paid in accordance with the rule and applicable procedures. The Commission rounds down prizes so prizes can be paid in multiples of whole dollars. This has been the Commission's standard practice for over ten years. The Commission does not pay prizes in dollars and cents. The Commission disagrees that players do not receive "their share of the money." The prize pool was discussed above. The Commission agrees that "commenter's give ideas or suggestions and some of the suggestions are not possible." Many of the commenter's comments are redundant to other comment submitted and summarized in this rule. The agency responses provided to that comment is incorporated here as if fully set out. With regard to the process use to promulgate this rule, the Commission, as a state agency, must comply with the rulemaking procedural requirements of the Administrative Procedures Act. The Commission, in promulgating this rule, did so. The proposed rule was authorized by the Commission for publication at its noticed January 31, 2003 Commission meeting. The proposal was published in the February 14, 2003 issue of the Texas Register. The Commission afforded interested persons a reasonable opportunity to comment. Comment was received, has been considered, summarized in this document, and agency responses to the comment have been provided.

As previously indicated, comment was also submitted in the form of responses to a feedback form, such form generated by another commenter and submitted by this commenter. The generic form appears to allow a person to indicate whether the person is opposed to of the proposed rule to increase the odds to 47.7 million-to-one and the play style (5/44 & 1/44-88 balls total) because the person plays to win the jackpot or in favor of the proposed rule because the person would like to see fewer jackpots so the pots can climb; to indicate whether the style of play is discriminatory towards the consumer-it increases the complexity of play and only serves to increase the unclaimed prize fund; and whether the person represents a group or an organization. With regard to forms that indicated the person identified on each of the forms represents a group or association, in most of the completed forms, the form does not indicate the name of the group or association. The majority of the forms submitted indicated that the person completing the form is opposed to the proposed rule to increase the odds to 47.7 million-to-one and the play style (5/44 & 1/44-88 balls total) because it makes winning the top prize harder to win and the person plays to win the jackpot and that the person believes this style of play is discriminatory towards the consumer-it increases the complexity of play and only serves to increase the unclaimed prize fund. Another group of feedback forms completed by persons appear to have additional optional responses. These subjects and respective comments are: "Offering a powerball type game & increasing the odds of winning the top prize: I'm OPPOSED to the odds, play style and 88 balls proposed because it makes winning the top prize harder to win. I play to WIN the jackpot."; "Selecting payment options at time of draw: I oppose this because it's a decision that should be made after players have had an opportunity to see what's best for them as individuals."; "Allocating a set percentage of sales to pay guaranteed prizes: I oppose having a set percentage of sales allocated for guaranteed prizes. This could result in short changing the players and/or the state. A risk I oppose."; "About the prize structure: I oppose the prize structure too. The prizes offered are meager sums and an insult to lottery players."; and, "Rounding down prize amounts: I oppose 'rounding down' prize amounts. Each drawing is an independent event and prizes should include the cents we won for the draw." Many commenters submitted comment in this format by selecting one or more of these optional responses. While some of the commenters indicated opposition by clicking on the prepared responses created, in other categories these commenters indicated, in connection with the subject "About the prize structure", the response "I like the prizes offered." Some other commenters indicated, in connection with the subject "Selecting payment options at time of draw", the response "I'm FOR having to make this decision before I win". The Commission disagrees with the comments indicating opposition to rule changes in the form of the standardized statements included in the feed back form based on the reasons stated for the opposition for the reasons the Commission has provided as its agency response in this document. The form also allows a person to submit additional comment. In connection with this additional comment, agency response will follow after the specific comment. This additional comment consisted of commenters indicating: Comment: wanting to keep the Lotto Texas game the same; Agency response: The Commission disagrees. The Commission believes that the Lotto Texas game should be changed at this time due to the lack of higher

jackpots and decreasing sales that have been experienced with the current game. Comment: not wanting a huge jackpot but winners of smaller jackpots more often; Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: not playing anymore or reducing the level or amount of money spent on the game or all games; Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. Comment: inquiring as to what numbers will be for a future drawing, making the 2nd ball 1 to 25; Agency response: The Commission's on-line game drawings are certified to be random by an independent statistician who analyzes all of the date from all of the drawings. No person knows what the numbers will be for a future drawing. Comment: the prizes are just right for Texas Two Step but the lottery needs to pay more for three numbers and this would increase the tickets sold; Agency response: The Commission disagrees. This rule making is focusing on the Lotto Texas game. Comment: there should be more chances to win with lower prizes; Agency response: The Commission agrees. The proposed game increases the number of prize levels from four prize levels to eight prize levels. The proposed game also has improved overall odds of winning of 1 in 57. Comment: make it easier to win the jackpot; Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: unclaimed prizes should go back into the jackpot; Agency response: The Commission does not have the authority to decide how unclaimed prize money should be used. State law requires that unclaimed prize be deposited to the credit of the Texas Department of Health state-owned multi-categorical teaching hospital account or the tertiary care facility account. Comment: it's already too hard to win the jackpot; Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: the Commission is already too greedy and this will only make it more so; Agency response: The Commission believes its role is to generate revenue for the State. With regard to this responsibility, the Commission must review game performance and make decisions regarding such performance. To that end, the Commission reviewed the performance of the Lotto Texas game and determined the game was not performing at the levels the Commission expected. The Commission conducted player research to determine the best approach to enhance the game in order to generate revenue. The Commission proposed the new rule for public comment, has received comment, and has considered the comment received. The Commission believes the process has been fair. The Commission also believes the new features of the Lotto Texas game do afford meaningful opportunities to players to win prizes, including the jackpot prize. Comment: inquiring why the Commission just doesn't join Powerball and get rid of Lotto Texas because the lottery was sold as a way to keep property taxes from increasing while funding schools and this hasn't happened; Agency response: The Commission disagrees with the comment. The purpose of the Commission is to operate the state lottery to generate revenue for Texas. Therefore, the Commission's focus is on performance of the state lottery and the games currently authorized by the State Lottery Act. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. Comment: the Texas Senate has certain officials that are against the lottery because of their religion and are purposely trying to ruin the Lotto program; Agency response: The Commission disagrees with the comment. The Commission makes its decisions based on game performance and its responsibility to generate revenue for the State. Comment: wanting Lotto Texas to go back to one drawing on Saturdays; Agency response: The Commission disagrees. This would be confusing for players and retailers and would not create the customer/player traffic that retailers are accustomed to with the current twice-per-week drawing schedule. This would also slow the growth or building of jackpots. As Lotto Texas jackpots grow, so do Lotto Texas sales. Slowing this process down would not be beneficial for sales. Comment: just another way that Lotto Texas holds onto more of the money and sales have dropped because of less play since the changes were made to the game; Agency response: The Commission is confused by the comment that "Lotto Texas holds onto more of the money." The Commission agrees that sales have dropped and that is the reason the Commission believes that the Lotto Texas game should be changed at this time. The Commission believes the proposed matrix will generate higher jackpots and therefore increase Lotto Texas sales and corresponding revenue to the State.

Additional comment in this feedback format with agency response to comment is the following: Comment: it is unfair to punish regular players in an attempt to attract those who play only if the Lotto is a big number, the solution lies in providing more publicity and more media attention to those that do win; Agency response: The Commission disagrees. The Commission cannot force jackpot winners to participate in publicity or speak to the media. The Commission does not feel it is punishing any players. The Commission believes there are player benefits in the proposed game. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: go back to 50 numbers; more people will play the games of Texas if the amounts and frequency of play are increased; Agency response: The Commission disagrees. The original matrix (6/50) had been in place for approximately eight years and was no longer generating the jackpots, sales or revenue expected. Comment: maybe the game is boring-questions whether there are different types of high end games; Agency response: The Commission agrees that lack of higher jackpots may have some players bored. The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently. Comment: haven't played the Lotto recently but once in a while when the jackpot is high, will play; better to guarantee having a $4 million prize and a winner each week; Agency response: The Commission agrees that not only the commenter but many other players will only play when the jackpot is high. The Commission disagrees about guaranteeing a $4 million prize winner each week. The Commission cannot guarantee a winner. The Commission's on-line game drawings are random. Lotto Texas would not be a rolling jackpot game if it had a winner every week or every draw. Lotto Texas is a jackpot driven game. Sales increase as the jackpot increases. Preventing the jackpot from rolling or increasing would be detrimental to sales and to the main intent of the game. Comment: need more winners even if it means lowering the top prize money; Agency response: The Commission disagrees. The proposed game is expected to

generate higher jackpots and at the same time there will be an approximate increase of 25% in the number of overall winners. The Commission feels this proposed game will achieve both objectives. Comment: the Commission is corrupt, when any organization gets too top heavy in management, loss of profit is always the issue; Agency response: The Commission disagrees with the comment. The issue is not loss of profits; instead, the issue is operating a state lottery to generate revenue for the State. Comment: increase the amount to $10 million from $4 million, increase the numbers to 60, and more people will want to play; Agency response: The Commission disagrees. Sales would not support a starting jackpot of $10 million and would create too much risk for the Commission. The mini-lab/focus group research did test a one field, 6/59 matrix. Players were asked to rate each matrix on various attributes as well as report potential spending on each matrix. All attributes and spending were asked of and compared to the current Lotto Texas matrix. Of the matrices tested the most beneficial matrix change is the 5/44 + 1/44, two-field matrix. With "likelihood to play" it was reported that this game was the more positive choice when choosing a change from the current Lotto Texas matrix. Comment: reducing the jackpot amount will reduce the amount of players; Agency response: The Commission agrees. The Commission intends for the starting Lotto Texas jackpot amount to remain at $4 million for the proposed game. Comment: make new games that pay moderate sums; word of mouth and people actually winning stimulates participation; Agency response: The Commission agrees that "word of mouth and people actually winning stimulates participation." The proposed game has improved overall odds of winning of 1 in 57. The proposed game will also have an approximate increase of 25% in the number of overall winners. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires.

One commenter indicates that it is an outrage to put the odds of winning the Lotto at 1 in 47 million. The commenter further indicated that she plays now even at low levels hoping she might stand an outside chance of winning. The commenter wants it fun to play, not impossible to win. Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The Commission agrees that it wants the Lotto Texas game to be fun to play. Sales trends show that players become excited and interested in the game when there are large jackpots. The Commission disagrees that the proposed game will be impossible to win.

One commenter indicated that it is a stupid idea to make it harder to win so that eventually there may be a larger lotto prize. The commenter further indicated that the Commission should realize that making it harder doesn't work, that the Commission has done that and it didn't work. The commenter suggests the Commission try a different approach. Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The Commission believes that the Lotto Texas game should be changed at this time due to the lack of higher level jackpots and decreasing sales that have been experienced with the current game. The Commission believes the proposed game will generate higher jackpots. Sales trends show that players become excited and interested in the game when there are large jackpots. The Commission believes this is the correct approach based on mini-lab/focus group research, sales trends and industry experience.

One commenter, writing on behalf of 30 friends and business associates, indicates that the latest change for the lotto really sucks. The commenter further indicates that that if the change is made, the group will never play the lotto again. The commenter also indicates that the recent changes to Cash 5 are a joke and the group believes Cash 5 should return to the original method. The commenter's group also questions the drawing time changed so now the television stations can't televise the actual drawing, the phone number to check winning numbers has been deleted, and whether there's something shady going on in the lotto. Agency response: The Commission disagrees. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission disagrees with the comment about the Cash Five game. The Commission has experienced a substantial sales increase (over 20%) in the Cash Five game since making the changes to the Cash Five game. The drawing time was changed to make it more convenient for TV stations to air the drawings. The Commission's drawings are televised via satellite and available for all Texas TV stations to broadcast. It is up to each TV station to decide if they want to air the Commission's drawings. The Commission's 1-900 results number was discontinued due to provider indicating it would discontinue the billing services previously provided and due to projected costs associated with continuing the number. Players can obtain drawing results at the Commission's Web site, in local newspapers and at Texas Lottery retail locations all around the state. The Commission disagrees that there is something "shady going on in the lotto."

One commenter suggested legalizing casino gambling as a way to increase revenue for Texas. Agency response: The Commission disagrees with the comment. The purpose of the Commission is to operate the state lottery to generate revenue for Texas. Therefore, the Commission's focus is on performance of the state lottery. The Commission has no jurisdiction as to decisions regarding the legalization of casino gambling.

One commenter indicated that adding more numbers isn't going to help. Instead, the game needs more winners, small or big. Agency response: The Commission disagrees. The Commission believes the proposed game will generate higher level jackpots and therefore, increase Lotto Texas sales and revenue to the State of Texas. The Commission agrees that the game needs more winners. The new game will improve the overall odds of winning any prize to 1 in 57 and provide and approximate increase of 25% in the number of overall winners.

Two commenters attached a newspaper clipping from the Tyler Morning Telegraph in which the paper conducted a survey. One of the commenters pointed out that 75% of the people who responded do not favor changes that increase the odds of winning. One of the commenters suggested that the lottery is failing in sales not because of small jackpots but because bettors are getting fed up and tired of bucking astronomical odds and coming out losers. This commenter suggests getting more winners out there, not bigger winners, and people feel that they have at least a reasonable chance to win something. Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The Commission agrees that players are tired of small or lower level jackpots. The Commission believes the proposed game will generate higher level jackpots. The Commission agrees that the game needs more

winners. The proposed game will improve the overall odds of winning any prize to 1 in 57 and provide and approximate increase of 25% in the number of overall winners.

One commenter indicated that the Commission should leave Lotto Texas as it is or take out the last four balls and lower the starting jackpot and also join a multi-state game. Agency response: The Commission disagrees. The Commission believes the current Lotto Texas game should be changed at this time due to the lack of higher jackpots and decreasing sales that have been experienced. The previous or original Lotto Texas matrix (6/50) had been in place for approximately eight years and was changed because it was no longer generating the jackpots, sales or revenue expected. Lowering the starting jackpot would cause a decrease in spending. The purpose of the Commission is to operate the state lottery to generate revenue for Texas. Therefore, the Commission's focus is on performance of the state lottery and the games currently authorized by the State Lottery Act. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law.

One commenter indicated that the pay-off for Lotto Texas and Cash 5 is disgusting. The commenter indicated that he talked to so many people and they all feel the way the commenter does. The commenter further indicated that the Commission doesn't pay enough for 3, 4 and 5 numbers and people are tired of the present pay-off. With regard to the Lotto Texas game, the commenter suggests making changes and paying $50 for 3 numbers, $1,500 for 4 numbers, $5,000 for 5 numbers and the balance for 6 numbers. With regard to Cash 5, the commenter suggests paying $150 for 3 numbers, $1,000 for 4 numbers, and the balance for 5 numbers. This commenter submitted additional comment in a separate subsequent mailing. The commenter indicated that the Commission just doesn't pay out enough for all the players that play but don't ever get but 3 or 4 numbers right. The commenter indicated that he has spent a lot of money trying to win but his luck is not like the lucky players that win the big pot. The commenter believes that if the Commission changes the odds of winning much harder, the Lottery may dry up. The commenter believes that leaving Lotto Texas at 54 numbers and Cash 5 at 37 numbers and pay out more for players that get just 3 or 4 numbers right, the Commission will see people start to play more. The commenter suggests that, for example, if the jackpot is $12 million on the regular Lotto and there is one winner, pay that winner $500,000 less and pay all the unlucky ones more. The commenter suggests that for persons that get 5 numbers right, $5,000, 4 numbers right, $1,000, and 3 numbers right, $100. For a Cash 5 jackpot that is $58,000, the Commission should use the same pay out accordingly: pay the player that gets all 5 numbers right, $56,000, 4 numbers right, $1,000, and 3 numbers right, $100. Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. The proposed game will increase the number of prize levels, the overall odds of winning any prize will improve to 1 in 57 and there will be an approximate increase of 25% in the number of overall winners. The Commission has experienced a substantial sales increase (over 20%) in the Cash Five game since making the changes to the Cash Five game. The Commission is not focusing on a change to the Cash Five game in this rule making but is focusing on improving the Lotto Texas game. The Commission does not believe that the "Lottery may dry up" because the odds of winning the jackpot prize are increasing. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The Commission cannot subtract prize dollars from the jackpot prize level and allocate those dollars to lower prize levels. The Commission operates the Lotto Texas game based on official on-line game rules. The software that runs the game is developed based on the official game rule. The suggestion would cause confusion for players regarding the amount of the jackpot prize and would contradict the pari-mutuel calculations of the prize levels as stated in the rule.

One commenter indicated that sales are off because of the economy. Agency response: The Commission disagrees. The Commission believes that Lotto Texas sales have been decreasing due to the lack of higher jackpots and consistent wins at the lower level jackpots.

One commenter indicated that the Commission thinks it is for the good of the State and the commenter can see that it would be good for the government of Texas but it is not good for the commenter. The commenter indicated that if the Commission takes advantage of the commenter to steal his dollars then the commenter sees that as the Commission taking advantage of the State. The commenter further indicated there a lot of people like him that make up Texas and Lotto Texas already gets a large amount of his voluntary contribution. The commenter further indicated that he plays Lotto Texas only for the chance for the upper tier prizes. The commenter wants the Commission to ask gamblers about the rule changes as opposed to GTECH. The commenter believes the Commission and GTECH are like the house in gambling, they always have the odds in their favor. Agency response: The Commission disagrees. The Commission does not believe it is stealing dollars from players nor is it taking advantage of the state. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games and to establish his/her own comfort level with the odds of winning. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. The Commission believes the proposed game will generate higher jackpots, increase Lotto Texas sales and therefore, increase revenue to the State of Texas. The proposed changes are estimated to bring an additional $56.4 million to the State within the first full fiscal year. The Commission conducted mini-lab/focus group research with Lotto Texas players in Houston and Dallas. The Commission agrees that many players play Lotto Texas to win the jackpot or upper tier prizes.

One commenter indicated the proposed change to Lotto Texas is inherently unfair and blatantly immoral and is no doubt being pushed behind the scene by politicians who have no real interest in the economic welfare of everyday citizens. Based on the premise that the Commission has not provided details of a survey indicating that lottery players want a lotto game they are unlikely to win, the commenter believes it's all one big sham. The commenter would like to know who and how many people participated in the survey and the details of any information the Commission provided about the proposed game. The commenter believes that the Commission has consistently denied players all of the information they need to know about the various lottery products and therefore believes the Commission orchestrated the surveys in ways to achieve the desired outcome. The

commenter indicated that while large jackpots do attract players who are otherwise smart enough not to gamble, the Commission's position that these periodic increases in sales justifies a harder to win lotto is dishonest, and the Commission knows it. The commenter believes that the Commission's statement that lottery players want fresh and exciting games is an outright lie. The commenter indicated that the players are not demanding a change, the Commission is. Agency response: The Commission disagrees. The Commission does not believe there is anything "unfair and blatantly immoral" about the proposed game. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games and to establish his/her own comfort level with the odds of winning. Mini-lab/focus group research was conducted with Lotto Texas players in Houston and Dallas. A summary of the research findings were presented in public at the January 31, 2003 Texas Lottery Commission meeting at the Commission's headquarters in Austin, Texas. This meeting was properly noticed in accordance with the Texas Open Meetings Act and the agenda for this meeting indicated that the Commission may consider proposing a new Lotto Texas rule. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Additionally, an interested person may request information from the Commission in accordance with the Texas Public Information Act for information that is not exempt from disclosure. The Commission complies with open government laws and will provide the information requested, to the extent such information is not exempt from disclosure. The Commission does believe that players want fresh and exciting games and believes past game changes and the sales increases associated with those changes illustrate that point. The Commission does not believe it is being dishonest about any aspect of this proposed game. Additionally, the Commission has promulgated the rule changes in accordance with the Administrative Procedures Act. As part of the rulemaking process, the Commission indicated its reasons for proposing the changes. The rulemaking process requires the agency afford interested persons a reasonable opportunity to comment and consider the comment received. This rulemaking afforded interested persons an opportunity to comment and the Commission considered such comment in making its decision. The Commission published the rule in the Texas Register, conducted two public comment hearings, and received public comment through mail and fax. The Commission believes players are demanding a change based on their spending and based on a review of sales trends.

One commenter indicated that he has played Lotto Texas since it started and he put his numbers in the computer to see how they are doing. The commenter further indicated he had to buy a new computer in 2000, then had to get new programs because they wouldn't do the date right. When the Commission added four balls, the commenter had to dump the drawing list, change it to 54 balls and put them back in. The commenter indicated it was a lot of trouble but he stayed with it in the hope that he would win some day. The commenter indicated he will stop playing if the changes are adopted. The commenter suggests keeping the current lotto game and also start the new one so people can play what they want. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. An independent statistician who analyzes all of the data from all of the drawings certifies the Commission's on-line game drawings to be random. Trending the numbers drawn in previous drawings is no indication that those same numbers or combination of those numbers will be drawn in future drawings. The Commission does not believe two in-state Lotto Texas games would be successful.

One commenter indicated that he plays the same numbers every time. The commenter would play even if the jackpot was only one million dollars or less. The commenter said he played when the Commission added the four balls but may have quit if the changes are made. The commenter indicated he was in two pools and plays several sets of numbers. The commenter suggested the Commission check with Louisiana and Colorado Lotteries. The commenter believes these states have a good lottery with 40 and 42 balls and they also have Powerball for the people that want to win big. The commenter indicated he just wants to win and the change will just make it harder. The commenter also suggests the Lotto Texas game go back to 50 balls and start the jackpot at one or two million dollars and join Powerball. The commenter indicated he would play both. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission has analyzed games currently being played in other states and the sales trends in other states. The Commission makes decisions on its games and how those games are performing in the Texas marketplace. There are certain games that perform better in certain states or jurisdictions due to the demographics of the player base in that particular state or jurisdiction. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. The Commission disagrees with going back to the previous "50 balls" or the original game matrix. The original matrix (6-of-50) had been in place for approximately eight years and was no longer generating the jackpots, sales or revenue expected.

One commenter indicated that people are buying "hope" when the buy a lotto ticket. When the odds go up to "hopeless", all incentive to buy goes away. The commenter believes two things has caused interest to drop on the lotto: raising the numbers to 54 and the television stations no longer showing the actual drawings. The commenter people buy into the big pots but they buy more consistently on the $4 to $10 million levels. The commenter suggests that if the numbers are increased, wiser buyers will simply switch to a game with better odds and more money will go out of Texas to lotteries with better odds. The commenter advised not to change the game; instead, lower the numbers, get more winners and see if interest doesn't increase, not lessen. Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. The Commission believes interest in the Lotto Texas game has dropped due to the lack of higher jackpots and consistent wins at lower level jackpots. The Commission's drawings are televised via satellite and available for all Texas TV stations to broadcast. It is up to each TV station to decide if it wants to air the Commission's drawings. The Commission agrees that there are consistent Lotto Texas players that play the game regardless of the jackpot amount. The Commission believes that lower jackpots do not cause the excitement necessary for a lottery jackpot game to be successful. The Commission believes this proposed game will generate higher jackpots, increased sales and at the same time provide players with increased prize levels, improved overall odds of winning any prize and an approximate increase of 25% in the number of overall winners.

One commenter indicated the commenter wants the game to stay as it is. The commenter also indicated that the only change the commenter would want is to go from 25 annual payments to 20 annual payments. Agency response: The Commission disagrees. Mini-lab/focus group research was conducted with Lotto Texas players in Houston and Dallas and the proposed 5/44 +1/44 bonus ball matrix was tested against the current matrix. The research shows increased spending on the proposed matrix compared to the existing matrix. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. The Commission disagrees with changing the annual payments from 25 payments to 20. The Commission is not considering a change to the annual payment option in this rule making.

One commenter indicated he is at a loss to understand how a person would not see that $4 million is a life-altering experience and instead to hold out for only when the pot is "big". The commenter indicated if the Commission catered to that belief the commenter will stop playing and he suspects there more like him. Agency response: The Commission disagrees. The Commission has run advertising about $4 million being "a lot of money" and also produced point-of-sale for lottery retailers that conveyed the same message. These efforts were not successful in increasing sales or player excitement about lower level jackpot amounts. Lotto Texas players report that they want to play for high level jackpot amounts because those jackpot amounts get them excited and interested in the game. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games

One commenter indicated that the Commission gives the general public little, if any, consideration for being somewhat intelligent. The commenter believes the numbers are not drawn randomly; instead, the commenter believes the numbers are drawn 15 minutes after the "cut-off" ticket purchasing time" in order for the Commission to scan the entire to see what numbers are drawn and then draw a set of numbers that have not been purchased. The commenter believes that since the commenter has played the same numbers from the inception and has a hard time believing that these numbers would not have been drawn if the system was fair. The commenter believes the whole system is "fixed" and adding more numbers will only have a negative impact on sales. Agency response: The Commission disagrees. The Commission's on-line game drawings are witnessed by a Certified Public Accountant and certified to be random by an independent statistician who analyzes all of the data from all of the drawings. Playing the same numbers for any period of time does not guarantee that a player will win at any prize level. Wagering for the night drawings stops at 10:00 p.m. and the on-line game drawing takes place at 10:12 p.m. During this time period, Lottery Security staff verify that all wagering for the games being drawn that night have ceased and they then prepare to conduct the drawings broadcast. Lottery Security has an extensive checklist they follow before every drawing broadcast including pre-tests that ensure the machines and ball sets being used are returning random results. All of the Commission's drawings are open to the public. Based on research and sales trends, the Commission does not believe the proposed game will have a negative impact on sales.

One commenter suggested having all television stations show the numbers as they are drawn out makes people feel the game is honest and not rigged. The commenter also wants the stations to show the numbers when they are drawn and not have to wait until 10:25 to see the numbers, then just flash the numbers, not giving a person time to write them down or wait for the paper to come to get the numbers. The commenter believes that 54 numbers makes the odds to great for anyone to win very often and that more winners makes more players. Agency response: The Commission agrees with the commenter about TV stations showing the Commission's drawings. The Commission's drawings are televised via satellite and available for all Texas TV stations to broadcast. It is up to each TV station to decide if it wants to air the Commission's drawings. Some TV stations opt to show a graphic during their news broadcast that shows the numbers drawn rather than airing the entire drawing broadcast. The Commission disagrees about 54 numbers making the odds too great for anyone to win. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. The Commission believes that the proposed game will create an approximate increase of 25% in the number of overall winners.

One commenter, commenting on behalf of his company, indicated the Commission should not make the change as proposed but instead the commenter offers an alternative proposal. The commenter indicated that the alternative proposal will have as profound an impact on lottery organizations' sales and income as did the introduction of online systems and multi-priced instant lottery tickets; estimates increasing State income through FY 07 from the projected ticket sales; is a tool for Commission game development that will restore player value and excitement to lotto play regardless of the matrix chosen by the Commission-minimum $16-$20 million jackpot prize pools for weekly 6/54 draws and $50 million for holiday draws, or $25 million weekly, $60 million holiday draws or a 5/44 +1/44 matrix; has a basis, methodology and player marketability that will rapidly be a worldwide industry standard whose benefits and implementation are irrefutably supported by both industry and Commission play and other gaming segments. The commenter suggests that his company's proposal will be provided to the Commission, transparently to Texas players, at no cost and no risk supported by an absolute AAA+ guarantee and participation by world leaders in the private sector. The commenter believes the proposed rule is driven by the overwhelming limitations of the existing pari-mutuel prize structure of the worldwide lotto industry. The commenter believes that adoption of the proposed rule on a comparative basis propels Lotto Texas to the worst odds State lotto game in the nation. The commenter suggests that its only escalation beyond that would be Texas joining Powerball or MegaMillions and that move would require either of these lotteries to move to 150-170 million tone odds. The commenter does not believe either of these alternatives is something the Commission wants for the Texas players who have loyally supported lotto play over the years. The commenter indicted that the proposed matrix change is not warranted given Lotto Texas sales and play characteristics; is not justified by any meaningful comparison to other jurisdictions; and implementation will cause an accelerated deterioration of both confidence and play in Lotto Texas. The commenter believes that all discussions and media regarding the matrix change has been specifically focused on only two claimed player benefits to be achieved-higher jackpots and 25% more wining tickets. The commenter believes there will be a negative residual effect of this change on future Texas lotto play and therefore, believes a full assessment of this proposed matrix change should be evaluated. The commenter indicated that he has conducted a comparison of all existing State lotto games and odds to win each on a $1.00 play, implementing a 5/44 + 1/44 matrix

would give Texas lotto players the worst odds lottery in the nation at 47.8 million to 1. The commenter also indicated that his company evaluated the total sales volume in Texas lotto play in combination with characteristics of play and Texas population base versus other jurisdictions. The commenter applies two states' data, California and Florida, to conclude there is no reason that emerges that would justify the Texas proposal. Instead, the commenter suggests the proposed change is probably a reaction to the abnormal win cycles experienced by the Texas Lottery in calendar year 2002. The commenter suggests that this is what really should be looked at, not just dismissing it with an arbitrary matrix change. The commenter agrees that the proposed matrix change should generate larger jackpots as a consequence of almost doubling the odds to win. The commenter also agrees that the added prize levels of the proposed matrix change should add 25% more winning tickets. The commenter believes that in fairness, evaluation should extend to the consequences of this matrix change beyond these two publicized aspects. The commenter is critical of reliance on the same people who projected three to four jackpots between $65 million and $100 million during a 52 week period to project jackpot behavior for this proposed matrix. The commenter believes that what is really being proposed is the exchange rate is being changed to effect an exchange of $.52 for every $1.00 from Texas players from the current exchange of $.55 for every dollar. The commenter believes Texas players would take a 5.5% "hit" on their total return. The commenter agrees with this change given the budget situation within the State. The commenter does not disagree on the matrix prize levels producing 25% more winning tickets but believes there is also a very negative aspect to the matrix proposal-a 42% reduction in average prize awards that has not been made a part of the discussion process for this matrix change. The commenter indicates that what the new matrix would produce is a virtual doubling of the rollover cycles and one other major effect-it would cut the number of jackpot winners in half versus the current game. The commenter believes that there will be a deterioration in core play that will accelerate the problems the lotto game has not only through this new matrix but or future play and changes as well. The commenter suggests an alternative that the commenter believes addresses the changing dynamics of lotto play worldwide. The commenter submitted information that the commenter believes shows the effects of substituting a probability based lotto prize structure, i.e., a large up-front guaranteed minimum jackpot prize pool in expectation of a level of future ticket sales within a rollover or win cycle, and, with these jackpot levels, being able for the first time in lotto play to offer multiple priced tickets within one lotto game. The commenter believes the commenter's proposal provides a probability based prize structure that gives the player immediate value for his purchase, heightened excitement and attendant increased play, and its marketability is irrefutably proven both in multi-priced instant lottery play and in other gaming applications. The commenter also believes that the commenter's proposal provides a multiple priced ticket entry that will dramatically increase Lottery and State income as proven by the incremental revenue generated by multi-priced instant tickets-the single greatest contributing factor to overall Texas Lottery profitability in the past 4 to 5 years. The commenter reiterates opposition to the implementation of the proposed matrix. The commenter believes the same economic benefits to the State and all other participants can be achieved by retaining the current 6/54 matrix with a $16 to $20 million minimum prize pool for weekly draws and four $50 million minimum holiday draws. Agency response: The Commission disagrees. The Commission believes that decreasing sales and lack of player interest and excitement due to consistent wins at the lower level jackpots does warrant a matrix change at this time. The Commission disagrees that the proposed matrix will cause deterioration of confidence and play in Lotto Texas. Research conducted shows increased spending on the proposed matrix compared to the existing matrix. The Commission disagrees that data from California and Florida conclude there is no reason to justify the current proposal. The Commission makes decisions on its games and how those games are performing in the Texas marketplace. Focus group research tested matrices that were similar to the current matrices in California, Florida, and New York. Trends experienced with the performance of a specific matrix in Florida or any other state are no guarantee that similar results would be experienced in Texas. The Commission believes that it is necessary to strengthen the in-state lotto jackpot game, as there is potential legislation that would authorize the commission to introduce a multi-state game such as Powerball or Mega Millions. While the Commission is uncertain as to whether clear statutory authority to operate or participate in a multi-state game will be enacted, it believes the in-state lotto game should be as strong and viable as possible to minimize cannibalization if a multi-state game is authorized. The Commission disagrees that the discussions and media regarding the matrix have been focused on higher jackpots and the approximate 25% increase in the number of winning tickets. The Commission feels there are other positive features of the proposal. The overall odds of winning the proposed game are 1 in 57 as compared to 1 in 71 for the current game. The familiarity with bonus ball style games is also a positive feature. The Commission disagrees with the commenter's criticism of reliance on the same people who previously noted similar jackpot projections. The Commission relies on numerous sources of information and has worked with the contracted vendor responsible for sales and jackpot projections for the proposed matrix. In addition, the Commission's independent statistical consultant has reviewed and calculated the odds needed at the jackpot tier to create longer roll cycles and generate higher level jackpots. The Commission disagrees with the comment regarding the negative aspect of the reduction in the average prize awards. Research shows that players play the Lotto Texas game to win large, multi-million jackpot prizes. That is what players want from the Lotto Texas game and that is how the game is positioned in the product mix. The proposed matrix was tested against the current matrix and the proposed matrix was the favorite choice among research participants. The main goal in the design of the proposed matrix was to generate higher jackpots that would create excitement and revitalize the game. The Commission agrees that the proposed game should provide larger jackpots and add 25% more winning tickets. The Commission does not agree with the commenter's suggested game alternative. The Commission does not believe that multiple priced tickets within one game are a positive feature as a previous on-line game with a $2 price point was not well received in the marketplace. The Commission feels the game alternative is confusing and would be difficult for retailers and players to comprehend. Research shows that players are not interested in playing for 25%, or 50% of a jackpot prize as suggested by the commenter. The Commission is confused as to how the prize pool is funded for the game alternative and also about why the commenter would put forth a suggested game that has odds of 1 in 95.6 million when the commenter previously criticized the commission for considering a game with odds of 1 in 47.7 million. The Commission does not understand how the commenter shows increasing revenue to the state, retailers, Lottery and GTECH each year, over a five year period, even as projected sales for each of those years decreases.

One commenter indicated that twice previously, the Commission put forth two proposals to increase the odds of Lotto Texas. The first was a "bonus ball" style matrix of approximately 25 million to 1 and it was rejected after minimal pubic comment. The second proposal was put forth five months later and was adopted, the current 6 of 54 matrix. The commenter indicated that the Commission is promoting this matrix to decrease the number of jackpot winners and thus increase jackpot peaks, encouraging more money to be spent on the game. The commenter believes this is a false business model because it unfairly encourages consumers to spend more money for less return (or chance of return) and it is indisputable that "more ways to win" was one of the design criteria for this new game. The commenter indicated that because two of the new prize tiers are guaranteed $5 each, and one is guaranteed $3, the net effect is to create more unclaimed prize money, both from excessive percentage of prizes $5 and below, and from the increased complexity of player ticket validation. The commenter also believes that the matrix is obviously designed to allow positive statements to be made even though they contradict the value chart presented in the commenter's comments. The commenter wants the Commission to review the following facts: the odds to win any prize do reduce from 1 in 71 to 1 in 57, however the dollar value toward winning the jackpot (exclusive of rollover) as well as the aggregate value of the lower prizes decreases in relation to both the 6/50 and 6/54 matrix; the prize level does not increase from 4 to 8, rather there are 2 guaranteed $5 levels-for a total of 7 levels; and, representing 25% more overall winners, while the dollar return to the consumer (exclusive of rollover) has decreased as shown on the comments submitted by the commenter. The commenter believes the Commission is making misleading statements about the proposed game to influence future ticket purchase. The commenter believes this appears to be a violation of §466.110, Prohibited Advertisements. The commenter believes the Commission is relying on a false business model and when players see fewer jackpots being won and when neither they nor others they know have positive winning experiences, sales will decrease. The commenter believes the matrix is doomed prior to implementation and bases his conclusion on performance of the 6/50 matrix that lasted 8 years. The commenter suggests that the Commission has a fiduciary responsibility to insure the lack of negative consequences of their actions-especially since a monopoly is being operated based on the police powers of the state, which should the public welfare foremost. The commenter also offered comments on Powerball. The commenter indicated that the very high odds Lotto game and Powerball has the "bonus ball" element now being proposed is no match in our region for Lotto Texas. The commenter also urges that everyone wishing to have an informed opinion and especially those in decision-making positions do their own research. The commenter further indicated there are a lot of figures being touted that may be well intended and assumed to be true, that on close inspection would make Enron proud. The commenter indicated that the figures used came from GTECH and it has its own agenda and are not an impartial source. The commenter also indicated that the Commission did a study in 1998 and determined that, at most, entry into a multi-state game would increase sales by 1% and that this more than offset by loss of local control. The commenter wants the Commission and the legislature to make the Commission a consumer responsive organization. The commenter believes that regarding the Commission and all other forms of gambling, the Commission should pass two tests: test of negative impact on society and test of valid business model. Agency response: The Commission agrees with the commenter regarding previous rule proposals. The Commission agrees that this game proposal is generated to increase jackpots and therefore, increase sales and revenue to the State of Texas. The Commission disagrees that the proposed game is a "false business model." The Commission believes it is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission believes that there are more ways to win in the proposed game. The Commission believes all of the following to be true regarding the current and the proposed game: the current game has four prize levels; the proposed game has eight prize levels. The proposed game has improved overall odds of winning any prize of 1 in 57; the current game has overall odds of winning any prize of 1 in 71; the proposed game will generate an approximate increase of 25% in the number of overall winners; there are three guaranteed prize levels in the proposed game; the prize pool for the proposed game is 52% of sales; the prize pool for the current game is 55% of sales. The Commission disagrees that the net effect is to create more unclaimed prize money. The Commission does not create unclaimed prize money. Players not cashing in winning tickets during the 180-day validation period creates unclaimed prizes. The Commission does not believe there will be "increased complexity of player ticket validation." The Commission already operates a bonus ball style game, Texas Two Step. Lottery players in Texas are familiar with this play style. Lottery players are also familiar with bonus ball play style games due to the awareness of multi state games like Powerball and Mega Millions. The Commission disagrees that sales will decrease in regards to the proposed rule. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. The Commission disagrees that proposed game is "doomed prior to implementation." Mini-lab/focus group research was conducted with Lotto Texas players in Houston and Dallas and the proposed 5/44 +1/44 bonus ball matrix was tested against the current matrix. The research shows increased spending on the proposed matrix compared to the existing matrix. With "likelihood to play" it was reported that this game was the more positive choice when choosing a change from the current Lotto Texas matrix. The Powerball game is not the focus of this rule making. Additionally, the Commission disagrees with comments regarding the assertion that the Commission is making misleading statements about the proposed game. The Commission has indicated that the changes are intended to generate revenue for the State. The purpose of the Commission is to operate the state lottery to generate revenue for Texas. The Commission's focus is on performance of the state lottery and ways the lottery games can be enhanced or created to for successful performance of the state lottery. The Commission believes the changes to the Lotto Texas game will result in a positive consequence-increased revenue to the State. The Commission believes the Lotto Texas game is intended for players who want big jackpots. The changes to the game are intended to create opportunities for big jackpots.

One commenter appeared at the March 7, 2003 hearing and also submitted written comment. The commenter indicated that his family won't play as much even when the pots get bigger because of the changes. The commenter indicated that he might get a quick pick or two when the pots get over $20 to $30 million range, a little bit different than getting $5 of the quick picks every time it's over $10 million. The commenter indicated his family believes in the philosophy that you can't win if you don't play but the Commission is trying to take that option away from the serious players. The commenter believes that he might as well sit

outside in the yard during thunderstorms playing with tin poles to see what numbers come to mind. The commenter represents a family of four players and also a group from work of about 10 or so. The commenter suggests that asking for consumer support to contact the appropriate representatives to push the issue to add the Powerball game. The commenter suggests as another option to just cut Lotto Texas back to one drawing a week, allowing more people to go and spend just the $5 during the week. The commenter indicated that his family was spending approximately $300 a month to play all the Texas Lottery games and when the jackpots went up, they would buy additional tickets outside of their regular allotted format. The commenter indicated with the winning percentage being so low, they cut back due to lack of return profits. The commenter suggests finding ways to televise the drawings and more people would be willing to part with their money. The commenter is also in a group from work and they play faithfully when the pots are over $10 million or above the limits they set. Other people join in at $20 and $30 million levels. The commenter indicated that they can't afford to put in $10 each on a weekly basis to maybe win back $5. Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games and to decide on the amount of money he/she feels comfortable wagering. The Commission agrees that "you can't win if you don't play." The Commission disagrees that it is trying to take "that option away from the serious player." The Commission believes that the Lotto Texas game should be changed at this time due to the lack of higher jackpots and decreasing sales that have been experienced with the current game. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. The Commission disagrees that a drawing once a week would be a benefit. This would be confusing for players and retailers and would not create the customer/player traffic that retailers are accustomed to with the current twice-per-week drawing schedule. This would also slow down the growth or building of jackpots. As Lotto Texas jackpots grow, so do Lotto Texas sales. Slowing this process down would not be beneficial for sales. The Commission's drawings are televised via satellite and available for all Texas TV stations to broadcast. It is up to each TV station to decide if they want to air the Commission's drawings. The Commission agrees that "other people join in at $20 and $30 million levels." The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently.

One commenter appeared and offered comment at the March 7, 2003 hearing, submitted written comment on March 14, 2003 by mail, and sent via facsimile additional comment on March 16, 2003. When the commenter submitted her comment on March 14, 2003 and March 16, 2003, she also included comment she had received from other persons. The comment from other persons is characterized by the commenter as responses to feed back forms the commenter placed on her web site for completion by other people. The commenter indicated that she placed a feedback form on her web site because she believes the Commission has done only the minimum as required by law to receive comment. The commenter indicated that if the Commission truly wanted comments, the Commission would have used other methods to receive comment such as its web site, its *Winning* publication, *PlayerConnect* email, and its retailers to generate comment. The commenter believes this was not done because the Commission knows this is not what the people want. She further indicated that she did this because she feels strongly that the people of Texas have a right to know what's going on and it was obvious to her, the Commission intended to keep this rule change the best kept secret in Texas. In connection with the comment the commenter collected from other people, the commenter also indicated that she had placed petitions in lottery retailer locations and a GTECH representative threw them in the trash at one retailer location. The commenter indicated she didn't need those petitions anyway because she had over 3,000 comments or letters written that she intended to give the Commission from the people but not at the time she testified at the March 7, 2003 hearing. The commenter indicated that she did not appear at the hearing because it would do any good but to go through the process. The commenter was critical of how comment in connection with past rulemakings was summarized. The commenter also indicated she had no faith in the Commission since the Commission proposed the rule and believes the Commission's interest only lies with the State and the income that could be derived as a result of such a game being played and offered in Texas. The commenter indicated she has a little faith in Texas legislators because they're voted into office and when they hear from people in their areas, they'll listen. The commenter also indicated she has a little bit of faith in the retailers, they care about their customers and their competition is fierce. The commenter referenced intent in connection with the various lottery on-line games. The commenter indicated that there's not a person in Texas who goes to the store to buy a lotto ticket that doesn't intend to win the jackpot. The commenter suggested that nobody goes to buy a lotto ticket with the intention of winning 3 of 6 numbers, 4 or 5 of 6 numbers. The commenter indicated the players' share of sales is wasted on meaningless prizes. The commenter believes the Commission wants to offer such prizes ($3 and $5) is to enable the Commission to advertise how many "winners", thus, the Commission is enticing sales to the poor and gullible. The commenter suggested that the Commission should be forced to clarify what the players "won" in their advertising strategies to increase sales. The commenter indicated that another reason the $3 and $5 prizes are being offered is so the Commission can promote this rule change as being "good". The commenter indicated that the Commission has stated, "an increase of 25% more 'overall' winners" yet-the truth is, the allocated funds that "more winners" will divide has been reduced. The commenter believes this is misleading and that no one should get $3 for matching 2 numbers-a total waste and self-serving. The commenter believes that if they don't hit the big one, then it's nice to have the small one; but, that's not their intention when they buy the ticket. They buy these tickets in good faith, in honor and belief in the integrity of the Texas Lottery. The commenter believes that when the Texas Lottery started out, they had good intentions, paid fairly, paid right, didn't hurt anybody. The commenter indicated that the Commission started changing the games in 1999 because sales went down a bit and leveled off. The commenter believes that's when the Commission started going downhill. The commenter believes that the sole intent of this rule is to make it impossible or very difficult for anybody to win the jackpot. The commenter indicated that the Commission decided the only way it can make more money is to give the consumer a game the consumer cannot win until $40 to $50 to $60 million dollars in sales in a three-day period are reached. The commenter believes this is very wrong. The commenter indicated the Commission will make more money if the Commission adopts the rule. The commenter indicated that sales will initially drop down to about $2 million. The commenter further indicated that when the jackpot reaches the $30, $40, $50, $80 million level, the Commission will make enough to offset

that where it averages out where you'll make more money. The commenter believes the Commission's intent to give the people an unfair game with a population of 21 million and odds of 47.7 million to 1 is terrible, wrong. The commenter believes that by offering such a game, the Commission is not only taking advantage of the consumers but retailers as well. The commenter indicated the Commission is taking advantage of the retailers with this rule change as well. The commenter indicated that if this rule change is implemented, there will be fewer winners and for retailers, this means fewer retailers will receive bonuses. The commenter believes retailers will make less money until the jackpot rises but the additional revenues will then be used to cover overtime, added staff and security. The commenter believes the sales increase might offset their losses for stolen inventory, property damage that could result from an over abundance of customers and lawsuits derived from employees who might be killed or injured by criminals as the stores will become a prime target for burglaries due to the suspected value of cash on hand. The commenter indicated that a retailer will not receive more than $500,000 for selling a winning ticket-yet the jackpots can and will be $60 million to $100+ million-just another way for the Commission and GTECH to come out ahead at the expense of the hard work provided by those that serve the Commission. The commenter believes that, worse yet, the Commission will be asking 17,000 retailers to sell (scam) the majority of its customers a useless piece of paper. The commenter believes there are only two organizations that will come out ahead with this plan, the State and GTECH. The commenter indicated that because she's so opposed to this aspect of the game, the other points in question are minute to her. The commenter indicated she opposes the proposed change for Lotto Texas for a number of reasons. The commenter is opposed to the requirement that players choose their option for payment in the event the jackpot is won at the time of purchase of the ticket. The commenter believes the only reason the Commission doesn't want to offer the option at another time is because the Commission is going to take advantage of somebody who accidentally marks his ticket with an annual pay and can't change his mind, so the Commission gets to purchase the annuities. The commenter believes the players aren't always receiving everything that's been invested on their behalf. The commenter also believes the rule as written doesn't guarantee the players their percentage of sales. The commenter indicated that the proposed rule allows the State to keep more than the State's share of sales. The commenter indicated that the Commission is withholding a percentage of sales in reserve just in case it's needed to pay the guaranteed prizes while the Commission advertises the game to be pari-mutuel. The commenter indicated that the proposed rule does not protect the people, nor does the current rule. The commenter indicated that both rules allow the Commission to retain a portion of the players' share of sales via the reserve fund and the guaranteed prizes. The commenter indicated that the only way players would ever be guaranteed to receive their share of sales is if all prizes were "pari-mutuel" which they are not-yet the game is promoted as such. The commenter believes this is false advertising. The commenter believes that the Commission overpaid people. The commenter is opposed to not guaranteeing the players their share of money. The commenter doesn't want the rule to allow rounding down of prizes. The commenter indicated that she had done everything in her power to stop the people from talking about the other on-line lottery games and to address only the proposed Lotto Texas rule. The commenter indicated that other commenters give ides or suggestions and some of the suggestions are not possible. The commenter indicated that the Commission doesn't want comment and does anything in its power to keep from getting comment. The commenter criticized the Commission's web site because the proposed rule isn't visible on the web site and people have to click to Legal to locate the rule. The commenter further indicated the Commission's intent is to make money at any cost, by any means, no matter if it is robbing the people and giving the people an unfair game. The commenter wants to know why they can't have an honest lottery-and one with integrity-integrity being defined as offering the people a "fair" game of chance that might enhance a citizen's lifestyle if won and the proceeds should be split 50/50. Agency response: The Commission agrees that when people play Lotto Texas, they are playing to win the jackpot. The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these desires. The Commission believes all of the following to be true regarding the current and the proposed game: the current game has four prize levels; the proposed game has eight prize levels; the proposed game has improved overall odds of winning any prize of 1 in 57; the current game has overall odds of winning any prize of 1 in 71; the proposed game will generate an approximate increase of 25% in the number of overall winners; there are three guaranteed prize levels in the proposed game; the prize pool for the proposed game is 52% of sales; the prize pool for the current game is 55% of sales. The 5/44 + 1/44 player benefits are: higher jackpots, increased number of prize levels, overall odds of winning any prize are 1 in 57, approximate increase of 25% in the number of overall winners and familiar bonus ball play style. The Commission disagrees that it is trying to "make it impossible or very difficult for anybody to win the jackpot." The Commission believes that the Lotto Texas game should be changed at this time due to the lack of higher jackpots and decreasing sales that have been experienced with the current game. The Commission agrees the proposed game will increase Lotto Texas sales and therefore, increase revenue to the State of Texas. The Commission does not agree that the proposed is an "unfair game." Mini-lab/focus group research was conducted with Lotto Texas players in Houston and Dallas and the proposed 5/44 + 1/44 bonus ball matrix was tested against the current matrix. With "likelihood to play" it was reported that the proposed game was the more positive choice when choosing a change from the current Lotto Texas matrix. The Commission disagrees with the comments regarding retailers. The Commission disagrees that it is asking retailers to "scam" customers. The Commission is proposing a change to the Lotto Texas game that will increase Lotto Texas sales. The more Lotto Texas tickets retailer sell, the more commission they earn. The Commission disagrees with the comment that the "rule as written doesn't guarantee the players their percentage of sales." 52% of draw sales are allocated to the prize pool for each Lotto Texas drawing. Of that 52%, 1.93% is allocated to a prize reserve fund. That prize reserve fund may be increased or decreased by paying Lotto Texas prizes. The Lotto Texas prize reserve fund is used only for the Lotto Texas game. A reserve fund is a common practice on jackpot style lotto games in some states. Other states have the ability to utilize unclaimed prizes to achieve the same objective. Unclaimed prizes are not available to the Commission for this purpose. The Commission disagrees with the commenter regarding the pari-mutuel prizes. A pari-mutuel prize is a prize category or prize level that is divided equally among multiple winners. The proposed game

has five pari-mutuel prize levels and three guaranteed prize levels. The Commission conducted an investigation regarding the commenter's allegation that the Commission "overpaid" people. The report was made public and a copy was provided to the commenter. The report indicated that winners were paid in accordance with the rule and applicable procedures. The Commission rounds down prizes so prizes can be paid in multiples of whole dollars. This has been the Commission's standard practice for over ten years. The Commission does not pay prizes in dollars and cents. The Commission disagrees that players do not receive "their share of the money." The prize pool was discussed above. The Commission agrees that "commenter's give ideas or suggestions and some of the suggestions are not possible." Many of the commenter's comments are redundant to other comment submitted and summarized in this rule. The agency responses provided to that comment is incorporated here as if fully set out. With regard to the process use to promulgate this rule, the Commission, as a state agency, must comply with the rulemaking procedural requirements of the Administrative Procedures Act. The Commission, in promulgating this rule, did so. The proposed rule was authorized by the Commission for publication at its noticed January 31, 2003 Commission meeting. The proposal was published in the February 14, 2003 issue of the Texas Register. The Commission afforded interested persons a reasonable opportunity to comment. Comment was received, has been considered, summarized in this document, and agency responses to the comment have been provided.

As previously indicated, comment was also submitted in the form of responses to a feedback form, such form generated by another commenter and submitted by this commenter. The generic form appears to allow a person to indicate whether the person is opposed to of the proposed rule to increase the odds to 47.7 million-to-one and the play style (5/44 & 1/44-88 balls total) because the person plays to win the jackpot or in favor of the proposed rule because the person would like to see fewer jackpots so the pots can climb; to indicate whether the style of play is discriminatory towards the consumer-it increases the complexity of play and only serves to increase the unclaimed prize fund; and whether the person represents a group or an organization. With regard to forms that indicated the person identified on each of the forms represents a group or association, in most of the completed forms, the form does not indicate the name of the group or association. The majority of the forms submitted indicated that the person completing the form is opposed to the proposed rule to increase the odds to 47.7 million-to-one and the play style (5/44 & 1/44-88 balls total) because it makes winning the top prize harder to win and the person plays to win the jackpot and that the person believes this style of play is discriminatory towards the consumer-it increases the complexity of play and only serves to increase the unclaimed prize fund. Another group of feedback forms completed by persons appear to have additional optional responses. These subjects and respective comments are: "Offering a powerball type game & increasing the odds of winning the top prize: I'm OPPOSED to the odds, play style and 88 balls proposed because it makes winning the top prize harder to win. I play to WIN the jackpot."; "Selecting payment options at time of draw: I oppose this because it's a decision that should be made after players have had an opportunity to see what's best for them as individuals."; "Allocating a set percentage of sales to pay guaranteed prizes: I oppose having a set percentage of sales allocated for guaranteed prizes. This could result in short changing the players and/or the state. A risk I oppose."; "About the prize structure: I oppose the prize structure too. The prizes offered are meager sums and an insult to lottery players."; and, "Rounding down prize amounts: I oppose 'rounding down' prize amounts. Each drawing is an independent event and prizes should include the cents we won for the draw." Many commenters submitted comment in this format by selecting one or more of these optional responses. While some of the commenters indicated opposition by clicking on the prepared responses created, in other categories these commenters indicated, in connection with the subject "About the prize structure", the response "I like the prizes offered." Some other commenters indicated, in connection with the subject "Selecting payment options at time of draw", the response "I'm FOR having to make this decision before I win". The Commission disagrees with the comments indicating opposition to rule changes in the form of the standardized statements included in the feed back form based on the reasons stated for the opposition for the reasons the Commission has provided as its agency response in this document. The form also allows a person to submit additional comment. In connection with this additional comment, agency response will follow after the specific comment. This additional comment consisted of commenters indicating: Comment: wanting to keep the Lotto Texas game the same; Agency response: The Commission disagrees. The Commission believes that the Lotto Texas game should be changed at this time due to the lack of higher jackpots and decreasing sales that have been experienced with the current game. Comment: not wanting a huge jackpot but winners of smaller jackpots more often; Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: not playing anymore or reducing the level or amount of money spent on the game or all games; Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. Comment: inquiring as to what numbers will be for a future drawing, making the 2nd ball 1 to 25; Agency response: The Commission's on-line game drawings are certified to be random by an independent statistician who analyzes all of the date from all of the drawings. No person knows what the numbers will be for a future drawing. Comment: the prizes are just right for Texas Two Step but the lottery needs to pay more for three numbers and this would increase the tickets sold; Agency response: The Commission disagrees. This rule making is focusing on the Lotto Texas game. Comment: there should be more chances to win with lower prizes; Agency response: The Commission agrees. The proposed game increases the number of prize levels from four prize levels to eight prize levels. The proposed game also has improved overall odds of winning of 1 in 57. Comment: make it easier to win the jackpot; Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: unclaimed prizes should go back into the jackpot; Agency response: The Commission does not have the authority to decide how unclaimed prize money should be used. State law requires that unclaimed prize be deposited to the credit of the Texas Department of Health state-owned multi-categorical teaching hospital account or the tertiary care facility account. Comment: it's already too hard to win the jackpot; Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: the Commission is already too greedy and this will only make it more so;

Agency response: The Commission believes its role is to generate revenue for the State. With regard to this responsibility, the Commission must review game performance and make decisions regarding such performance. To that end, the Commission reviewed the performance of the Lotto Texas game and determined the game was not performing at the levels the Commission expected. The Commission conducted player research to determine the best approach to enhance the game in order to generate revenue. The Commission proposed the new rule for public comment, has received comment, and has considered the comment received. The Commission believes the process has been fair. The Commission also believes the new features of the Lotto Texas game do afford meaningful opportunities to players to win prizes, including the jackpot prize. Comment: inquiring why the Commission just doesn't join Powerball and get rid of Lotto Texas because the lottery was sold as a way to keep property taxes from increasing while funding schools and this hasn't happened; Agency response: The Commission disagrees with the comment. The purpose of the Commission is to operate the state lottery to generate revenue for Texas. Therefore, the Commission's focus is on performance of the state lottery and the games currently authorized by the State Lottery Act. At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. Comment: the Texas Senate has certain officials that are against the lottery because of their religion and are purposely trying to ruin the Lotto program; Agency response: The Commission disagrees with the comment. The Commission makes its decisions based on game performance and its responsibility to generate revenue for the State. Comment: wanting Lotto Texas to go back to one drawing on Saturdays; Agency response: The Commission disagrees. This would be confusing for players and retailers and would not create the customer/player traffic that retailers are accustomed to with the current twice-per-week drawing schedule. This would also slow the growth or building of jackpots. As Lotto Texas jackpots grow, so do Lotto Texas sales. Slowing this process down would not be beneficial for sales. Comment: just another way that Lotto Texas holds onto more of the money and sales have dropped because of less play since the changes were made to the game; Agency response: The Commission is confused by the comment that "Lotto Texas holds onto more of the money." The Commission agrees that sales have dropped and that is the reason the Commission believes that the Lotto Texas game should be changed at this time. The Commission believes the proposed matrix will generate higher jackpots and therefore increase Lotto Texas sales and corresponding revenue to the State.

Additional comment in this feedback format with agency response to comment is the following: Comment: it is unfair to punish regular players in an attempt to attract those who play only if the Lotto is a big number, the solution lies in providing more publicity and more media attention to those that do win; Agency response: The Commission disagrees. The Commission cannot force jackpot winners to participate in publicity or speak to the media. The Commission does not feel it is punishing any players. The Commission believes there are player benefits in the proposed game. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: go back to 50 numbers; more people will play the games of Texas if the amounts and frequency of play are increased; Agency response: The Commission disagrees. The original matrix (6/50) had been in place for approximately eight years and was no longer generating the jackpots, sales or revenue expected. Comment: maybe the game is boring-questions whether there are different types of high end games; Agency response: The Commission agrees that lack of higher jackpots may have some players bored. The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently. Comment: haven't played the Lotto recently but once in a while when the jackpot is high, will play; better to guarantee having a $4 million prize and a winner each week; Agency response: The Commission agrees that not only the commenter but many other players will only play when the jackpot is high. The Commission disagrees about guaranteeing a $4 million prize winner each week. The Commission cannot guarantee a winner. The Commission's on-line game drawings are random. Lotto Texas would not be a rolling jackpot game if it had a winner every week or every draw. Lotto Texas is a jackpot driven game. Sales increase as the jackpot increases. Preventing the jackpot from rolling or increasing would be detrimental to sales and to the main intent of the game. Comment: need more winners even if it means lowering the top prize money; Agency response: The Commission disagrees. The proposed game is expected to generate higher jackpots and at the same time there will be an approximate increase of 25% in the number of overall winners. The Commission feels this proposed game will achieve both objectives. Comment: the Commission is corrupt, when any organization gets too top heavy in management, loss of profit is always the issue; Agency response: The Commission disagrees with the comment. The issue is not loss of profits; instead, the issue is operating a state lottery to generate revenue for the State. Comment: increase the amount to $10 million from $4 million, increase the numbers to 60, and more people will want to play; Agency response: The Commission disagrees. Sales would not support a starting jackpot of $10 million and would create too much risk for the Commission. The mini-lab/focus group research did test a one field, 6/59 matrix. Players were asked to rate each matrix on various attributes as well as report potential spending on each matrix. All attributes and spending were asked of and compared to the current Lotto Texas matrix. Of the matrices tested the most beneficial matrix change is the 5/44 + 1/44, two-field matrix. With "likelihood to play" it was reported that this game was the more positive choice when choosing a change from the current Lotto Texas matrix. Comment: reducing the jackpot amount will reduce the amount of players; Agency response: The Commission agrees. The Commission intends for the starting Lotto Texas jackpot amount to remain at $4 million for the proposed game. Comment: make new games that pay moderate sums; word of mouth and people actually winning stimulates participation; Agency response: The Commission agrees that "word of mouth and people actually winning stimulates participation." The proposed game has improved overall odds of winning of 1 in 57. The proposed game will also have an approximate increase of 25% in the number of overall winners. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires.

Comment: the lower prize awards should be raised; Agency response: The Commission disagrees. Increasing the prize amounts for the lower prize tiers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is

no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: just like to match 5 once, never mind 6; Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. Comment: have another lotto with the odds higher for that huge win and call it "As Big As Texas", $2 to buy in, one or two drawings a month, higher odds; Agency response: The Commission disagrees. The Commission does not believe two in-state lotto style games would be successful. The Commission does not believe that "$2 to buy in" would be successful as a previous on-line game with a $2 price point was not well received in the marketplace. A drawing once a month would be confusing for players and retailers and would not create the customer/player traffic retailers are accustomed to with a more frequent drawing schedule. The Commission does agree that higher odds to win the jackpot prize are appropriate. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: lottery is rigged, show the lottery on TV and have someone other a lottery person each and every draw oversee the drawing; Agency response: The Commission disagrees with the comment. The Commission's independent drawings auditor attends every drawing and the auditor's function is to ensure the integrity of the drawings. Additionally, the Commission's independent statistician reviews the results of each drawing and pretest drawings to ensure the randomness of the drawings. Comment: even with the odds now there's no chance that out of 100 tickets the commenter would get no numbers; Agency response: It is up to the individual player or groups of players to decide if they want to participate in any of the Commission's games and to establish their own comfort level with the odds of winning. Comment: consider legalizing casino gambling if not making enough money from the lottery; Agency response: The Commission disagrees with the comment. The purpose of the Commission is to operate the state lottery to generate revenue for Texas. Therefore, the Commission's focus is on performance of the state lottery. The Commission has no jurisdiction as to decisions regarding the legalization of casino gambling. Comment: number of games seems to be out of hand, should only enhance the ones now available; Agency response: The Commission disagrees. The proposed game is an enhancement of the current Lotto Texas game. Sales trends do not indicate that the Commission is currently offering too many games. Comment: lotto was making more money when the odds were less with 50 numbers; Agency response: The Commission disagrees. The original matrix (6/50) had been in place for eight years and was no longer generating the jackpots, sales or revenue expected. Comment: look at the operator and check his cost, maybe that's what needs to be changed; Agency response: The Commission disagrees with the comment. The issue presented by the proposed game change is revenue to the State and performance of the Lotto Texas game. Comment: increase the 2nd and 3rd prizes, especially the prize for 5 correct, so more people will want to play; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: start the jackpot at $8 million; Agency response: The Commission disagrees. Sales would not support a starting jackpot of $8 million and would create too much risk for the commission. Comment: the 4 and 5 number winners should get more percentage than they are getting now, this would help more people; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: take the unclaimed prize money plus "raking" an amount from each biweekly drawing when there were no winners and use that money to add to the minimum jackpot amounts, more people would play from the beginning and the players, as well as the state would benefit; Agency response: The Commission does not have the authority to decide how unclaimed prize money should be used. State law requires that unclaimed prize be deposited to the credit of the Texas Department of Health state-owned multi-categorical teaching hospital account or the tertiary care facility account. Comment: it's already too hard to win the jackpot; should be the same amount of winners but the top winner should not get as much, for example, in a $15 million pot-6 numbers should get $13 million, 5 numbers should get $50,000 each or more, 4 numbers should get $1,500 or more, and 3 numbers should get $30 or more; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: reduce the number of balls to 46, making it easier to win, a jackpot of $2 to $3 million and odds of 12 or 13 million to one will get more players believing they can win; Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: increase the 3, 4, and 5 number prizes, and, it would be worth the increase in the odds, right now the 5 number payoff is an insult; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: the state is presently receiving 66% of the prize money consumers put into the lottery, the new style of play will increase the amount the state recovers; Agency response: The Commission is responsible for operating a state lottery to generate revenue for the State. Currently, the State receives approximately 30% of lottery sales. Comment: from a retailer standpoint, promised money for 6/54, none of the retailers have seen an increase in lottery sales but have seen angry customers who no longer buy from retailers because they have no reason to shop at a convenience store; Agency response: The Commission disagrees. The first full year of the 6/54 matrix did realize an increase in Lotto Texas sales. The Commission believes its role is to generate revenue for the State. With regard to this responsibility, the Commission must review game performance and make decisions regarding

such performance. The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently. Comment: will vote against any and all politicians who have a hand in this change during the next election; Agency response: The purpose of the Commission is to operate the state lottery to generate revenue for the State. The Commission is the entity that determines the game product and mix, subject to the statutory authority established through its enabling law, that best generates such revenue. Comment: questions whether the Commission has lost sight of its purpose; Agency response: The Commission believes its role is to generate revenue for the State. With regard to this responsibility, the Commission must review game performance and make decisions regarding such performance. To that end, the Commission reviewed the performance of the Lotto Texas game and determined the game was not performing at the levels the Commission expected. The Commission conducted player research to determine the best approach to enhance the game in order to generate revenue. The Commission proposed the new rule for public comment, has received comment, and has considered the comment received. The Commission believes the process has been fair. The Commission also believes the new features of the Lotto Texas game do afford meaningful opportunities to players to win prizes, including the jackpot prize. Comment: problem is that state has gotten too dependent upon getting more money from the lottery. Agency response: The Commission believes that the revenue generated by lottery sales is a source of income for the State but recognizes that it is based on discretionary dollars spent by players. Comment: there are less lotto players because the market is saturated with games, the average person can't afford to play all of these games so they pick to one or ones they like best (lotto may not be one of them); Agency response: The Commission disagrees. It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. The Commission believes that there has been a decrease in Lotto Texas sales due to the lack of higher jackpots. Comment: considers scratch offs and lotto a waste of time and money; Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. Comment: if you want to increase ticket sales, start the jackpot out at a higher value; Agency response: The Commission disagrees. Sales would not support a higher starting jackpot and would create too much risk for the commission. Comment: prefer smaller jackpots, do not play at all when the jackpot grows to great heights; Agency response: It is up to the individual player to determine the amount of money he/she spends and at what jackpot level he/she chooses to enter the game. Comment: abolish the games and ask the people of Texas to make donations to the State; Agency response: The Commission is responsible for operating a state lottery to generate revenue for the State. The Commission is not the entity that has the authority to abolish the games and ask Texans for donations. The focus of this rulemaking is to make changes to the Lotto Texas game. Comment: choose a different time of day to run it instead of night, maybe noon time; Agency response: The Commission disagrees. The Commission believes night drawings are most appropriate for the Lotto Texas game. The night drawing time allows players more time to purchase tickets, especially on the drawing days, Wednesdays and Saturdays, when ticket sales are typically the highest. The Commission does draw its Pick 3 game every Monday through Saturday at 12:27 p.m. Comment: this proposal simply converts Lotto Texas into a larger version of Texas Two Step, bad idea; Agency response: The Commission disagrees. Lotto Texas is seen as the Commission's premiere on-line game and the Lotto Texas game is synonymous with the Commission itself. The Lotto Texas product and the Texas Two Step product are positioned entirely differently in the product mix. The proposed Lotto Texas rule does offer the same play style as the Texas Two Step game does. Comment: does not play unless the jackpot is larger than $27 million, this change would cause the commenter to not buy until the jackpot is at least $47.7 million; Agency response: It is up to the individual player to determine the amount of money he/she spends and at what jackpot level he/she chooses to enter the game. Comment: increases complexity of the game, instead increase the payout on the "second place" slot to about 2.5 times what it is now; Agency response: The Commission disagrees. The Commission already operates a bonus ball style game, Texas Two Step. Lottery players in Texas are familiar with this play style. Lottery players are also familiar with bonus ball play style games due to the awareness of multi state games like Powerball and Mega Millions. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: let the jackpots scale with the play instead of raising the odds; should have 365 days to claim the prize like every other state; Agency response: State law sets the period of time at 180 days, the Commission does not have the discretion to change the time period. Comment: more likely that the only folks who could get that huge pot when it finally arrives would be some lotto group who purchases thousands of tickets at one time; Agency response: The Commission disagrees. A jackpot prize can be won with the purchase of a $1 wager. Comment: if the game is going to be harder and the prize higher, then the percentage that goes to public schools need to be dramatically increased; Agency response: The Commission, in creating and operating its games, balances the amount paid in prizes with the amount transferred to the Foundation School Fund. Comment: if number of balls are increased, will recommend to people to consider Keno; Agency response: The Commission is focused on enhancements to the Lotto Texas game in connection with this rulemaking. At this point, there is a question as to whether Keno is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. Comment: when it gets to $20 million and over, have more than one drawing for a winner, split the pot so there are more millionaires in Texas; Agency response: The Commission disagrees. Lotto Texas is a jackpot driven game. Sales increase as the jackpot increases. Preventing the jackpot from rolling or increasing would be detrimental to sales and to the main intent of the game. Comment: start the jackpot at $5 million and increase it by $5 million or more anytime there is no winner; Agency response: The Commission disagrees. Sales would not support a starting jackpot of $5 million and would create too much risk for the commission. The jackpot increases or rolls based on draw sales not on a pre-determined roll amount. Comment: state's lottery revenue went to 8-liners, if you can't get rid of the 8-liners, have to open gaming rooms or pay lottery players better; Agency response: The Commission is focused on enhancements to the Lotto Texas game in connection with this rulemaking. Under current Texas law, gambling devices that pay out cash are illegal. Comment: start at $6 million and increase respectively each week

until a winner is picked; Agency response: The Commission disagrees. Sales would not support a starting jackpot of $6 million and would create too much risk for the commission. The Commission does increase or roll the jackpot based on draw sales until a jackpot ticket is sold. Comment: give 20 $1 million prizes instead of one $20 million prize; Agency response: The Commission disagrees. Lotto Texas is a jackpot driven game. Sales increase as the jackpot increases. Preventing the jackpot from rolling or increasing would be detrimental to sales and to the main intent of the game. Comment: should be a ceiling on the amount of "reserve" money that is held back, should be a drawing to give back to the consumer the "reserve" money that was held back the previous fiscal year; Agency response: The Commission disagrees. Out of the 52% prize pool, the proposed rule allocates 1.93% to the prize reserve fund. The reserve fund may be increased or decreased by paying Lotto Texas prizes. The Lotto Texas prize reserve fund may be used only for the Lotto Texas game. A drawing would deplete the reserve. That is not the intent of the reserve fund. Comment: opposed to the practice drawings, it decreases chances by 6 times; Agency response: The Commission disagrees. The Commission's on-line game drawings are certified to be random. Practice drawings or pre-tests do not alter the randomness of the live drawing. Practice drawings are a means to detect whether machines and/or balls are not functioning randomly. Comment: if lotto goes over $10 million, maybe about 5 players could win $500,000; Agency response: The Commission disagrees. Lotto Texas is a jackpot driven game. Sales increase as the jackpot increases. Preventing the jackpot from rolling or increasing would be detrimental to sales and to the main intent of the game. Comment: do a pick four instead; Agency response: The Commission is always evaluating game performance. The Commission believes game enhancements should be implemented to keep the on-line product mix fresh and exciting. Comment: lotto is always won on the coast or in the larger cities or suburbs, what about the smaller towns; Agency response: The Commission disagrees. The Commission's drawings are certified to be random. The Commission cannot place winners in any geographic area. The number of winners that come from a particular geographic region depends on the number of players in that region which, in turn, is related to the area's population size. The more players that live in an area, the more likely it will be that winners will occur in that area. Comment: payoff for getting 3 of 6 should pay $10 or 3 of 6 pays 5% of the pot, 4 of 6 pays 8% of the pot, 5 of 6 pays 12% of the pot, 6 of 6 pays 75% of the pot, size of the pot is less whatever the operating costs are of the game, all unclaimed money goes to public purposes; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: a static $5 million jackpot should remain eligible for winning each time there is a drawing until there is a winner; Agency response: The Commission disagrees. Lotto Texas is a jackpot driven game. Sales increase as the jackpot increases. Preventing the jackpot from rolling or increasing would be detrimental to sales and to the main intent of the game. Comment: Colorado only has 45 numbers; Agency response: The Commission is focused on its game and their performance in the Texas marketplace. While the Commission does review game approach and performance in other states, it must make decisions based on the make up of Texas. Comment: won't play until the jackpot exceeds $50 million; Agency response: It is up to the individual player to determine the amount of money the/she spends and at what jackpot level he/she chooses to enter the game. Comment: substantially lower the top prize and substantially increase the lower prizes; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: eliminate the lower prizes and make the 5/6 $50,000 or $100,000; Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: make the 6 number pay off $1 million, 5 number $500,000, 4 number $5,000, and 3 number $50; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: would play if the extra money was earmarked for schools, doesn't seem to be any accountability for the money lotto is generating now; Agency response: Current law requires proceeds from lottery sales to be transferred to the Foundation School Fund. The State Lottery Act requires an independent financial audit of all accounts and transactions of the lottery. Comment: increase the prize pool on the other games, state would benefit in increased revenue by attracting more players to games with more prizes, state revenue would be increased by quantity; Agency response: The Commission is always evaluating its product mix and how its games can be enhanced. The Commission believes its role is to generate revenue for the State. With regard to this responsibility, the Commission must review game performance and make decisions regarding such performance. Comment: make the jackpot what is advertised, nothing less; Agency response: In the game, for the first four Lotto Texas drawings in the roll cycle, the jackpot amount will be the greater of either the advertised jackpot or the jackpot based on sales, determined in part by the applicable interest rate factor. For all subsequent Lotto Texas drawings in the roll cycle, the jackpot amount will be the jackpot based on sales, determined in part by the applicable interest rate factor. Comment: people will go out of state to play games in neighboring state, including casinos and lotteries; Agency response: People should make their own decisions as to how they spend their money. Comment: decrease the numbers and lower the initial jackpot to $1 million, maybe 200 winners a drawing could each get $100,000; Agency response: The Commission disagrees. Research shows that players are willing to choose difficult odds for a bigger grand prize, but a better chance to win a smaller prize. The game proposal achieves both of these player desires. Comment: all money left over or not claimed should be transferred equally to all school districts to be used for teacher incentives; Agency response: State law dictates how the proceeds of lottery sales is used by the State, the Commission has no discretion regarding how such proceeds are used. Comment: too much money is spent promoting the

lottery, put up billboards at the state lines to let others know and save some bucks; Agency response: The Commission believes it advertises and promotes its games appropriately. The focus of this rule making is the Lotto Texas game. Comment: drawings should be completed within one minute of closing the lotto ticket machines, there is no real reason for waiting 12 or 15 minutes to draw numbers after ticket machines shut down; Agency response: The Commission disagrees. Wagering for the night drawings stops at 10:00 p.m. and the on-line game drawing takes place at 10:12 p.m. During this time period, Lottery Security staff verify that all wagering for the games being drawn that night have ceased and they then prepare to conduct the drawings broadcast. Comment: this is a ploy to increase revenue since more people play when the jackpots are larger; Agency response: The Commission believes that the proposed game will create higher jackpots, increase Lotto Texas sales and therefore, revenue to the State of Texas. Comment: all games need to be fair, honest, and winnable, with full disclosure of odds at point of sale; Agency response: The Commission believes all games are fair, honest, and winnable and the odds of winning are disclosed at the point of sale. However, the games are intended and designed to appeal to a different type of player. Additionally, the lottery paper roll stock for each on-line game has the odds on the back of the paper stock. Comment: new game separate from this one with 4 numbers and a power ball or five numbers with a power ball; Agency response: The Commission disagrees. The Commission's Texas Two Step game is a 45/35 +1/35 bonus ball style matrix. The proposed game is a 5/44 + 1/44 bonus ball style matrix. Comment: Texas doesn't need a "powerball" type lotto, will only serve to bolster rarely won, inflated jackpots, causing hype and hysteria, while inviting residents of other states to play, this is not what Lotto Texas was started for; Agency response: The Commission disagrees. The Commission believes its role is to generate revenue for the State. With regard to this responsibility, the Commission must review game performance and make decisions regarding such performance. Comment: double the lotto prize after no one won for the particular drawing; Agency response: The Commission disagrees. The jackpot increases or rolls based on draw sales not on a pre-determined roll amount. Comment: most people want the bigger winnings for getting 4 or 5 matching numbers, only time commenter spends money now is when jackpot is over $25 million, decreased amount of play because of change from 50 to 54 numbers; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. It is up to the individual player to determine the amount of money he/she spends and at what jackpot level he/she chooses to enter the game. The Commission believes there has been a sales decrease due to the lack of higher jackpots. Comment: increase the 3 ball winners to $10 and the rest accordingly, many people will not play unless the pot is above $20 million; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. The Commission agrees that many players join or participate after the "pot is above $20 million." The main intent of the proposed game is to generate higher jackpots more frequently so more people will participate in the Lotto Texas game more frequently. Comment: rather play Cash 5 or Texas Two Step and leave the big lotto to the other players; Agency response: It is up to the individual player to decide if he/she wants to participate in any of the Commission's games. Comment: multiple winner system, begin with one drawing, if no winner, draw two sets of numbers for the next drawing, if no winner, draw three sets of numbers; Agency response: The Commission disagrees. The Commission believes that it is appropriate to draw one set of winning numbers per drawing. Drawing multiple sets of winning numbers would increase the odds of split jackpots and therefore, smaller jackpots for 6 of 6 winners. Additionally, Commission's liability for a drawing with regard to the prizes, including guaranteed prizes, would potentially increase which could create an adverse impact on the prize reserve fund. Comment: people quit playing the lotto because it's hard to win anyway; Agency response: The Commission disagrees. The Commission believes sales have declined due to the lack of higher jackpots. Comment: look at Michigan's game, when people start to see jackpots of $20 million or more, they will play; Agency response: While the Commission reviews other states' games for approach and performance, the Commission must make its decisions based on anticipated performance of a game in Texas. Comment in the form of responses to the feedback form that was in support of the rule changes was also submitted by the commenter who created the feedback form. In contrast to the comment submitted in opposition to the rule changes, this comment was minimal. The feedback form contained the following subject and response: Comment: "Offering a powerball type game & increasing the odds of winning the top prize: I am FOR the proposed rule 16 TAC 401.305. I would like to see fewer jackpots so the pots can climb."; Agency response: The Commission agrees. Many of the persons completing these forms also offered the following comments: Comment: commenter is after the big money and if the new way could produce pay outs like the powerball's $200 million, commenter is all for it as long as it can be won, commenter thinks the Commission is messing up by only going from 4>5>6>8>10, liked the rolls when they went from 4>6>9>12>15; Agency response: The Commission disagrees that it is "messing up" in jackpot rolls. The Commission rolls or increases the jackpot based on draw sales. Comment: would like the jackpot to grow and have fewer winners and since the adding of the 51-54 didn't work, hopes this will work; Agency response: The Commission agrees. Comment: it's bigger pots or prefers adding Powerball, joining other states in this would reduce our surpluses, both would be ideal, a painless way to avoid state income taxes; Agency response: At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. Comment: wants Powerball, Texas Two Step just is not big enough prizes; there are plenty of games offering better odds of winning smaller prizes, rather have a small chance of winning a big prize; Agency response: At this point, there is a question as to whether a multi-state game is currently authorized by the State Lottery Act. The Commission must make its decisions based on current law and what is permissible under current law. Texas Two Step is positioned as a rolling jackpot game with a better chance to win a smaller jackpot. Comment: instead of giving multi-million dollars to one person, why not have a game

plan to have multiple winners of $1 million each, the numbers that did not have a winning claimant would roll over to the next drawing; Agency response: The Commission disagrees with having multiple winners of $1 million each. The Commission believes that the decrease in Lotto Texas sales is due to the lack of high jackpots and consistent wins at the lower level jackpots. Lower jackpots do not cause the excitement that is necessary for a lottery jackpot game to be successful. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: wants to see a change in selecting the pay off, instead of selecting cash option or 25 payments at time of ticket purchase, select which you want when you claim your prize, Powerball does it this way; Agency response: Amendments to the federal law in 1998 allow some taxpayers, but not all, to rely upon a special rule for cash options in lottery winnings. Because there is uncertainty in the application of the possible IRS tax provision and because of the impact on the players and winners, which may include the impact on the annual installments paid based on fluctuating interest rates between the time the Commission knows a 6 of 6 match occurred for a particular draw and the time the claimant would choose payment method, if the Commission was to implement a change, the Commission has not chosen to change its existing structure that requires the player to choose, at time of purchase, whether the prize will be in the form of a one time payment or annual installments over 25 years. At this time, the choice remains within the discretion of the Commission and at this time, the Commission chooses to continue with its existing practice. Comment: the prizes matching other winnings besides the top prize need to have higher payouts, several states such as Florida pay several thousand more for hitting 5 numbers, if the change occurs, hitting 5 numbers without the lucky ball needs to have a substantial amount, $75,000-$100,000 should be minimal; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Comment: don't mind the grand prize odds being more stringent but wants to see the smaller prizes increase significantly; Agency response: The Commission disagrees. Increasing the prize amounts for matching three, four or five numbers causes a smaller amount of the prize pool to be allocated to the jackpot prize. A smaller amount of the prize pool being allocated to the jackpot prize prevents the Commission from building up to large jackpots when there is no jackpot prize winner in a drawing. Sales trends show that as the jackpot climbs, so do Lotto Texas sales. Also, as a part of this feedback form, a person was able to indicate whether them represented a group or organization by clicking the response: "Yes, I am speaking for my family, a group and/or an organization." But, the form did not require the person to disclose or identify the group or association. Therefore, many of the feed back forms indicating that the person providing comment was speaking for his/her family, a group and/or organization do not disclose or identify the group or association. Each of these individuals will be listed in the preamble of this rule as representing an unidentified group or association.

Other comment was in the form of email messages to another commenter who submitted this email comment as part of the commenter's comment. Generally, these email messages indicated opposition to the changes to the Lotto Texas game. Other comment was in the form of petitions completed indicating agreement with the statement on the petition: "I oppose proposed rule, 16 TAC 401.305, because it makes winning the Lotto Texas jackpot (1st prize) harder to win and I play to win the jackpot. I feel the Texas Lottery is taking advantage of the people of Texas by proposing such a game." This comment was also submitted by the same commenter who submitted the feed back forms and the email comment addressed to the commenter. The Commission disagrees with the comments indicating opposition based on the reasons stated in the standardized statements contained in the feed back forms for the reasons the Commission has provided as its agency response in this document.

Groups or associations opposed to the rule are: Individuals that indicated they are speaking for their family, a group and/or an organization: Carolyn Bevills, Delores Metcalf, Lynn L. Dillingham, Henrik Risvang, Eugenio Ramos, Shannon Magnus, Joe Oliver, David Lowenberg, Brain W. Wing, Wendell Hernandez, Michael Hughes, Greg Alban, Jimmy last name unknown, Angela Whitmire, Mary L. Harris, Vickey Derleth, Cynthia Rothermel, L.D. Sherman, John Gray, Anielia Stephens, Steven Longcor, Michael McKinney, Susan Young, Susan Tiffin, Renee Kidd, Tuan Nguyen, Rodney Pendley, Roger Pierre Nealy, Mike Morrison, Shay Khan, Uroosa Khan, Richard Lawson, Tony DeJacimo, Deborah last name unknown, Nancy last name unknown, Tom Buck, Fred Gola, Billy Parker, Dalton Slape, William Harrison, Jeff Reeh, Eugene C. Campbell, Ronnie C. Williams, Josh Neff, Paul Goins, Art Wharton, Chuck Tark, Porsla Duszynski, Darren Lilie, Richard Schaffer, Brandon last name unknown, Z. Ray Richter, Jerry Goldfarb, George Molina, Scott Crosland, Joyce Shepherd, Marti Thornton, Richard Nieman, Joao Mio Mao, Jeri Thompson, Bobby Eaton, Daniel Deleon, Christy Sly, J. Smith, Courtney McCullough, Carmen Norwood, Leo Moorer, Robert Miller, Bob Jorgenson, Anthony Mondrey, Nate Miller, Wayne Duke, Gordon Rountree, TK Lane, Ken Savage, R. D. Hamel, Frank Clanton, Brenda Long, Lisa Watts, Frank S. Kopta, M. Carey, Peggy Wilson, Sharon Sweeney, Mario Cmet, Bob Moore, Gene Kottke, Mickey McCarley, Justin Jauer, Ronnie Pfeil, Jeanie Morris, Diana Butler, Daniel Denson, Billie Harrison, James Creagh, Karl Johnson, Elvin Meadows, Ben Hicks, Jesus Cabrera, Martin Kennedy, Jaime Sandoval, Lanny Ramay, Anita Ramay, Marilyn Mosley, Ken McFarlin, Sarah Gaunt, David Robertson, K.J. Keppner, Steve Coweart, Tena Martin, Elan Turner, Tina Bess, Anthony Bess, Chet Hodgins, Gerald Nicholson, Cliff Smith, Beverly last name unknown, Susan Orner, Tim Robinson, Wayne Bennett, Earnest Young, Jennifer Tidwell, K M Rouse, Solomon Hawkins, BJ Trammeell, Jonathan Endicott, Aaron Starling, Lonnie Williams, Richard Laughlin, Jason Worley, Ed last name unknown, Richard Forsythe, Buddy Christopher, Fernando Granda, Jenifer last name unknown, Valencia Gandara, Jesse Rodriguez, Kris Michael, Roby Benedict, Ed Sanchez, Barbara Walton, Rik Musia, Keith Johnston, Stephen McCravy, Cathy Piaczynski, Ronnie Whatley, Donal Parker, Rena Whitlock, Robert McCullion, Charlie Piland, Dustie Cates, Edward Wallace, Bill Prikryl, Lymon Washington, Jr., Richard Flashnick, Terri Fulton, Chris Thomas, JoAnn Justice, Jose Dominguez, Hank last name unknown, McNeil Smith, Thomas Marton, John Glover, Matt Cason, Nancy Bernard, Michael Byington, Billy Blackwell, Kory last name unknown, Dallas Dleay, Cindy Dought, Sharlene Chaney, Daniel Manchester, Chandler last name unknown, Ilene Campbell, Jesse Duckett, Stacy Kaupas, Michael Smith, Rose Garcia, Erika Lucas, Nye Cooper, Andy Richardson, L. Durst, Debbie Don, Beverly Whetsell, Doug Stone, Jamie last name unknown, Karen Smith, William Looney,

Larry Bilbay, Karl Sears, Charles Stanley, Ellie Kriebel, Tom Smith, Alan Lampin, Jane Gordon, Lynn Dicken, Tom Warner, Richard Teichman, Kevin Jones, Rodney Nix, Tommy Portwood, Sammy L. Curry, Ilenda Ortiz, Mark last name unknown, Addam Smith, LuAnn Taylor, G. K. Jochec, James Herron, Eric Tabone, Russell Minton, Bill last name unknown, Patrick Dvorak, Patrick Moran, George McCann, Fernando Marrufo, Joe Hnandez, Carlos last name unknown, Jerome S Kari, Luis Navas, Robert Pollok, Ginnette Taylor, Nina Saunders, Janie last name unknown, Royce Smith, John Williams, Landen Fredrick, Terry Parker, D. Parnell, Harvey Patton, Brian Walker, Allen Easley, Tom Castillon, Russell Grider, Donald Jones, Barry Sullivan, Alfredo H. Delpin, Thomas Kelly, J Netherton, Don Reynolds, Tom Lawson, B.G. McCurdy, Terry Damman, Iraida last name unknown, Shawn Quigley, David Hofer, Kim Peters, Bruce Prihoda, David Tonn, B. Lawson, Susan Hassel, Debbie Erb, Sharon Rancour, Jo Ann Hudson, Chuck Richter, Matt McClure, Tommy Carpenter, Ann Chapman, Jeff Baskett, Teresa Core, Rodney Sullivan, Henry Frost, Joseph last name unknown, Ray Smith, RB Phemister, Linda Lunday, Jerry Kennedy, Sally Henson, George Bartlett, Mike Murehead, W.C. Coulter, Tena Murphy, Bobby L. Williams, Robert Rexroat, Ruth Piland, Tissie Ford, Sam Sharp, Jerry Moore, Jerry Hinds, Elsie and Van Kroussakis, Robert Oliver, Daniel last name unknown, Amy McGilvray, Walter E. Livingston, Marianne Westmoreland, Annette Jones, Edwin S. Rigsby, Michael Moses, Marisa Lucio, S.M. Hines, Sherrie Acker, Max Gibbs, Leon Crenshaw, Lolly Wylds, Jack Rosenbaum, Louise Acton, Jason Sanchez, Linda Morgan, Gary Coley, Erica s. Worthy, Claudia Goldberg, Ambrose Charvis, Steve Floyd, Dan Nolan, Henry Lee Kraatz Jr., Javie Ruiz, Ken Gound, Sarah Poole, Mark Kingfish, J Stubblefield, James King, Johnny Garner, Stephen Trout, Peggy Boors, Douglas F. Carr, D. White, P. Burch, Will Zapalac, Jeff Moore, John Burton, Suzy Mena, Marc Randall, Elaine King, Chris Cochran, Anthony Ignatious, Michael Carmichae, Yermek Tynyshbayev, Gus Guevara Jr., Victoria McGinley, Jay last name unknown, Joseph Frenza, Mike Jass, Chane Overland, Walter A. Green, Qui Ly, Mitchell Jones, Jaime Munoz, Kenneth smith, Paul Crockett, Taufik Subroto, Meri Montgomery, Patrick Chu, Priscilla Miranda, Mike Simmons, Sheila Harrison, Mark Gifford, Christopher Colbert, David Foreman, James Wood, Stan Devlin, Anthony Alexander, Pedro Martinez, Lee Brown, Thea singer, Debil Donthelli, Steve Pontiff, Justin Nguyen, Carrie last name unknown, Anseth Steinberg, Randel Anderson, Brandon Whittle, Keith Abernathy, Mark Mancha, C. Henk, Merlin Sojo, Jonas Thiemer, John Smiley, Jim Shaver, C.L. Smith, Charles Schulz, Rachel Cannon, Jim Cannon, James Westmoreland, Harley Tittle, Norman Reola, Jack M. Smith, Angela Perdue, Joseph Yentzen, Tim Ray, Kathleen smith, Jeff Wade, Mike Farris, Cindy Pospisil, Roger Varathar, Brian DeFiore, Bill McCown, Kay Milder, Kevin Chaka, Kathy Railey, S. Jeppesen, Jeffrey Jones, James H. Spearman, Ronald Trowbridge, Tim Molnes, Thad Carson, Ricky last name unknown, Tammy Tucker, Chris Blurton, Steve Havard, Paul McGuire III, Betty Smith, Anne Roberts, Karen Templeton, Audie Templeton, Aubrey Futch, Nancy Wilson, Mildred Arbuckle, David L. Secrest, Sandra Speaks, Ray Newman, Sylvia Segovia, David Zuniga, Al Newman, Stephen Paulson, Raymond H. Richardson, Dick Daley, Danial Martinez, Mary Ann Young, Michael Shaw, Ed Clark, Joe Cox, Brad Damron, Phillip Daniel, Dorothy Caldwell, Kathy M. Samson, Gloria Sharp, Bill Wischkaemper, Harvie last name unknown, Norman F. Schuetz, Larry Liles, Melissa Ausburn, Jerone Anderson, Stacy Washburn, Lisa Cortasie, Kenneth Knopp, Pam Richards, Barnie Malcolm, Marvin Reams, Jeff McCarty L.S. Allen, Jason TeBeest, Larry Grimes, Will Stewart, Glen Cranford, Chuck Kelly, Denise last name unknown, Tonya Lanham, Kim Davis, Betty Rabie, Janet Anders, Jim Snyder, Andrew Cocker, Carol Campbell, K.W. Adams, Dolores Thomson, Joe Narro, Art Salinas, Susan Mullins, Vilma Irizarry, Janet Croom, Dempsey Sawyer, M. Jones, DR Lewis, Claire Sindone, Larry Gardner, Adams last name unknown, Mr. Bin Koshy, LaMar Booker, BJ Bounds, Kathy Hamm, Ortho Parker, Robert McNaughton, Roger Kelly, David Rawlings, Kay last name unknown, Nick Noor, Royce Wilcox, Santos Ortiz, Devona Hinsdale, Truett Hunter, W.M. Pursley, Claudia Stockton, Martha McDonald, Sarah Farley, Robert McGuffey, Mohammad Salehpour, Jeannie Ingram, Roger A. Nassif, John S. Whitford, Bryan Dubose, Rexx Behring, Doris Herron, Dorston Fontenot, James A. Hall, Linda last name unknown, Jack Hall, S. David Wiest, Louie Wilkerson, Neil Coffee, Ron Waterhouse, Cindy Bauer, Jack Means, J. Kilpatrick, Henry P. Ryan, V.I. Guidry, AH Glass, A. Garcia, Ken Sims, Dixie Sims, Kevin Davis, Tommy Cross, Forrest Dean Salmon, Beth Durland, Karen J Herrick, Steve Kasmiersky, Julie Phillips, Glenda Charrier, Star Moses, Bill Burt, Cheryl White, DC Bonney, Christy Tanner, J.W. Hardy, Harriet Mikus, Eric W Smith, Dale Robbins, Michael Wilson, Marcos Resendiz, Erin Canada, Prasad Nekkanti, J. Dudley, Alex White, Pat Stratton, TS last name unknown, Tad Daniel, Brain Wallace, Troy Donahue, James M. Brown, Jay B. Jackson, Hazel Rambo, John Robinson, Lance Solomon, Richard Adcock, Paulette last name unknown, Peggy Tilson, Rose Guel, Kevin Carroll, Jennifer Presson, Alvin Walls, Claud Dockrey, Craig Meacham, Jason Murphy, Michelle Ramirez, Gail Dowell, Deborah Walton, Clint Edmundson, Garie Littleton, Kenneth Hood, John Hollinshead, Michael Korelc, Yvette Fanestiel, Jeramy Tunnell, Krisy Devillier, David Hicks, Bill Newsom, Terry Faubion, Richard McClanahan, Susan Lawrence, Davis Ellis, David C. Loera, A. Schmalbach, Katie Holman, Merritt Larson, Tonia Lacy, Lita Conner, William Pryor, John Gutierrez, Robert Gratteau, Gordon Lieb, Randy Cunniff, Tim Gerrish, Bob Adamson, Jim Payne, Keith B., Collin Strickland, William L Heiner, Bryce Wanless David Valentine, RD Daugherty, Bill Melton, M Gibbons, Michael Boatman, Gladys McGuire, Jim Capell, Brenda Webb, J Bilicek, Jimmie Grokett, Randy P. Shirley, Debra Bennett, Herman L. Minter, Tom Burns, Waylon last name unknown, Billy Lindsey, Benny Dadidycus, Mary Lewis, Eva Day, Eva Kesckemeti, Bill Sussen, Merle Bass, Eddy Knapp, Tom Scanlan, Karen Kmoch, Mike Trocko, Lee Scott, Vernice Sonnier, Richard Ard, Jim Bridges, Jonas Tinkler, Terri Cranford, Robert L. Russell, Tammy Hudson, Janet Cogburn, Harry Wilkinson, Matthew Janak, Kevin Phillips, Roy Stover, Rebecca last name unknown, Henry R. Head, Jo Robinson, Pat Willis, Connie Brian, Christi Coffey, William Campbell, Samantha Nelson, Leslie Pierce, Jason last name unknown, CF Shelton, Gene Shelton, Kathy Conner, James Beasley, Mary Montee, Christine Palmer, Robert Flores, E.J. Raley, Jason Cooley, Jack Grigsby, M. Bailey, Grover Pippin, SJ Jackson, Melvin Bradford, Danny Huser, Paul Kates, Gail Dobson, Nhien Nguyen, Les Heath, Lonnie Barrington, Robert Evenbly, Joe Enber Jr., Betty C. Lanasa, Bennie Anderson, Carol White, Eunice Giolley, Jean Ross, Conner Sturdivant, C. Hebert, Roger Powell, Rick Frasier, Ilia Hall, Annamarie Mootz, Dora White, Terry Short, Randy Cunniff, Mike last name unknown, Connie McKinney, Jim King, Darlene Cotner, Rod Vaugh, Sue Aldrich, Rosa Owens, Anita Nicholson, Gary Grant, C.L. Cowan Jr, Randy Burgfield, Tim Danforth, Maricela De La Cruz, Neon Gonzales, T Thomas, Gayla O'Neall, Shah Syed, James last name unknown, Linda Goodman, David Reyes, Roger Pierce, Rick Ruckman, Mark

Stockdale, Thomas Shirley, Cheryl Davidson, Tom Concklin, Sheron Skaggs, Fred Trimyer, Dennis Field, Dr. Vincent, Beverly Atner, Ernie Harris, Larry Foster, Robert Fuoco, Just Justin, Al Ranayk, Blaine Byers, Amado E. Chaheine, Jackie Benner, Greg last name unknown, John Thompson, Mark Painter, Horatio Arce, Amanda Clark, Gerald Sobecky,Kathy Anderson, Charles Wright, Glenda Wright, Patti Cox, Stephen Zapalac, Sherry Phipps, O.E. Buzzaird, R Worley, Daniel L. Lott, Clara Helmbright, Lance Polson, Richard Hart, Ralf Miller, Teresa Ennis, Gault last name unknown, David Williams, Kevin Scott, Brian Burton, William Bright, Dominic Lepore, Dale Evans, Jo Hammons, Raymond Woodruff, Donis Westmoreland, Eileen Strand, Billy Ballard, Bryan A. Blake, James Gossett, James Hight, Dee Robinson, Ann Muncy, Jim Ricketts, Larry Dickey, Robert Engish, Jeff Joyce, Larry J. Johnson, Duane Johnson, Rose Gibson, Kelly last name unknown, Dewayne Johnson, Miguel R. Cortinas, James Smith, Lyndelle last name unknown, Jennifer Burkhalter, Glenda Michaels, David Sauter, Theda Rowlett, John Stitt, Mike Hernandez, Amanda Duffin, John D. Kelly, Jerimy L. Harris, Stephen Broll, Russell Dillard, Patrick Pulliam, Tlindley last name unknown, Laura Cason, Jessica Johnson, Rod Mills, mm last name unknown, Karen Germany, Robert Machen, Debie Ferrell, Nancy Fahey, Pedro Garcia, Roy Rogers, Felice Williams, Leland Roberson, Shawn Kelly, Earnest Oldham, Louis Sandefer, William T. Stockman, Richard Tucker, Robin Newton, Rene Gregg, Robert R. Levesque, Joann Brito, Thomas last name unknown, Lola Morton & family, John Holmes, Amy Parker, Early Goodson, Chuck Ruth, Joseph Talban, Annie Frenza, Todd Richards, Zack Levitt, Terry Overton, Angela Holder, Kenneth Pope, Steve last name unknown, Susan Williams, James Page, Joe Salazar, Louis R. Perrin, Daniel Dovalina, R. Lee, Edie Stebbins, John M. Hall, Becky McClung, M. Saxon, David Linsay, Ted last name unknown, Ronnie last name unknown, Jennie Huddleston, Rex Naylor, James Tuucker, Dale Powell, Brenda Anthony, Gloria Lundeen, John Farrow, William N Jonas, Maria Jones, Gene Leavaell, John Marckstein, Anthony Cabrera, Gererdo Hidalgo, Brian R. Dixon, Dave Stone, Mario Canales, Rogelio Paniagua, Lucy Nesbit, Debbie Moore, Robert Bernard, Dianne Harwood, Jon Nancy, Joel Brock, Martha Garcia, Travis Tucker, Tony Panaytumi, Sue Ann Robertson, Michael last name unknown, James Sowell, Sirilio Falcon, Mitch Francis, Betty Marvin, Charles and Barbara Bearn, Tony last name unknown, D.T. Turner, Anadelia Rodriguez, Kara Clairborne, Mark Puckett, Andrew Scott, Genie Smart, Verie Theriot, Darla Maimbourg, Brenda Roden, Fay Bayres, Ron Palmer, Vicotria Reglin, Peter Block, Bill Ingram, Kathy Varner, Anthony Cox, D.W. Scott, George Robinson, Jerry W. Duke, Jayna last name unknown, Robbie Riggs, JT last name unknown, Fred Grupe, Jim Smith, Diane Babb, Jerilyn last name unknown, B G Lawless, Fred Gola, Alvin Kinder, Richard Schaffer, Lisa Wicks, Louis G. Goodall, Cherisse Huddleston, Dennis Galliera, Nita Baldridge, Rejane Keonig, Diane Johnson, Nathan Oujezdsky, Larry Crabb, Wesley Ghormley, Robert Knabe, Danny Nichols, Kenneth Enloe, James E. Groves, RD Hamel, Michelle McNabb, Doris L. Curry, Robert Rath, M. Mosley, Mike McElveen, Glenda Fryer, Ruben Chavez, Rob & JoEddy Busby, Kenneth Brady, Richard Cox, George Spain, Brad Giannini, Jack Duffie, Norman Barnhill, Ernie Jordan, Jim Cox, Charles R. Cox Jr., Martha Gomez, Peggy Taiclet, Bob Brown, Marsha Barbato, John T. Opincar, Frank Turney, E.B. Reddoch, William Boatwright, Anne Thomas, L Recio, Marilyn Wallace, Michael Smith, James Pearson, Nell Dedman, Greg Pannell, Rosemary Watson, Richard Crandall, James Wallace, Tim Hansen, Luis Valdez, Mike Blanton, Michael Craig, Roger Fritz, Kristin Reynolds, Alan Richards, Cindy Simpton, Britany Taylor, Howard Harris, Betty Jo Mican, Craig Mabry, Chris Rogers, Diefino Moreno III, Pat Hogan, Darlene Huckaby, Don Stagner, Joe Spradlin, Jim Baradziej, Karen Watson, James K. Pack, Sandra Jenkins, Paul Holtz, Adan Garcia Hernandez, Tim Larson, Frank Orges, John Shepherd, Tara Earl, Gloria Eggert, Jim Wilkie, L. Reason, Todd Rufner, Tim Larson, Klaus D. Meybaum, Robert Chaney, M.A. Martin, Bob Martin, J.P. Seyler, Terrie Seyler, Chad Links, Chris Links, John Cofey, Vaidren A. Trotti, Guy Parks, Charlie Muery, Charles Turney, Travis King, Matthew Easterling, Therssia McDaniel, Billy Hughes, Irvin Hosie, Bobby Lawter, Betty Fessenden, Matt Henry, James Sanders, Steve Perkins, James Tullos, Jason Bowden, R Jones, John Steven Lira, Mihael Meche, Kevin Gilmore, R.P. Campbell, Joseph C. Dorsey, Gary Raufeisen, Dan Drummond, Jim Sands, Tom last name unknown, Keith Brenton, Shelia Rogerson, Alvin Hebert, Eav last name unknown, Myra Cole, William Machnski, Zackary Odom, G. Stutes, Brandon Silver, E. J. Updegrove, Carol Atkinson, Glenn Lacey, Bill Shaffer, Larry Presser, Mamie Robinson, Sherri Butler, Nella F. Cook, Vickye Reaves, Julie Carlson, Mark Haler, Gary Anderson, Joel Scott, Kay Foster, Stephanie Tobin, Ryan Alsobrook, Fred Koppe, Larry R. Leek, Daniel last name unknown, Dale Eicker, David t. Newman, Joe Grant, Jay Birdsong, Sondra Neiman, Bert Furr, Bobby last name unknown, John Price, Rose Feazell, Cal Schooley, Brian last name unknown, Keenan Cruce, Alfred Sanderson, Larry Grimes, Diana Garza, Nancy Barr, Hubert Stevens, Patsy Lenderman, Pamela Sutter, Karen Latona, Joel R. Jordan, Richard A. Bryant, Patty Jacobs, James Hall, James Lowney, John Christie, Veronica last name unknown, C.R. Anderson, S. Snow, Darla Snow, Ralph and Shirley last name unknown, Howard R. Hanna, Eddie Upchurch, David E. Childs, Ron Odom, George Howard, Donald McCullough, John Freemyer, John Stamps, Mary Burrow, Rich Lively, Aaron Smith, Ronnie Henson, Dewitt Brown III, Dale Guidry, Patsy Mahone, Brenda Bretzke, Fondon Ellison, Alice Dickson, L.J. Middleton, Lewis Haymes, Jenny Wade-Lycan, Karen Taylor, Theresa Lawrence, Nancy K. Oliver, James Lofton, Angela Walderon, Eric Willard, Phillip Adams, Wayne Freeman, Ron Matthis, James Carpenter, Ethel C. Mundy, Stan Wallace, Beverly Shipman, Verne R King, Robert E. Lordon, Ken Hanes, Anthony B. Miller, Jim Benbrook, Kathleen Hill, Michael Grauman, Jerry Buzek, Amber Anderson, Cyndie Nunn, William Graves, John McCloskey, Scott Alan Cole, Joyce Lipp, Donald E. Broeren, Phillip Satterwhite, Cathy McCool, E. Funderburk, Bob Adamson, Andy last name unknown, Pamela Cook, S. Brown, Robert P. Wagener, Estela G. Lomax, Cynthia Hawkins, Joe Moralez, Terri Gray, John Walker, Linda Contreras, Eileen Corrigan McFadyen, Jim Miller, Brian Busenlehner, Bill Zabicki, Parkhill last name unknown, Fred Stevens, Michael J. Kriegel, James Claridge, Gregory Bailey, Sarah Perkins, David McCurrin, Shelby last name unknown, William Perritt, Eugene Delp, Elaine last name unknown, William Birkenfield, Sue Davis, Bob Russell, Parvin Gidvani, Higy Singh, Bob Kukla, Dina Bassett, DM Janssen, Beverly Gomez, Richard Robinson, Cathy Guignet, Lois Hamby, Benny Carter, Ron Wheeler, John Haynes, Catherine Umphers, E.J. Ward, Michael Greer, Bobby Lee Williams, Ron Reed, Gaye Callicoat, Milt Jones, Lynette Samuel, Alice Anderson, Richard Canty, J.Z. last name unknown, Scott last name unknown, Jim McCrary, G. Hargrove, Carloyn Humphries, Don Paquin, Kelly and Linda Christian, James E. Wheeler, Thomas Tucker, Burl Huggins, Reeves Huie, Ph.D., Fran Mathis, Robert Chesire Jr., Dwight Latta, Debbie Cackler, Mike Switzer, Jim Stafford, Mike Gibbs, Pamela Stewart, Linda Ownby, Dixie Ranallo, Vlad

Andrus, M.R. Knott, Randy Reynolds, Adolfo D. Chavez, Paul Pierce, J. Henry, Robert Gooden, Jim Boyer, Thomas Vincens, and Maudane Hamilton. Groups or associations opposed to the rule: The Lotto Report; Burmingham & Son; AT&T Wilcox's Mechanical; Mobil; Wholesale Lumber; General Hospital; A.G. Edwards; Texaco; Kroger's; Pager Sales & Services; Teacher Retirement System; Old San Francisco Steak House; Kinko's; Ezrabrook6; Coca Cola; Ford Motor Company; Krafy Korner Ceramics; E-Fix; Diamond Shamrock Corner Stores; Holloman Corporation; Re-Max Realtors; Kwik Copy; Woodland Farm; Bush Contractors; Sons of DeWitt Colony Texas; U-Haul Rentals; G&C Electric; Holmes Builders; Texas Department of Protective & Regulatory Service; ALPA; Cataract Institute; R S Consulting; The Puckett Corporation; Sears; Lyle Professional Services; Paragon Engineering Services; Channelview Retirement Fund; McDonalds; Roses Deli and Catering; Gold & Silver; McDonald Insurance; White Hat Trucking; Engineer Group; Mervyn's; City of Mineral Wells; Al's Sports Apparel; Texas Rangers; Test Data Systems; Albertson's; Allstate Insurance; Sheppard Air Force Base; American Airlines; Clayton's, Inc.; 7-11; Imperial Auto; Indian Oaks Neighborhood; Dycus Holdings, Inc.; LaQuinta; Mobile Homes; Friday's; Hamilton Electric; Firemans Group; Southwest Airlines; MCI; Dvorak Trucking; Surf City Productions; AlcatelUSA; Lockheed Martin; Sabre; AAA Rental; Dart; Significant Images.

Groups or associations in favor of the rule are: Individuals that indicated they are speaking for their family, a group and/or an organization: Don Iden MD, Jeff Walter, Steven Mayhue, Donald Stephenson, David Miller, and Robert Hamill.

The new section is adopted under Government Code, §466.015 which authorizes the Commission to adopt all rules necessary to administer the State Lottery Act and to adopt rules governing the establishment and operation of the lottery, and under Government Code, §467.102 which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

The new rule implements Government Code, Chapter 466.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302157
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: May 4, 2003
Proposal publication date: February 14, 2003
For further information, please call: (512) 344-5113

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 153. SCHOOL DISTRICT PERSONNEL

SUBCHAPTER CC. COMMISSIONER'S RULES ON CREDITABLE YEARS OF SERVICE

19 TAC §153.1021

The Texas Education Agency (TEA) adopts an amendment to §153.1021, concerning school district personnel, without changes to the proposed text as published in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1036) and will not be republished. The section determines the experience for which certain professional staff members are given credit in placement on the state minimum salary schedule. The adopted amendment adds three established and respected international accrediting organizations to the list of recognized accrediting entities for salary increment purposes.

Effective February 1, 1998, the commissioner of education adopted 19 TAC §153.1021, Recognition of Creditable Years of Service, as authorized by the Texas Education Code, §21.403, 75th Texas Legislature, 1997. The provisions of law required the commissioner to adopt rules for determining the experience for which certain professional staff are to be given credit in placement on the state minimum salary schedule.

The existing 19 TAC §153.1021, as amended effective April 16, 2000, concerning placement on the salary schedule, applies to teachers, librarians, counselors, and nurses. The rule provides appropriate definitions and explains required documents, necessary credentials, and the service record. The rule details the provisions for creditable years of service, including recognized employing entities for service credit.

The adopted amendment to 19 TAC §153.1021, which adds content and modifies existing language in order to accommodate the addition of three international accrediting associations, includes the following changes.

The definition relating to regional accrediting agencies in subsection (a)(14) is expanded to include the International Baccalaureate Organization, the European Council of International Schools, and the National Council for Private School Accreditation in new subparagraphs (H) - (J), respectively.

Language in subsection (f)(1) is added to reflect Texas public colleges and universities. This change is proposed as clarification to the rule that prior to the 1990-1991 school year, minimum days at less than 100% of the day are applicable only to recognized Texas public entities.

Language in subsection (h)(12)(B) describing accreditation by a recognized state or regional accrediting agency is modified to include the additional recognized accrediting agencies in subsection (a)(14).

Language in subsection (h)(13)(C) describing accreditation of foreign private schools is modified to account for the additional recognized regional accrediting agencies in subsection (a)(14).

The following comments were received regarding adoption of the amendment.

Comment. The Texas Classroom Teachers Association (TCTA) requested that the language concerning Texas public entities under subsection (f)(1) not be changed.

Agency Response. The agency disagrees. The change is necessary to align Texas public universities with Texas public schools. The amendment is not changing the current provision concerning experience credit from Texas public schools, but clarifying years of creditable service at less than 100% of the day from public colleges and universities prior to the 1978-1979 school year. This amendment is for clarification purposes and may have no or little effect on public school teachers.

Comment. TCTA proposed a change to the definition of 100% of the day employed or full-time equivalency under subsection (a)(9).

Agency Response. The agency disagrees. Any rule revisions related to this suggestion are beyond the scope of the current rule changes and would have to be addressed in another rule-making process.

Comment. TCTA proposed adding language to the rule to provide teacher aides who subsequently attain certification with up to two years of service credit for salary increment purposes.

Agency Response. The agency disagrees. Any rule revisions related to this suggestion are beyond the scope of the current rule changes and would have to be addressed in another rule-making process.

Comment. An individual suggested adding language to include other state agencies that are not currently recognized for salary increment purposes under 19 TAC §153.1021. The individual commented that she had been employed in an educational capacity at a state agency other than the state department of education and she felt that her experience should be recognized for salary increment purposes.

Agency Response. The agency disagrees. Any rule revisions related to this suggestion are beyond the scope of the current rule changes and would have to be addressed in another rule-making process.

The amendment is adopted under Texas Education Code, §21.403, which authorizes the commissioner to adopt rules for determining the experience for which a teacher, librarian, counselor, or nurse is to be given credit in placing the teacher, librarian, counselor, or nurse on the minimum salary schedule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302221
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Effective date: April 24, 2003
Proposal publication date: February 7, 2003
For further information, please call: (512) 463-9701

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS STATE BOARD OF MEDICAL EXAMINERS

CHAPTER 163. LICENSURE

22 TAC §163.1, §163.10

The Texas State Board of Medical Examiners adopts amendments to §163.1 and §163.10, concerning Licensure, without changes to the proposed text as published in the February 28, 2003, issue of the *Texas Register* (28 TexReg 1784) and will not be republished.

The amendments are made to definitions and relicensure requirements.

No comments were received regarding adoption of the rules.

The amendments are adopted under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302269
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Effective date: April 27, 2003
Proposal publication date: February 28, 2003
For further information, please call: (512) 305-7016

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CHAPTER 167. REINSTATEMENT AND REISSUANCE

22 TAC §§167.1, 167.2, 167.4 - 167.6

The Texas State Board of Medical Examiners adopts amendments to §§167.1, 167.2, 167.4-167.6, concerning procedures for reinstatement and reissuance of a license, without changes to the proposed text as published in the February 28, 2003, issue of the *Texas Register* (28 TexReg 1787) and will not be republished.

Elsewhere in this issue of the *Texas Register* , the Texas State Board of Medical Examiners adopts the rule review for Chapter 167.

No comments were received regarding adoption of the rules.

The amendments are adopted under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302270
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Effective date: April 27, 2003
Proposal publication date: February 28, 2003
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CHAPTER 169. AUTHORITY OF PHYSICIANS TO SUPPLY DRUGS

22 TAC §§169.1 - 169.5, 169.7

The Texas State Board of Medical Examiners adopts amendments to §§169.1-169.5, 169.7, concerning authority of physicians to supply drugs. Sections 169.1-169.4 and §169.7 are adopted without changes to the proposed text as published in the February 28, 2003, issue of the *Texas Register* (28 TexReg 1789) and will not be republished. Section 169.5 is adopted with non substantive changes to the proposed text as published in the February 28, 2003, issue of the *Texas Register* (28 TexReg 1789). The text of the rule will be republished.

The amendments are necessary for general clean up of the chapter.

Elsewhere in this issue of the *Texas Register* , the Texas State Board of Medical Examiners adopts the rule review for Chapter 169.

The Texas State Board of Pharmacy commented that deletion of the phrase "in which there is no pharmacy" from §169.5(1) might mislead physicians with respect to the statutory requirement in §563.053 of the Texas Pharmacy Act.

The Board agreed to make a nonsubstantive change in the proposed rule to alleviate the concerns of the State Board of Pharmacy.

The amendments are adopted under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

§169.5. Exceptions.

Under the following circumstances, a physician may dispense or distribute drugs in quantities greater than those necessary to meet a patient's immediate needs.

(1) A licensed physician who practices medicine in a rural area, as defined in Section 169.2(10) of this chapter, may maintain a supply of dangerous drugs in his or her office to be dispensed in treating his or her patients and may be reimbursed for the cost of supplying those drugs without violating the Texas Pharmacy Act, Title 3 Subtitle J Tex. Occ. Code Ann. A physician desiring to dispense dangerous drugs in compliance with this subsection and §§158.001-.003 of the Act, shall notify the board and the Texas State Board of Pharmacy that he or she practices in a rural area.

(2) If a physician believes that a patient's prescribed treatment regimen should include certain drugs, the physician may supply them to the patient by means of pharmaceutical samples. No charge may be made by a physician for such samples. A patient's immediate needs as defined in this chapter shall not affect or limit the quantity of pharmaceutical samples a physician may provide to the patient.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302271

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Effective date: April 27, 2003
Proposal publication date: February 28, 2003
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CHAPTER 171. POSTGRADUATE TRAINING PERMITS

22 TAC §171.1

The Texas State Board of Medical Examiners adopts an amendment to §171.1, concerning reporting requirements relating to postgraduate training permits, without changes to the proposed text as published in the February 28, 2003, issue of the *Texas Register* (28 TexReg 1791) and will not be republished.

The amendment is necessary to update the reporting requirements.

No comments were received regarding adoption of the rule.

The amendment is adopted under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302272
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Effective date: April 27, 2003
Proposal publication date: February 28, 2003
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CHAPTER 174. TELEMEDICINE

22 TAC §§174.1 - 174.6, 174.10, 174.12 - 174.14, 174.17

The Texas State Board of Medical Examiners adopts amendments to §§174.1-174.6, 174.10, 174.12-174.14 and new §174.17, concerning Telemedicine without changes to the proposed text as published in the February 28, 2003, issue of the *Texas Register* (28 TexReg 1792) and will not be republished.

The amendments are necessary to clarify definitions and informed consent and for general cleanup of the chapter.

New §174.17 concerns the use of the Internet in medical practice.

No comments were received regarding adoption of the rules.

The amendment and new rule are adopted under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its

duties; regulate the practice of medicine in this state; and enforce this subtitle.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302273
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Effective date: April 27, 2003
Proposal publication date: February 28, 2003
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CHAPTER 184. SURGICAL ASSISTANTS

22 TAC §184.25

The Texas State Board of Medical Examiners adopts new §184.25, concerning surgical assistants, without changes to the proposed text as published in the February 28, 2003, issue of the *Texas Register* (28 TexReg 1795) and will not be republished.

The amendments concern continuing education for surgical assistants.

No comments were received regarding adoption of the rule.

The new rule is adopted under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302274
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Executive Director
Texas State Board of Medical Examiners
Effective date: April 27, 2003
Proposal publication date: February 28, 2003
For further information, please call: (512) 305-7016

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CHAPTER 187. PROCEDURAL RULES SUBCHAPTER B. INFORMAL BOARD PROCEEDINGS

22 TAC §§187.10, 187.12, 187.13

The Texas State Board of Medical Examiners adopts amendments to §§187.10, 187.12 and 187.13, concerning Procedural Rules, without changes to the proposed text as published in the February 28, 2003, issue of the *Texas Register* (28 TexReg 1797) and will not be republished.

The amendments are necessary to formalize the procedure whereby the Executive Director has the authority to offer restricted licenses and permits.

No comments were received regarding adoption of the rules.

The amendments are adopted under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302275
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Effective date: April 27, 2003
Proposal publication date: February 28, 2003
For further information, please call: (512) 305-7016

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CHAPTER 196. VOLUNTARY SURRENDER OF A MEDICAL LICENSE

22 TAC §§196.1 - 196.5

The Texas State Board of Medical Examiners adopts amendments to §§196.1-196.5, concerning Voluntary Surrender of a Medical License, without changes to the proposed text as published in the February 28, 2003, issue of the *Texas Register* (28 TexReg 1798) and will not be republished.

The amendments are necessary for general clean up of the chapter.

Elsewhere in this issue of the *Texas Register*, the Texas State Board of Medical Examiners adopts the rule review for Chapter 196.

No comments were received regarding adoption of the rules.

The amendments are adopted under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302276
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Effective date: April 27, 2003
Proposal publication date: February 28, 2003
For further information, please call: (512) 305-7016

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PART 38. TEXAS MIDWIFERY BOARD

CHAPTER 831. MIDWIFERY

The Texas Midwifery Board (board), with the approval of the Texas Board of Health, adopts amendments to §§831.1, 831.2, 831.3, 831.7, 831.11, 831.31, 831.101, 831.111, 831.121, §831.131, 831.141, and 831.161, the repeal of §831.51, and new §§831.51, 831.52, 831.54, 831.57, 831.58, 831.60, 831.65, 831.70, and 831.75 concerning the documentation and regulation of midwives. Sections 831.1, 831.51, 831.58, and 831.75 are adopted with changes to the proposed text as published in the December 6, 2002 issue of the *Texas Register* (27 TexReg 11372) as a result of comments received during the 60-day comment period. Sections §§831.2, 831.3, 831.7, 831.11, 831.31, 831.101, 831.111, 831.121, §831.131, 831.141, and 831.161, the repeal of §831.51, and new §§831.52, 831.54, 831.57, 831.60, 831.65, and 831.70 are adopted without changes, and therefore the sections will not be republished.

Government Code, §2001.039, requires that each state agency conduct a review of its rules every four years and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 831.1-831.3, 831.7, 831.11, 831.31, 831.101, 831.111, 831.121, 831.131, 831.141 and 831.161 have been reviewed and the board has determined that the reasons for adopting the sections continue to exist. The board has also determined that §831.51 should be repealed and replaced with new sections as described in this preamble.

The amendments correct internal references to §831.51 being repealed and replace them with new §§831.51, 831.52, 831.54, 831.57, 831.58, 831.60, 831.65, 831.70, and 831.75; update references to the Act as codified in Texas Occupations Code, Chapter 203; and replace language which refers to the department's Fair Hearing Procedures with language referring to the State of Office of Administrative Hearings. The amendments to §831.11, Annual Documentation, increase the documentation requirements for persons who graduate from a basic midwifery education program and do not apply for initial documentation within four years, and recognize graduation from a Midwifery Education and Accreditation (MEAC) accredited basic midwifery school as acceptable basic midwifery education. The amendments to §831.161 delete language referencing complaint categories, and replace it with language referencing board policy in order to enable the board to participate in the development of standardized complaint categories currently underway in the Professional Licensing and Certification Division. Minor amendments to wording in several sections for which no substantive change is indicated were also adopted to allow the sections as proposed to be published in their entirety.

All comments received concerned the proposed repeal of §831.51 and the new sections. One hundred and thirty-eight comments were received from individuals and twelve comments were received from organizations, Austin Area Midwives Association, Metroplex Area Midwifery Association, Association of Texas Midwives, Rio Grande Valley Midwifery Association, West Texans for Natural Childbirth, San Antonio Birth Doulas, Texans for Midwifery, North Texas Midwives Association, Texas Medical Association, Texas Nurses Association, Consortium of Texas Certified Nurse Midwives, and Student Midwives of Maternidad la Luz. Most of the comments (150) received were in support of the proposed rules as written. Only one commenter, the Texas Medical Association, opposed the rules as proposed in their entirety.

Comment: One hundred and forty-four commenters supported the adoption of the rules as proposed.

Response: The board considered the comments. No change was made as a result of the comments.

Comment: One commenter requested that the proposed repeal and new sections be withdrawn, and that the existing repeal of §831.51 be retained.

Response: The board disagrees. The proposed repeal and new standards organize and update the rules, are written to function as regulatory rather than proscriptive rules, and appropriately implement the Act. No change was made as a result of the comment.

Comment: One commenter stated that both the old and the new rules inappropriately assign responsibility to the midwife, although the ultimate responsibility rests with the mother in a home birth setting.

Response: The board disagrees. The Act and rules establish requirements related to the practice of midwifery by documented midwives. Legislative change would be required to shift all responsibility to the mother. No change was made as a result of the comment.

Comment: One commenter stated that the language at §831.51(d) and (e) appears to promote midwifery and should be modified to be more in keeping with the regulatory function of the rules.

Response: The board disagrees. This language, retained from the existing rules, accurately describes the board's standards for midwifery practice. No change was made as a result of the comment.

Comment: One commenter requested that §831.51(g)(2) be modified to require that a midwife grant the client access to her records within 30 days.

Response: The board agrees and has amended the section accordingly.

Comment: One commenter requested that §831.51(g)(5)(B) be amended from "age of majority" to "age of maturity".

Response: The board disagrees. The language reflects the definition of "age of majority" in state law at Civil Practice and Remedies Code, Chapter 129. No definition exists in state law for age of maturity. No change was made as a result of the comment.

Comment: One commenter suggested that the existing language found in the repeal of §§831.51(b)(3)(D)(i) through §831.51(b)(3)(D)(x) be retained unchanged in its entirety. The commenter stated that the proposed rules are silent as to a definition of low, normal or high-risk pregnancies as required by the Act, and silent as to whether a midwife should accept a mother who has or develops a high-risk condition.

Response: The board disagrees. The new sections appropriately delineate findings that would preclude a woman or newborn from being classified as normal. The Act specifically defines normal: "Normal" means, as applied to pregnancy, labor, delivery, the postpartum period, and the newborn period, and as defined by midwifery board rule, circumstances under which a

midwife has determined that a client is at a low risk of developing complications." The categories proposed by the commenter, "low, normal and high-risk pregnancies", do not track the language of the Act. Inclusion of the existing language in the new sections as proposed would be confusing, contradictory, and duplicative. No change was made as a result of the comment.

Comment: Concerning §831.11, one commenter objected to the requirement that midwives practice in accordance with the Midwives Alliance of North America (MANA) Core Competencies, and specifically objected to the use of the word "intuition", stating that this replaces the acquisition of clinical skills and clearly alludes to the establishment of a medical diagnosis and treatment process.

Response: The board disagrees. The MANA Core Competencies are nationally-recognized direct entry midwifery competencies, and have been required subject matter for every midwifery student, as well as for all midwives redocumenting after a lapse, since 1999. The board specifically disagrees that the word "intuition" refers to medical diagnosis and treatment, and asserts to the contrary that it appropriately reflects one aspect of the unique client-centered care provided by midwives, without precluding the clinical skills and judgment required for the independent practice of both midwifery and medicine. No change was made as a result of the comment.

Comment: One commenter provided a specific comment of support for §831.52 (relating to Inter-Professional Care) for appropriately including language which authorizes a midwife to refer or transfer to a certified nurse-midwife, thereby enhancing consumer access to care and facilitating interprofessional communication and collaboration.

Response: The board considered the comment. No change was made as a result of the comment.

Comment: One commenter stated that the language at §831.52(3) concerning the referral process is inconsistent and has the potential for abuse, and should be replaced with a requirement for collaboration with a physician.

Response: The board disagrees. The language is specifically designed to permit a client to receive collaborative care in lieu of referral, but also to permit the client to refuse referral and continue to receive midwifery care unless her pregnancy requires transfer to the care of a physician as specified by rule. No change was made as a result of the comment.

Comment: One commenter requested that the language in the repeal of §831.51(b)(3)(D)(i) relating to informing the client that she has or may have a high-risk condition be retained.

Response: The board disagrees. The proposed requirement for referral is sufficient to inform the client, in conjunction with the proposed requirements included in §831.51(e)(1)-(2). No change was made as a result of the comment.

Comment: One commenter stated that the rules remove an existing requirement that midwives consult with a physician regarding the condition of the mother and the newborn. The commenter stated that if midwives are no longer required to speak to a physician, the scope of practice of midwives will be expanded and the safety levels of practice will be lowered.

Response: The board disagrees. The language regarding consultation does not in fact require a midwife to consult with a physician, the language in the repeal of §831.51(b)(3)(D)(ii)-(iii) requires that a consultation be recommended, the language in the repeal of §831.51(b)(3)(D)(iv)-(vi) provides that the midwife may transfer the client in lieu of consultation. No change was made as a result of the comment.

Comment: One commenter stated that the proposed rules remove or radically redefine many of the medical findings currently used to delineate a "normal" pregnancy.

Response: The board disagrees. The Act requires the board to delineate standards for findings that preclude a pregnancy from being considered normal. These standards are specifically listed in the new sections. No change was made as a result of the comment.

Comment: One commenter stated that the requirement in §831.54 (relating to Policies and Protocols) be based on standard textbooks and references used by basic midwifery education courses approved by the board constitutes inappropriate delegation of authority to a private entity. The commenter requests that any reference list be approved by the board before final rules are adopted and be published by the board for public comment.

Response: The board disagrees. The requirement for written protocols is an increased requirement placed on midwives to enable the board to regulate midwifery practice based not only on the required rules delineating what is not normal, but also on the individual midwife's adherence to her own specific practice protocols. The reference lists for midwifery education courses approved by the board reflect the board's standards both for the way midwifery is taught and the way it should be practiced in Texas. No change was made as a result of the comment.

Comment: One commenter objected to §831.54 (relating to Policies and Protocols) on the grounds that it would not impose significant restrictions on the midwife's practice, and that the section is too general for the quality of the policies to be enforceable. The commenter requested that the phrase "to the extent not inconsistent with the midwifery act or these rules" be added to the section.

Response: The board disagrees. The section imposes additional requirements on the midwife for written protocols not previously set out in rule. The requirement that a midwife comply with the Act and rules is clear and need not be restated in this section. No change was made as a result of the comment.

Comment: One commenter requested that §831.58 (relating to Transfer of Care in An Emergency Situation) be removed as untenable, unsafe and unfair to both the mother and the physician, and that additional rules clarifying protocols and requiring collaboration with a physician be added.

Response: The board disagrees. The proposed rules impose additional requirements on a midwife beyond those imposed by the existing rules (which do not define what constitutes "transfer") to make reasonable attempts to contact the health care provider to whom the client will be transferred and follow his/her instructions. An "emergency transfer of care", like any medical emergency, may require that the affected individual be seen by the physician currently on duty in an emergency room. No change was made as a result of this comment.

Comment: One commenter requested that additional language be added to §831.58 requiring the midwife to provide emergency care as needed until transfer of care has been accomplished.

Response: The board agrees and has amended the section accordingly.

Comment: One commenter requested that midwives be required to provide a copy of the rules at §831.60 to their clients.

Response: The board agrees that the client has the right to understand the law and rules which govern midwifery practice in Texas, and believes that §831.51(e) appropriately requires the midwife to provide this information to the client. No change was made as result of the comment.

Comment: One commenter requested that the terms "infant" and "newborn" be clarified in §831.75 (relating to Newborn and Infant Care) to make clear that a midwife may not provide care to the infant beyond six weeks postpartum.

Response: The board agrees and has inserted new language and clarified the terms.

The board made minor editorial changes due to staff comments to clarify the rules in the amendment to §831.1 and new §831.51.

SUBCHAPTER A. THE BOARD

22 TAC §§831.1 - 831.3, 831.7

The amendments are adopted under the Government Code, §2001.03, which requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act); the Occupations Code, §203.151, which provides the board with the authority to adopt rules prescribing the standards for the practice of midwifery, subject to the approval of the Texas Board of Health; and the Health and Safety Code, §12.001, which provides the Board of Health with authority to adopt rules for the performance of every duty imposed by law on the Board of Health, the department, and the commissioner of health.

§831.1. Introduction.

(a) Purpose. This chapter implements the applicable provisions of the Texas Midwifery Act, Texas Occupations Code, Chapter 203; relating to the practice and regulation of direct entry midwifery in Texas.

(b) Construction. These sections cover definitions; the Midwifery Board; the petition for the adoption of a rule; annual documentation; education; standards for the practice of midwifery in Texas; definitions; protocols; termination of the midwife-client relationship; transfer of care in an emergency situation; prenatal care; labor and delivery; postpartum care; newborn and infant care; the administration of oxygen; eye prophylaxis; newborn screening; the informed choice and disclosure statement; the provision of support services; and complaint review.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302253
Debra Evans
Chair
Texas Midwifery Board
Effective date: April 24, 2003
Proposal publication date: December 6, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER B. DOCUMENTATION

22 TAC §831.11

The amendment is adopted under the Government Code, §2001.03, which requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act); the Occupations Code, §203.151, which provides the board with the authority to adopt rules prescribing the standards for the practice of midwifery, subject to the approval of the Texas Board of Health; and the Health and Safety Code, §12.001, which provides the Board of Health with authority to adopt rules for the performance of every duty imposed by law on the Board of Health, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302254
Debra Evans
Chair
Texas Midwifery Board
Effective date: April 24, 2003
Proposal publication date: December 6, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER C. EDUCATION

22 TAC §831.31

The amendment is adopted under the Government Code, §2001.03, which requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act); the Occupations Code, §203.151, which provides the board with the authority to adopt rules prescribing the standards for the practice of midwifery, subject to the approval of the Texas Board of Health; and the Health and Safety Code, §12.001, which provides the Board of Health with authority to adopt rules for the performance of every duty imposed by law on the Board of Health, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302255
Debra Evans
Chair
Texas Midwifery Board
Effective date: April 24, 2003
Proposal publication date: December 6, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER D. PRACTICE OF MIDWIFERY

22 TAC §831.51

The repeal is adopted under the Government Code, §2001.03, which requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act); the Occupations Code, §203.151, which provides the board with the authority to adopt rules prescribing the standards for the practice of midwifery, subject to the approval of the Texas Board of Health; and the Health and Safety Code, §12.001, which provides the Board of Health with authority to adopt rules for the performance of every duty imposed by law on the Board of Health, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302256
Debra Evans
Chair
Texas Midwifery Board
Effective date: April 24, 2003
Proposal publication date: December 6, 2002
For further information, please call: (512) 458-7236

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22 TAC §§831.51, 831.52, 831.54, 831.57, 831.58, 831.60, 831.65, 831.70, 831.75, 831.101, 831.111, 831.121, 831.131, 831.141

The amendments and new sections are adopted under the Government Code, §2001.03, which requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act); the Occupations Code, §203.151, which provides the board with the authority to adopt rules prescribing the standards for the practice of midwifery, subject to the approval of the Texas Board of Health; and the Health and Safety Code, §12.001, which provides the Board of Health with authority to adopt rules for the performance of every duty imposed by law on the Board of Health, the department, and the commissioner of health.

§831.51. Standards for the Practice of Midwifery in Texas.

(a) Purpose. To establish standards for safe midwifery care.

(b) Midwifery is the practice by a midwife of giving the necessary supervision, care, and advice to a woman during normal pregnancy, labor and the postpartum period; conducting a normal delivery of a child; and providing normal newborn care.

(c) Midwifery practice is based upon education in the sciences and upon necessary clinical skills as defined in §831.11 of this title (relating to Annual Documentation) and §831.31 of this title (relating to Education). The education shall be obtained through apprenticeship or an approved basic midwifery education course.

(d) Midwifery care is provided by qualified practitioners. The midwife:

(1) is regulated by the Midwifery Board of the Texas Department of Health; and

(2) is in compliance with the legal requirements of the State of Texas while practicing in the state.

(e) Midwifery care supports individual rights and self-determination within the boundaries of safety. The midwife shall:

(1) provide clients with a description of the scope of midwifery services and information regarding the client's rights and responsibilities in accordance with §203.351 of the Texas Midwifery Act;

(2) provide clients with information about other providers and services when requested or when the care required is not within the scope of practice of midwifery, or as further limited by the protocols of the individual midwife; and

(3) practice in accordance with the knowledge, clinical skills, and judgments described in the Midwives Alliance of North America (MANA) Core Competencies for Basic Midwifery Practice, adopted October 3, 1994 within the bounds of the midwifery scope of practice as defined by the Texas Midwifery Act; the Texas Midwifery Board Standards for the Practice of Midwifery in Texas and; the protocols of the individual midwifery service/practice.

(f) The midwife shall provide care in a safe and clean environment. The midwife shall:

(1) carry, and use, when needed, resuscitation equipment; and

(2) use universal precautions for infection control.

(g) Midwifery care is documented in legible, complete health records. The midwife shall:

(1) maintain records that completely and accurately document the client's history, physical exam, laboratory test results, antepartum visits, consultation reports, referrals, labor, delivery, postpartum visits, and neonatal evaluations at the time midwifery services are delivered and when reports are received;

(2) grant clients access to their records within 30 days of the date the request is received;

(3) provide a mechanism for sending a copy of the health record upon referral or transfer to other levels of care;

(4) maintain the confidentiality of client records; and

(5) maintain records:

(A) for the mother, for a minimum of five years; and

(B) for the infant, until the age of majority.

(h) Midwifery care includes documentation of a periodic process of evaluation and quality assurance of midwifery practice. The midwife shall:

(1) collect client care data systematically and be involved in analysis of that data for the evaluation of the process and outcome of care;

(2) review problems identified by the midwife or by other professionals or consumers in the community; and

(3) act to resolve problems that are identified.

§831.58. Transfer of Care in An Emergency Situation.

In an emergency situation, the midwife shall initiate emergency care as indicated by the situation and initiate immediate transfer of care in accordance with the protocols of his or her practice by making a reasonable effort to contact the health care professional or institution to whom the client will be transferred and to follow the health care professional's instructions; and continue emergency care as needed while:

(1) transporting the client by private vehicle; or

(2) calling 911 and reporting the need for immediate transfer.

§831.75. Newborn Care During the First Six Weeks After Birth.

(a) Prior to delivery, the midwife shall establish a plan with the client for continuing care of the newborn. This plan shall:

(1) include referral or transfer to a health care professional who has current pediatric knowledge; and

(2) be documented in the midwifery record.

(b) The midwife shall:

(1) evaluate the newborn by monitoring the vital signs, performing a physical exam, and obtaining the laboratory tests necessary for the infant during the postpartum period;

(2) provide appropriate education and counseling to the mother; and

(3) observe the newborn for a minimum of two hours after he or she is stable with no signs of distress.

(c) If on any newborn assessment in the immediate postpartum period (first six hours of life), one of the following conditions exists, the midwife shall recommend referral in accordance with §831.52 of this title (relating to Inter-Professional Care) and document that recommendation in the midwifery record:

(1) birth injury;

(2) gestational age assessment less than 36 weeks;

(3) small for gestational age;

(4) large for gestational age; or

(5) any other abnormal newborn behavior or appearance which could adversely affect the newborn, as assessed by a midwife exercising ordinary skill and knowledge.

(d) If on any newborn assessment in the immediate postpartum period (first six hours of life), one of the following conditions exists, the midwife shall initiate immediate transfer to an appropriate health care professional in accordance with §831.58 of this title (relating to Transfer of Care in an Emergency Situation), initiate emergency care as indicated by the situation, continue care as needed, and document that action in the midwifery record:

(1) non-transient respiratory distress;

(2) non-transient pallor or central cyanosis;

(3) jaundice;

(4) apgar at 5 minutes less than or equal to 6;

(5) prolonged apnea;

(6) hemorrhage;

(7) signs of infection;

(8) seizure;

(9) major congenital anomaly not diagnosed prenatally;

(10) unstable vital signs;

(11) prolonged:

(A) lethargy;

(B) flaccidity; or

(C) irritability;

(12) inability to suck;

(13) persistent jitteriness;

(14) hyperthermia;

(15) hypothermia; or

(16) other abnormal newborn behavior or appearance which could threaten the life of the newborn, as assessed by a midwife exercising ordinary skill and knowledge.

(e) If on any newborn assessment after the immediate postpartum period, one of the following conditions exists, the midwife shall recommend referral to an appropriate health care professional in accordance with §831.52 of this title and document that recommendation in the midwifery record:

(1) abnormal laboratory test results;

(2) minor congenital anomaly;

(3) failure to thrive; or

(4) any other abnormal newborn behavior or appearance which could adversely affect the infant, as assessed by a midwife exercising ordinary skill and knowledge.

(f) If on any newborn assessment after the immediate postpartum period, one of the following conditions exists, the midwife shall initiate immediate transfer to an appropriate health care professional in accordance with §831.58 of this title and document that action in the midwifery record:

(1) respiratory distress;

(2) pallor or central cyanosis;

(3) pathological jaundice;

(4) hemorrhage;

(5) seizure;

(6) inability to urinate or pass meconium within 24 hours of birth;

(7) unstable vital signs;

(8) lethargy;

(9) flaccidity;

(10) irritability;

(11) inability to feed;

(12) persistent jitteriness; or

(13) any other abnormal newborn behavior or appearance which could threaten the life of the newborn, as assessed by a midwife exercising ordinary skill and knowledge.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302257
Debra Evans
Chair
Texas Midwifery Board
Effective date: April 24, 2003
Proposal publication date: December 6, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER E. COMPLAINT REVIEW

22 TAC §831.161

The amendment is adopted under the Government Code, §2001.03, which requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act); the Occupations Code, §203.151, which provides the board with the authority to adopt rules prescribing the standards for the practice of midwifery, subject to the approval of the Texas Board of Health; and the Health and Safety Code, §12.001, which provides the Board of Health with authority to adopt rules for the performance of every duty imposed by law on the Board of Health, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302258
Debra Evans
Chair
Texas Midwifery Board
Effective date: April 24, 2003
Proposal publication date: December 6, 2002
For further information, please call: (512) 458-7236

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 13. HEALTH PLANNING AND RESOURCE DEVELOPMENT

SUBCHAPTER E. ADVISORY COMMITTEE

25 TAC §13.51

The Texas Department of Health (department) adopts the repeal of §13.51, concerning the Hospital Data Advisory Committee (committee) without changes to the proposal as published in the January 31, 2003, issue of the *Texas Register* (28 TexReg 819). The committee has provided advice to the Texas Board of Health (board) and the department on hospital reporting requirements and on interpretation and evaluation of the data received.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules on advisory committees. The rules must state the purpose of the committee, describe the tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 1995, the board established a rule relating to the Hospital Data Advisory Committee. The rule states that the committee will automatically be abolished on May 1, 2003, and the board has determined that the committee should be abolished on that date. Issues relating to the type of advice previously provided by the committee are better addressed through the establishment of ad hoc workgroups.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §13.51 and has determined that reasons for adopting the rule no longer continue to exist.

The department published a Notice of Intention to Review §13.51 in the *Texas Register* on December 27, 2002 (27 TexReg 12382). No comments were received due to publication of this notice.

There were no comments received concerning the repeal during the 30-day comment period.

The repeal is adopted under the Health and Safety Code, §11.016, which allows the board to establish advisory committees; the Government Code, Chapter 2110, which sets standards for the evaluation of advisory committees by the agencies for which they function; and the Health and Safety Code, §12.001, which provides the board with authority to adopt rules for the performance of every duty imposed by law upon the board, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302217
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: April 24, 2003
Proposal publication date: January 31, 2003
For further information, please call: (512) 458-7236

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CHAPTER 91. CANCER

SUBCHAPTER A. CANCER REGISTRY

25 TAC §91.4

The Texas Department of Health (department) adopts an amendment to §91.4, concerning cancer incidence reporting requirements without changes to the proposed text as published in the January 31, 2003, issue of the *Texas Register* (28 TexReg 820). The amended section clarifies cancer incidence information that persons are required to report to the department.

The department reviewed the rule to ensure that covered entities under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) would continue to report the same information they currently report after the federal HIPAA privacy standards (45 Code of Federal Regulations (CFR), Parts 160 and 164) become effective on April 14, 2003. The amended section clarifies the rule to ensure there will be no change in the information reported under this section, and to further ensure that HIPAA covered reporting entities will comply with the letter and the spirit of the HIPAA privacy standards.

The amended section elucidated discrepancies between the rule and the information the department currently receives. The amended section makes no change in the information a person is currently required to report to the department and ensures

that persons required to report will have continuing authority to disclose protected health information (PHI) to the department after the implementation date of the federal privacy standards.

The department received the following comment concerning the proposed section.

Comment: Concerning §91.4(b)(1)(H), a commenter recommended that wording be added to include advanced practice nurses by changing the word "physician" to "practitioner or advanced practice nurse" since advanced practice nurses (APN) are also legally authorized to order laboratory exams.

Response: The department disagrees with the suggested change. The department is authorized by the Health and Safety Code, §82.008 to collect cancer data from health care facilities, clinical pathology laboratories or health care practitioners. A health care practitioner is defined as a physician or dentist by §82.002. No change was made as a result of this comment.

One comment was received from the Coalition for Nurses In Advanced Practice and was generally in favor of the rule, however, it offered one suggested change.

The amended section is adopted under the Health and Safety Code, §82.006, which authorizes the board to adopt rules necessary to implement the Cancer Registry; and §12.001, which provides the board with the authority to adopt rules for the performance of each duty imposed by law on the board, the department, and the commissioner.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302218
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: April 24, 2003
Proposal publication date: January 31, 2003
For further information, please call: (512) 458-7236

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CHAPTER 99. OCCUPATIONAL DISEASES

25 TAC §99.1

Texas Department of Health (department) adopts an amendment to §99.1, concerning reporting requirements to the department, with changes to the proposed text as published in the January 31, 2003, issue of the *Texas Register* (28 TexReg 823), as a result of comments received during the 30-day comment period.

The program reviewed the rule to ensure that covered entities under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) would continue to report the same information they currently report after the federal HIPAA privacy standards (45 Code of Federal Regulations (CFR), Parts 160 and 164) which became effective on April 14, 2003. The HIPAA privacy standards contain sections that allow HIPAA covered entities to use and disclose protected health information (PHI), which is individually identifiable health information, without the authorization of the individual, if the use and disclosure is required by law or rule, the use and disclosure complies with the law or rule and is limited to the requirements of the law or rule (45 CFR §164.512(a), and for public health activities (45 CFR §164.512(b)). The amendment corrects any discrepancies between the rule and the information the department currently receives. The amended section will make no change in the information a person is currently required to report to the department. The amendment to the section will ensure that persons required to report will have continuing authority to disclose PHI to the department after the implementation date of the federal privacy standards.

Three comments were received during the comment period. All the comments are from the Coalition for Nurses in Advanced Practice (CNAP). The comments suggest using the term "health professionals" in those paragraphs that address reporting. The "health professionals" language is a defined term in Health and Safety Code, §84.002. Some health professionals, notably advanced practice nurses and physician assistants may diagnose and treat patients with occupational diseases. Especially among medically underserved populations, these health professionals are frequently in separate locations from that of a collaborating physician. Therefore it is appropriate to require all practitioners who treat the patient to report the occupational conditions identified by the department. These comments clarify and update the reporting requirements section of this rule.

Comment: Concerning §99.1(b)(1), a commenter suggested to add "or other health professional acting within the scope of the professional license," after "physician" and before "based upon."

Response: The department agrees and has corrected the wording in the section.

Comment: Concerning §99.1(c)(1), a commenter suggested to insert "or health professional," after "physician" and before "holding".

Response: The department agrees and has corrected the wording in the section.

Comment: Concerning §99.1(c)(3), a commenter suggested to add "health professional" in the first sentence after "physician" and before "or laboratory director." The commenter also suggested to add "health professional" after "physician" and before "or laboratory director" in the second sentence.

Response: The department agrees and has corrected the wording in the section. This change more accurately reflects the wording of Health and Safety Code, §84.004, which requires all health professionals to report.

The amendment is adopted under Health and Safety Code, §84.003 which allows the Board of Health (board) to adopt rules that require the reporting of occupational diseases; and Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for the performance of each duty imposed by law on the board, the department, and the commissioner.

§99.1. General Provisions.

(a) Purpose. This section implements the Texas Occupational Conditions Reporting Act, Health and Safety Code, Chapter 84, House Bill 2091, 69th Legislature, 1985, which authorizes the Texas Board of Health to adopt rules concerning the reporting and control of occupational conditions.

(b) Definitions. The following words and terms, when used in these sections, shall have the following meanings unless the context clearly indicates otherwise.

(1) Case--A person in whom an occupational condition is diagnosed by a physician or other health professional acting within the

scope of the professional license, based upon clinical evaluation, interpretation of laboratory and/or roentgenographic findings, and an appropriate occupational history.

(2) Commissioner--The commissioner of health.

(3) Department--The Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

(4) Local health authority--The chief administrative officer of a public health district or a local health department, or the physician who is to administer state and local laws relating to public health.

(5) Occupational conditions--Those diseases, abnormal health conditions or laboratory findings that are caused by or are related to exposures in the workplace.

(6) Reportable occupational condition--Any occupational disease, condition or laboratory finding for which an official report is required. See subsection (d) of this section.

(7) Report of occupational condition--The notification to the appropriate authority of the occurrence of a specific occupational disease in a human, including all information required by the procedures established by the Board of Health.

(8) Suspected case--A case in which an occupational condition is suspected, but the final diagnosis is not yet made.

(c) Reporting requirements.

(1) It is the duty of every physician or health professional holding a license to practice in the State of Texas to report promptly to the local health authority each patient she or he shall examine and who has or is suspected of having any reportable occupational condition. The local health authority may authorize a staff member to transmit reports.

(2) It is the duty of every person who is in charge of a clinical or hospital laboratory, blood bank, mobile unit, or other facility in which a laboratory examination of any specimen derived from a human body yields microscopical, cultural, serological, chemical, or other evidence suggestive of a reportable condition to report promptly that information to the local health authority.

(3) The reporting physician, health professional, or laboratory director shall make the report in writing. A local health authority may authorize one or more employees under his or her supervision to receive the report from the physician, health professional, or laboratory director by telephone; use of this alternative, if authorized, is at the option of the reporter. The local health authority shall implement a method of verifying the identity of the telephone caller when that person is unfamiliar to the employee.

(4) The local health authority shall collect the reports and transmit the information at weekly intervals to the Environmental Epidemiology and Toxicology Division, Bureau of Epidemiology, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. Transmission may be made by mail, courier, or electronic transfer.

(A) If by mail or courier, the reports shall be placed in a sealed envelope addressed to the attention of the Environmental Epidemiology and Toxicology Division, Bureau of Epidemiology, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756, and marked "Confidential Medical Records."

(B) If by electronic transmission, including facsimile transmission by telephone, it shall be in a manner and form authorized by the commissioner or his or her designee in each instance. Any electronic transmission of the reports must provide at least the same degree of protection against unauthorized disclosure as those of mail or courier transmission. The commissioner or his or her designee shall, before authorizing such transmission, establish guidelines for establishing and conducting such transmission.

(5) When an occupational condition is reported to a local health authority, and the person diagnosed as having the condition resides outside his or her area of local health jurisdiction, the local health authority receiving the report shall notify the appropriate local health authority where the person or persons reside. The department shall assist the local health authority in providing such notifications if requested.

(d) Reportable conditions and information to be reported.

(1) The reportable occupational conditions are: asbestosis, silicosis, blood lead levels in persons 15 years of age or older, and acute pesticide poisoning.

(2) Reports for asbestosis and silicosis shall include all information collected by the reporting person and required to complete the most recent version of the department's Asbestosis and Silicosis Case Report Form F09-11626.

(3) Reports for blood lead levels in persons 15 years of age and older shall include all information collected by the reporting person and required to complete the most recent version of the department's Adult Blood Lead Report Form F09-11624.

(4) Reports for acute pesticide poisoning shall include all information collected by the reporting person and required to complete the most recent version of the department's Pesticide Poisoning Report Form F09-11625.

(e) General control measures for reportable occupational conditions. The commissioner or his or her duly authorized representative shall, as circumstances may require, proceed as follows:

(1) investigation shall be made for the purpose of verifying the diagnosis, ascertaining the source of the causative agent, obtaining an occupational and employment history and discovering unreported cases;

(2) collection of specimens of the body tissues, fluids, or discharges and of materials directly or indirectly associated with the case, as may be necessary in confirmation of the diagnosis, and their submission to a laboratory for examination;

(3) obtaining samples of air or materials from the current or former business or place of employment of a case, as may be necessary to ascertain if a public health hazard exists. If a hazard is found the commissioner or his/her designee shall make appropriate recommendations concerning the hazard.

(f) Confidential nature of case reporting.

(1) All case reports received by the local health authority or the Texas Department of Health are confidential records and not public records. These records will be held in a secure location and accessed only by authorized personnel.

(2) The department may use information obtained from reports or health records for statistical and epidemiological studies which may be public information as long as an individual is not identifiable.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302216

Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: April 24, 2003
Proposal publication date: January 31, 2003
For further information, please call: (512) 458-7236

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CHAPTER 128. PERMITS FOR CONTACT LENS DISPENSERS

The Texas Department of Health (department) adopts the repeal of §§128.1 - 128.10 and new §§128.1 - 128.15, concerning the regulation of persons filling contact lens prescriptions without changes to the proposed text as published in the December 6, 2002, issue of the *Texas Register* (27 TexReg 11401), and the sections will not be republished.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The sections have been reviewed and the department has determined that reasons for adopting the sections continue to exist in that rules on this subject are needed; however the need to reorganize and modify the existing sections warrants the repeal and new sections.

Each section was edited and restructured to correct grammatical errors; update legal citations; and delete repetitive, ambiguous, obsolete, unenforceable, and unnecessary language. The new sections improve draftsmanship and make the rules more accessible, understandable, and usable. Much of the adopted language is former language; however, the sections were reorganized in a more logical manner resulting in the language appearing as new in the adopted sections.

New §128.1 (relating to Introduction) explains the overall purpose of the rules and identifies the topics covered in the rules.

A definition for business entity is included in new §128.2 (relating to Definitions). The term was not formerly defined; however, the definition is necessary to assist applicants in determining the amount of the annual permit fee.

New §128.3 (relating to Fees) and §128.4 (relating to Petition for Rulemaking) is language that was formerly included in another section. New §128.3 is adopted for easy reference in determining applicable fees required for obtaining and maintaining a contact lens permit. New §128.4 is adopted for a more logical placement of the information.

New §128.5 (relating to Sale or Delivery of Contact Lenses) is adopted to clearly describe the requirements for the sale or delivery of contact lenses in Texas.

New §128.6 (relating to Display of Permit) is language that was formerly included in the rules, but in a different sequence.

New §128.7 (relating to Application Requirements and Procedures) is adopted to clearly describe the application process; and to remove the obsolete requirement for applicants to obtain letters from the Comptroller of Texas attesting to compliance with the Tax Code, Chapter 171 (Franchise Tax).

New §128.8 (relating to Application Processing) is adopted to identify the time periods and procedures for issuing a contact lens permit.

New §128.9 (relating to Renewal of Permit) is adopted to clearly set out the permit renewal process and to include language relating to the suspension of a permit for failure to comply with a court order providing for the possession of or access to a child.

New §128.10 (relating to Changes of Name or Address) is adopted to explain the process for changing the name or address of the permit holder.

New §128.11 (relating to Filing Complaints and Complaint Investigations) is adopted to reflect the process for filing a complaint and conducting an investigation of the complaint.

New §128.12 (relating to Disciplinary Actions) is adopted to reflect the department's authority to deny an application, suspend or revoke a permit, place a permit on probation, or impose administrative penalties.

New §128.13 (relating to Informal Disposition) and §128.14 explain the process for informal settlement conferences and formal hearings.

The two commenters were the Texas Optometry Board and the Texas Optometric Association, Inc. The commenters were neither for nor against the proposed rules in their entirety; rather, they offered comments and questions regarding specific points in the rules.

Comment: One commenter requested that additional language be added to the end of §128.5(c), specifically "Any such request shall be dated and if such request is made by facsimile or electronic method the facsimile or electronic mail shall contain the actual time of transmittal." The commenter stated that this would help provide documentary evidence to the Optometry Board or Medical Board regarding whether or not a doctor has responded in a timely fashion to an agent's request on behalf of a patient.

Response: The department disagrees. The additional language is not required by either the Texas Optometry Act, Occupations Code Chapter 351 or the Contact Lens Prescription Act, Occupations Code Chapter 353, nor is a corresponding requirement related to prescription release included in the rules of the Texas Optometry Board, 22 TAC §279.2 relating to contact lens prescriptions. No change was made as a result of the comment.

Comment: The commenter requested that language allowing a physician or optometrist to provide a prescription by telephone or other electronic means to a contact lens dispenser be removed, or if it remains, that additional requirements be included related to reducing the additional transmittal methods to writing, requirements for ascertaining the authenticity of the prescription, and requirements for maintaining the records and for return of the prescription to the customer when not all the lenses have been dispensed, as well as more specific language describing "other electronic means".

Response: The department disagrees. The proposed language tracks the language of the Texas Optometry Act, which permits a physician or optometrist to authorize the dispensing of lenses by these methods. The rules as proposed already require that prescriptions be maintained and returned to the patient in accordance with the Act. Any additional restrictions on methods of prescription release necessary for a physician or optometrist should properly be addressed in the rules of the appropriate licensing board. No change was made as a result of the comment.

Comment: One commenter requested that language be included which requires that "licensed dispensers be readily available to

prescribing doctors should the prescribing doctor have a question concerning the request for a prescription."

Response: The department disagrees. The proposed language would place additional requirements on the contact lens dispenser not mandated by the Act, which sets out clear guidelines related to the release of prescriptions to consumers or their agents by physicians and optometrists. No change was made as a result of the comment.

25 TAC §§128.1 - 128.10

The repeals are adopted under the Occupations Code, Chapter 353, which provides the Board of Health (board) with the authority to adopt rules; and Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302222
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: April 24, 2003
Proposal publication date: December 6, 2002
For further information, please call: (512) 458-7236

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25 TAC §§128.1 - 128.15

The new sections are adopted under the Occupations Code, Chapter 353, which provides the Board of Health (board) with the authority to adopt rules; and Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302223
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: April 24, 2003
Proposal publication date: December 6, 2002
For further information, please call: (512) 458-7236

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CHAPTER 169. ZOONOSIS CONTROL
SUBCHAPTER E. DOG AND CAT STERILIZATION

25 TAC §169.101

The Texas Department of Health (department) adopts an amendment to §169.101, concerning the Animal Friendly Advisory Committee (committee). Section 169.101 is adopted without changes to the proposed text as published in the January 31, 2003, issue of the *Texas Register* (28 TexReg 888). The section is amended to change the process for filling vacancies in the offices of presiding officer and assistant presiding officer; include additional requirements regarding statements by members; and clarify the components that the committee must include in an annual report to the commissioner.

Government Code, §2001.039, requires that each state agency conduct a review of its rules every four years and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedures Act). Section 169.101 has been reviewed and the department has determined that reasons for adopting the section continue to exist in that a rule on this subject is needed.

The department published a Notice of Intention to Review for §169.101 as required by Government Code, §2001.039 in the *Texas Register* on May 19, 2000 (25 TexReg 4598). The department received no comments due to the publication of the notices.

No comments were received on the proposal during the comment period.

The amendment is adopted under Health and Safety Code, Chapter 828, "Dog and Cat Sterilization," §828.015, which provides the Texas Board of Health (board) with the authority to appoint a committee to provide advice on the dispensing of grant money in the animal friendly license plate account to eligible organizations for the purpose of providing low-cost dog and cat sterilization to the general public; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302215
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: April 24, 2003
Proposal publication date: January 31, 2003
For further information, please call: (512) 458-7236

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CHAPTER 221. MEAT SAFETY ASSURANCE
SUBCHAPTER B. MEAT AND POULTRY INSPECTION

25 TAC §221.12

The Texas Department of Health (department) adopts an amendment to §221.12, concerning meat and poultry inspection. Section 221.12 is being adopted without changes to the proposed text as published in the December 6, 2002, issue of the *Texas Register* (27 TexReg 11406) and, therefore, the section will not be republished. The amendment to §221.12 increases the fee per hour for overtime inspection and special services.

The Texas Meat and Poultry Inspection Act allows the department to collect fees for overtime and special services provided to establishments and for services required to be performed under this act relating to the inspection of animals, birds, or products that are not regulated under the Federal Meat Inspection Act or the Federal Poultry Products Inspection Act. The department does not collect a fee for inspection services required under the Texas Meat and Poultry Inspection Act, but not required under the federal acts. However, the department does collect a fee for overtime and special services provided to establishments. The current fee of $23 per hour is not sufficient to recover the cost of providing the services, so the department is increasing the fee to $29.50 per hour. The new fee is expected to cover the cost of providing overtime inspection and special services to industry.

There were no comments received on the proposal during the 30-day comment period.

The amendment is adopted under the Health and Safety Code, Chapter 433, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 433; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302212
Susan K. Steeg
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Effective date: April 24, 2003
Proposal publication date: December 6, 2002
For further information, please call: (512) 458-7236

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CHAPTER 227. MINIMUM GUIDELINES FOR HUMAN DONOR MILK BANKS

25 TAC §227.1

The Texas Department of Health (department) adopts new §227.1, concerning minimum guidelines for human donor milk banks without changes to the proposed text as published in the December 6, 2002, issue of the *Texas Register* (27 TexReg 11406), and the section will not be republished.

House Bill 391, 77th Legislative Session, 2001, added new §161.071 to the Health and Safety Code, which requires the department to establish minimum guidelines for the procurement, processing, distribution, or use of human milk by donor milk banks. Specifically, the new section adopts by reference the "Guidelines for the Establishment and Operation of a Donor Human Milk Bank" written by the Human Milk Banking Association of North America.

There were no comments received regarding the proposed new section during the comment period.

The new section is adopted under the Health and Safety Code, §161.071, which provides the department with the authority to adopt necessary minimum guidelines for the procurement, processing, distribution, or use of human milk by donor milk banks; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302219
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: April 24, 2003
Proposal publication date: December 6, 2002
For further information, please call: (512) 458-7236

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CHAPTER 229. FOOD AND DRUG

The Texas Department of Health (department) adopts the repeal of §229.261, and new §229.261, concerning the assessment of an administrative penalty against food and drug operations. The repeal and new section are adopted without changes to the proposed text as published in the December 6, 2002, issue of the *Texas Register* (27 TexReg 11411) and, therefore, the section will not be republished.

The new rule applies to the following programs within the Bureau of Food and Drug Safety: food wholesaler and manufacturer, wholesale drug manufacturer and distributor, device manufacturer and distributor, narcotic treatment program, retail food establishment, tanning facility, tattoo studio, body piercing studio, salvage establishment, and salvage broker.

The title of the subchapter, new rule, and the language have been changed to more accurately reflect the fact that administrative penalties are assessed by the department, but civil penalties are not. The definitions of the severity levels have been clarified. In addition, examples of violations categorized by severity level have been removed from the rule. Examples of violations will be provided to the regulated community in a guidance document available from the Bureau. Persons and entities that will be impacted by this rule include the department staff, and licensed persons who are not in compliance with the applicable regulations.

Health and Safety Code, Chapter 145, §145.0122, Chapter 146, §146.019, Chapter 431, §431.054, Chapter 432, §432.021, Chapter 437, §437.018, and Chapter 466, §466.043, authorize the department to assess an administrative penalty against a person who violates these statutes. With these changes, the new rule will be consistent with these chapters.

Government Code §2001.039, requires each state agency to review and consider for adoption each rule adopted by that agency pursuant to Government Code, Chapter 2001 (Administrative Procedure Act). The current rule has been reviewed and the department has determined that reasons for adopting the section continue to exist. However, because substantial changes have been made to simplify this section, the current rule is being repealed and a new rule adopted.

The department published a Notice of Intention to Review for §229.261 in the *Texas Register* on February 25, 2000 (25 TexReg 1731). No comments were received as a result of the publication of the notice.

There were no comments received regarding the proposed repeal and new section during the comment period.

SUBCHAPTER P. ADMINISTRATIVE OR CIVIL PENALTIES

25 TAC §229.261

The repeal is adopted under the Health and Safety Code, Chapter 145, §145.011, Chapter 146, §146.015, Chapter 431, §431.241, Chapter 432, §432.011, Chapter 437, §437.0056, and Chapter 466, §466.004, which all require the department to adopt rules for the implementation and efficient enforcement of Chapters 145, 146, 431, 432, 437, and 466; and the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health; and implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302213
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: April 24, 2003
Proposal publication date: December 6, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER P. ASSESSMENT OF ADMINISTRATIVE PENALTIES

25 TAC §229.261

The new section is adopted under the Health and Safety Code, Chapter 145, §145.011, Chapter 146, §146.015, Chapter 431, §431.241, Chapter 432, §432.011, Chapter 437, §437.0056, and Chapter 466, §466.004, which all require the department to adopt rules for the implementation and efficient enforcement of Chapters 145, 146, 431, 432, 437, and 466; and the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health; and implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302214
Susan K. Steeg
General Counsel
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Effective date: April 24, 2003
Proposal publication date: December 6, 2002
For further information, please call: (512) 458-7236

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PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 404. PROTECTION OF CLIENTS AND STAFF

SUBCHAPTER G. UNUSUAL INCIDENTS INVOLVING PERSONS SERVED BY TXMHMR FACILITIES

25 TAC §§404.241 - 404.249

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the repeals of §§404.241 - 404.249 of Chapter 404, Subchapter G, concerning unusual incidents involving persons served in TXMHMR facilities, without changes to the proposal as published in the November 29, 2002, issue of the *Texas Register* (27 TexReg 11043).

The reporting procedures contained in the subchapter have been incorporated into internal policy and the reasons for initially adopting the rules no longer exist.

The repeal of this subchapter fulfills the requirements of the Texas Government Code, §2001.039, concerning the periodic review of agency rules.

No comments on the proposed repeals were received.

The repeals are adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 3, 2003.

TRD-200302192
Rudy Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: April 23, 2003
Proposal publication date: November 29, 2002
For further information, please call: (512) 206-4516

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CHAPTER 407. INTERNAL FACILITIES MANAGEMENT

SUBCHAPTER A. FINANCIAL SERVICES

25 TAC §§407.1 - 407.6, 407.22 - 407.24

The Texas Department of Mental Health and Mental Retardation (department) adopts the repeal of existing §§407.1 - 407.6 and §§407.22 - 407.24 of Chapter 407, concerning financial services without changes to the proposal in the December 13, 2002, issue of the *Texas Register* (27 TexReg 11708). New Chapter 417, Subchapter A, concerning substantially the same matters is contemporaneously adopted in this issue of the *Texas Register*.

Sections 407.1 - 407.6 and §§407.22 - 407.24 of Chapter 407 primarily describe the department's procedures for managing department and benefit funds as well as the consumer trust fund. The adoption of the repeal of the existing sections and the new sections is made according to the department's rule review as required by the Texas Government Code, §2001.039.

Comments were not received from the public.

The repeal is adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority.

The repeal affects the Texas Health and Safety Code, §551.001 and §§551.003 - 551.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302263
Rudy Arrendondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: April 27, 2003
Proposal publication date: December 13, 2002
For further information, please call: (512) 206-4516

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SUBCHAPTER C. LEASE OF TDMHMR SURPLUS PROPERTY

25 TAC §407.120

The Texas Department of Mental Health and Mental Retardation (department) adopts the repeal of existing §407.120 of Chapter 407, Subchapter C, concerning lease of TDMHMR surplus property, without changes to the proposAL in the December 13, 2002, issue of the *Texas Register* (27 TexReg 11709). New Chapter 417, Subchapter A, concerning substantially the same matter is contemporaneously adopted in the this issue of the *Texas Register*.

Section 407.120 described the requirements associated with the long-term lease of TDMHMR surplus property. The adoption of the repeal of the existing section and new sections are made according to the department's rule review plan that is required by Texas Government Code, §2001.039.

Comments from the public were not received.

The repeal is adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority and Texas Government Code, §2001.039, which requires the department to review its rules.

The repeal affects no statute, article, or code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302264
Rudy Arrendondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: April 27, 2003
Proposal publication date: December 13, 2002
For further information, please call: (512) 206-4516

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CHAPTER 410. VOLUNTEER SERVICES AND PUBLIC INFORMATION

SUBCHAPTER C. CAPITAL IMPROVEMENTS BY CITIZEN GROUPS

25 TAC §§410.101 - 410.122

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the repeal of existing Chapter 410, Subchapter C, §§410.101 - 410.122, concerning capital improvements by citizens groups without changes to the proposal as published in the December 6, 2002, issue of the *Texas Register* (27 TexReg 11448). The repealed sections are replaced by new Chapter 417, Subchapter D, §§417.151 - 417.160, which contain substantially the same matters, are contemporaneously adopted in this issue of the *Texas Register*.

The repealed §§410.101 - 410.122 provided policies and procedures for citizens and community groups to donate a capital improvement to a facility.

The adoption of the repeals and new rule fulfill the requirements of Texas Government Code, §2001.039, concerning the periodic review of department rules.

Comments were not received from the public.

The repeals are adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority and Texas Government Code §2001.039, which requires the department to review its rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302268
Rudy Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: April 27, 2003
Proposal publication date: December 6, 2002
For further information, please call: (512) 206-4516

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CHAPTER 414. PROTECTION OF CONSUMERS AND CONSUMER RIGHTS

SUBCHAPTER A. CLIENT-IDENTIFYING INFORMATION

25 TAC §§414.1 - 414.17

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the repeals of §§414.1 - 414.17 of Chapter 414, Subchapter A, concerning client-identifying information, without changes to the proposal as published in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1039). New §§414.1 - 414.8 of Chapter 414, Subchapter A, concerning protected health information, which replace the repealed sections, are contemporaneously adopted in this issue of the *Texas Register*.

The repeals allow for the adoption of new sections governing the same matters.

No comments on the proposed repeals were received.

The repeals are adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board (board) with broad rulemaking authority, and §533.009, which requires the board to adopt rules governing the exchange of patient and client records without the patient's or client's consent among department facilities, local mental health or mental retardation authorities, community centers, other designated providers, and subcontractees of mental health and mental retardation services.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 3, 2003.

TRD-200302194
Rudy Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: April 23, 2003
Proposal publication date: February 7, 2003
For further information, please call: (512) 206-4516

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SUBCHAPTER A. PROTECTED HEALTH INFORMATION

25 TAC §§414.1 - 414.8

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new §§414.1 - 414.8 of Chapter 414, Subchapter A, concerning protected health information. Sections 414.4 - 414.7 are adopted with changes to the proposed text as published in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1040). Sections 414.1 - 414.3, and §414.8 are adopted without changes. The repeals of existing §§414.1 - 414.17 of Chapter 414, Subchapter A, concerning client-identifying information, which the new sections replace, are contemporaneously adopted in this issue of the *Texas Register*.

The new rules require facilities, local authorities, community centers, and their respective contract providers to comply with all applicable federal and state statutes, rules, and regulations governing privacy of protected health information. The new rules list applicable federal and state statutes, rules, and regulations. The new rules also require the Notice of Privacy Practice of each facility, local authority, and community center to include information regarding permitted disclosures under Texas Health and Safety Code, §533.009. Additionally, the new rules require each facility, local authority, and community center to include in its Notice of Privacy Practice a statement that identifies it as a part of the TDMHMR service delivery system and a statement that individuals may file a complaint with TDMHMR Consumer Services and Rights Protection/Ombudsman Office by calling 1-800-252-8154 or writing to P.O. Box 12668, Austin, Texas 78711.

The new rules also reference TDMHMR's "Interpretive Guidance on Laws Pertaining to Privacy of Mental Health and Mental Retardation Records for the TDMHMR Service Delivery System," which is an interpretation of the applicable federal and state statutes, rules, and regulations listed in the new rules. The new rules require TDMHMR Central Office and all facilities to comply with the interpretive guidance. Although the new rules do not require local authorities and community centers to comply with the interpretive guidance, TDMHMR notes that the document is the result of its analysis of the interaction of the numerous state and federal laws that govern the privacy of health information, including preemption of conflicting state laws. TDMHMR will be guided by the document in assessing the compliance with applicable privacy laws by local authorities and community centers.

Upon adoption, the title of Exhibit A that is referenced in §414.4(a)(2) and §414.6 has been changed to "Interpretive Guidance on Laws Pertaining to Privacy of Mental Health and Mental Retardation Records for the TDMHMR Service Delivery System." Two state statutes have been added to §414.5 and §414.7. In §414.6, a toll free number has been added as a more expedient manner of requesting a copy of Exhibit A as well as a web address for accessing the exhibit via the Internet.

Changes made to Exhibit A between the subchapter's proposal and adoption include adding the term "community center" to the definitions of "component" and "contract provider" in §2 and throughout the document, as appropriate. Language has been added to the definition of "MHMR services" to specifically exclude any services for alcohol or drug abuse, substance abuse, or chemical dependency. The requirement for components to document their designated record sets has been moved from §15(e)(1) to a new subsection (b) in §4. Language related to limiting incidental uses and disclosures has been revised in §4 to be consistent with the federal privacy rule. Language has been modified in §5(g) to clarify that §5(f) describes how a revised notice is to be made available. Language has been added to §6(a)(2) to ensure that determinations are individualized. Language has been modified in §8(a) to clarify that facilities are not responsible for designating a privacy *official* and that facilities' privacy coordinators will work with the TDMHMR Central Office Privacy Official. Language has also been added clarifying that the privacy official may be a current member of the component's workforce who performs other types of duties.

Clarifying language has been added to §9(b)(3). The term "advising" has been changed to "informing" in §9(e) and (f) and §10(d). Language has been modified in §10(b) to be consistent with federal regulations. Clarifying language has been added to §11(c)(9). The subsection related to conditioning the provision of alcohol or drug abuse treatment on the individual signing an authorization has been deleted in §11. Minor grammatical changes have been made in §12(b)(2)(B)(i) and §13(b)(2)(A). Language has been added to §15(a)(1) clarifying that an individual's LAR

who is acting on the individual's behalf has a right of access to PHI about the individual. Language has been added to §15(d)(1) stating that an LAR is not entitled to access the individual's PHI that relates to alcohol or drug abuse treatment unless the individual is incompetent (as defined). The provision in proposed §15(d)(3)(ii) has been deleted. Clarifying language has been added to §19(d). The sections relating to attachments and references have been combined under §21 and references to the Texas Health and Safety Code, §614.017, and Texas Government Code, §531.042, have been added.

Minor clarifications have been made to Attachments AA, BB, CC, and DD. Additionally, language has been added to Attachments BB and CC stating that federal rules restrict any use of information about alcohol or drug abuse treatment to criminally investigate or prosecute any alcohol or drug abuse patient.

A public hearing was held on February 21, 2003. No oral or written testimony was presented at the hearing. Written comments on the proposal were received from Hilgers & Watkins, P.C., Austin; Heart of Texas Region MHMR Center, Waco; Advocacy, Inc., Austin; MHMR Authority of Harris County, Houston; and the Texas Council for Developmental Disabilities, Austin.

One commenter stated, "The most important and informative set of information is in 'Exhibit A.' It cannot be assumed that the public has access to or understanding of the information which is contained in Exhibit A, but that information is vital if the public is to understand their rights and exercise them within the Department's processes. As stated in previous conversations we believe it is in the best interest of the public if Exhibit A is adopted by reference." TDMHMR declines to adopt Exhibit A by reference because it would not provide the public with greater access to the information. (Documents that are adopted by reference are not published in the *Texas Register*.) TDMHMR notes that §414.6 provides information on how to obtain a copy of the exhibit. Additionally, a toll free phone number has been added to §414.6 as well as a statement that the exhibit is accessible via the Internet at www.mhmr.state.tx.us/hipaa.html.

Regarding the definitions of "component" and "contract provider" in §2 of Exhibit A, one commenter asked whether community centers should be included. TDMHMR responds by adding the term "community center" throughout Exhibit A, as appropriate.

Regarding limiting incidental uses and disclosures of PHI in proposed §4(c)(1)(B) of Exhibit A, one commenter recommended modifying the language to state that a component must make a diligent effort to prevent incidental uses or disclosures. TDMHMR responds that the provision originates in 45 CFR §164.530(c)(2)(ii). Language related to limiting incidental uses and disclosures has been revised in §4 to be consistent with the federal privacy rule.

Regarding mitigating harmful effects which are the result of a violation of medical privacy laws in proposed §4(c)(3) of Exhibit A, one commenter asked what process would facilities use to accomplish this requirement. TDMHMR responds that any action taken by a facility would depend upon the circumstances of the particular situation. TDMHMR notes that in the *Federal Register* (65 Fed. Reg. 82,748 (2000)), the United States Department of Health and Human Services (HHS) responded to a similar comment by stating, "The covered entity is expected to take reasonable steps based on knowledge of where the information has been disclosed, how it might be used to cause harm to the patient or another individual, and what steps can actually have a mitigating effect in that specific situation."

Regarding consent to carry out treatment, payment, or health care operations in adopted §4(f) of Exhibit A, one commenter asked "why permit the use or disclosures when not necessary." The commenter stated that it would potentially confuse an individual or LAR and place him/her in a situation in which due process is not offered. TDMHMR responds that §4(f) is permissive; obtaining consent to carry out treatment, payment, or health care operations is at the discretion of each component. If a component determines that obtaining consent would confuse individuals and LAR, then the component may choose to not obtain consent. TDMHMR notes that the provision originates in 45 CFR §164.506(b).

Regarding making available to individuals a revised notice of privacy practices in §5(g) of Exhibit A, one commenter stated that the subsection does not articulate how a component should make the revised notice available to consumers. TDMHMR responds that §5(f) describes how the notice is to be made available. Clarifying language has been added in §5(g) to reflect this.

Regarding the requirement to document an individual's receipt of the Notice of Privacy Practices in §5(h) of Exhibit A, one commenter asked if her component should add a signature line to Attachment CC. TDMHMR responds that the commenter's component is responsible for deciding how to comply with the documentation requirement. TDMHMR notes that state mental health facilities have developed a separate form for documenting receipt of various information, including the Notice of Privacy Practices. State mental retardation facilities will use a separate form for acknowledgement of receipt of the notice.

Regarding use, disclosure, or request for an entire medical record in §6(a)(2) of Exhibit A, one commenter expressed concern that the intent of the language, which is to ensure individualized determinations are made, could be lost and the process manipulated into a blanket policy to routinely request an entire record in an effort to expedite requests for information. The commenter suggested revised language to address the concern. TDMHMR responds by using the commenter's suggested language.

Regarding complaints in §7 of Exhibit A, one commenter expressed concern that the term "complaint" does not convey the serious nature of the charges that an individual may be making with regard to misuse of his or her records. The commenter suggested that the term "complaint" be replaced with "charges of improper disclosure of PHI" in §7(a). The commenter also suggested that the phrase "a process for individuals to make complaints concerning" be replaced with "a process for individuals to file official complaints concerning." The commenter also expressed concern that §7 provides no information relating to penalties or remedies for having committed a violation of privacy laws and recommended adding a description of the penalties and remedies to ensure that both providers of services and individuals are aware of the serious nature of these laws. TDMHMR responds that the term "complaint" originates in the federal privacy rule, specifically, 45 CFR Part 160, Subpart C, §164.520(b)(1)(vi), and §164.530(d). To be consistent with federal regulations, TDMHMR declines to replace the term "complaint" as suggested by the commenter. TDMHMR notes that penalties for violating the federal privacy regulations, which are described in federal law (42 USC §1320d-6, 42 USC §290ee-3(f), and 42 USC §290dd-3(f)), would be imposed by HHS and not TDMHMR or a component.

Regarding complaints in §7 of Exhibit A, one commenter asked if the Office of Consumer Services and Rights Protection will

maintain complaint information, such as number and type, and make it available to the public as it does for other risk indicators. TDMHMR responds that it will.

Regarding designation of a privacy official in §8(a) of Exhibit A, one commenter suggested that the sentence state, "Each component must designate a *staff who will function in the capacity of the* privacy official ..." TDMHMR declines to use the commenter's suggested language because a component's privacy official does not have to be a staff of the component. Language has been added clarifying that the privacy official may be a current member of the component's workforce who performs other types of duties.

Regarding disclosure of PHI without authorization to provide treatment and ensure continuity of care in §9(a)(2)(A) of Exhibit A, one commenter asked if such continuity of care applied to special needs offenders. The commenter also asked if chemical dependency treatment information is protected under the section. TDMHMR responds that the continuity of care referenced in §9(a)(2)(A) applies to all individuals served by components. As it relates to special needs offenders, the provision does not allow components to disclose a special needs offender's PHI to any entity or person other than a component. TDMHMR notes protection of PHI that relates to alcohol and drug abuse treatment is addressed in §10.

One commenter asked if TDMHMR takes the position that substance abuse information can be released to coroners and medical examiners. The commenter referenced §9(d)(6) of Exhibit A. TDMHMR responds that it does not take the position that substance abuse information can be released to coroners and medical examiners. Section 9(d)(6) referenced by the commenter governs psychotherapy notes under MHMR services. Section 10 governs when authorization is not required to disclose PHI that relates to alcohol or drug abuse treatment.

Regarding §9(f) of Exhibit A, one commenter expressed grave concerns that a professional could disclose PHI about an individual receiving mental retardation services without authorization when informing the individual's parent, guardian, relative, or friend of the individual's current physical condition. The commenter stated that the provision seems contrary to the intent of privacy laws and suggested that more restrictive parameters be delineated for releasing information regarding current physical and mental conditions to unauthorized individuals. TDMHMR responds that both state law (Texas Health and Safety Code, §595.010) and federal law (45 CFR §164.510(b)) authorizes such disclosures.

Regarding §11(c)(9) of Exhibit A, one commenter stated that the wording was confusing and incomprehensible. TDMHMR responds by adding clarifying language.

Regarding conditioning alcohol or drug abuse treatment on an individual's signing an authorization in §11(i) of Exhibit A, one commenter asked why the provision exists since MHMR services are not conditioned upon signing an authorization. The commenter stated that it is the position of Advocacy, Inc., that no treatment should be conditioned upon signing an authorization for disclosure and that such a provision is, at best, questionable clinical practice. TDMHMR responds by deleting §11(i). TDMHMR notes that for minors 16 and 17 years of age, 42 CFR §2.14(b) allows conditioning alcohol or drug abuse treatment on the minor individual's signing an authorization for disclosure of PHI that is necessary for the provider to obtain payment for the alcohol or drug abuse treatment.

Regarding a component administrator authorizing disclosure of PHI related to alcohol or drug abuse treatment in §13(a)(2) of Exhibit A, one commenter recommended adding a statement that directs component administrators to exercise reasonable efforts to obtain authorization for disclosure of PHI from individuals who experience episodic times during which they are unable to authorize disclosure. TDMHMR declines to add the commenter's suggested requirement because it is unnecessary considering the very limited situation being described (i.e., the adult suffers from a *medical condition*, the authorization is for the *sole purpose of obtaining payment* for *alcohol or drug abuse treatment* from a third-party payor). TDMHMR notes that the provision originates in 42 CFR §2.15(a)(2).

Regarding who may authorize the use or disclosure of PHI of a minor 15 years of age or younger who is receiving inpatient alcohol or drug abuse treatment in §13(b)(2)(A) of Exhibit A, one commenter expressed surprise that both the minor and the minor's LAR must authorize a use or disclosure of PHI and asked if the provision was written accurately. The commenter asked if there was a minimum age or whether the provision applied to a minor who is five years old. Two commenters asked what would happen if the minor and the minor's LAR disagreed. One of the commenters asked if either would be offered due process if such a disagreement occurs. TDMHMR responds that the provision is written accurately. Pursuant to 42 CFR §2.14, the determination of who may authorize use or disclosure is based on whether or not state law requires parental consent to the minor's treatment for inpatient alcohol or drug abuse treatment. Texas law (Health and Safety Code, §462.022(a)(3)(A)) requires the consent of a parent, managing conservator, or guardian of a minor who is 15 years of age or younger. Section 2.14(c)(1) of 42 CFR states, "Where State law requires consent of a parent, guardian, or other person for a minor to obtain alcohol or drug abuse treatment, any written consent for disclosure authorized under subpart C of these regulations must be given by both the minor and his or her parent, guardian, or other person authorized under State law to act in the minor's behalf." TDMHMR notes that no minimum age is prescribed by state or federal law. Regarding disagreement between the minor and the LAR, TDMHMR's interpretation is that both the minor and the LAR must agree or the disclosure cannot be made. Regarding the offer of due process if a disagreement occurs, TDMHMR responds that the disagreement is between the minor and LAR and does not involve the component; therefore, there is no basis for due process.

Regarding §15(c)(4) and §17(b)(3) of Exhibit A, one commenter noted that facilities were given specific maximum charge amounts for providing copies and accountings and asked if the maximum charges were appropriate for community centers as well. TDMHMR responds that each component, including facilities, is responsible for determining whether it will impose a fee. If a component decides to impose a fee, then the component (except a facility) is also responsible for determining the fee amount, which must be reasonable and cost-based. If a facility decides to impose a fee, then the facility's fee may not exceed the charges described in the boxes under §16(c)(4) and §17(b)(3) in Exhibit A. TDMHMR notes that the maximum per page charges for facilities described in Exhibit A are those established by the Texas Department of Health (see www.tdh.state.tx.us/hfc/feeinfo.htm). TDMHMR also notes the federal privacy rule (specifically, 45 CFR §164.524(c)(4)) identifies the elements that are permitted to be included in a fee for copies.

Regarding facilities' maximum charges for copies and accountings in §15(c)(4) and §17(b)(3) of Exhibit A, one commenter stated that the charges are unreasonable because many individuals accessing the services through components are living at or close to the poverty level. TDMHMR responds that the maximum per page charges for facilities described in Exhibit A are those promulgated by the Texas Department of Health at www.tdh.state.tx.us/hfc/feeinfo.htm, which states "In accordance with §241.154(e) of the Health and Safety Code, the fee for providing a patient's health care information has been adjusted 1.3% to reflect the most recent changes to the consumer price index as published by the Bureau of Labor Statistics (BLS) of the United States Department of Labor. The BLS measures the average changes in prices of goods and services purchased by urban wage earners and clerical workers." TDMHMR notes that facilities are not required to impose a fee, nor are they required to impose the maximum fee.

Regarding denying a request for amendment in §16(b)(3) of Exhibit A, one commenter expressed concern that components would be able to make a sole determination as to the accuracy and completeness of the PHI. The commenter stated that since the amendment of PHI as offered by the individual does not supplant the original information, the individual should be given the right to add his or her comment to the record. TDMHMR declines to revise the provision because it originates in 45 CFR §164.526(a)(2)(iv). TDMHMR notes that under 45 CFR §164.526(d)(2) and §16(e)(2) of Exhibit A, the individual is permitted to submit a statement of disagreement regarding the denial of an amendment, which will be kept in the individual's record.

Regarding §16(c)(2)(A) and (B) and §17(b)(2) of Exhibit A, one commenter stated that the 60-day and 30-day time frames are unreasonably lengthy. The commenter noted that "in most cases, a component should be able be able to respond to requests within 30 days, allowing for 60 days on rare occasions." TDMHMR responds that the time frames originate in 45 CFR §164.526(b)(2) and §164.528(c)(1) and represent the *maximum time* allowed. TDMHMR agrees with the commenter that, in most cases, a component should be able be able to respond to requests within 30 days.

Regarding confidential communications in §19(d) of Exhibit A, one commenter suggested the language be changed to state, "A component *shall* not require an explanation from the individual as to the basis for the request as a condition of providing confidential communications." The commenter also suggested adding a new subsection (e) to state, "An individual shall not be required to explain why a request for confidential communications of PHI is being made." TDMHMR has revised the language to address the commenter's concern.

Regarding a business associate agreement being unnecessary if disclosure of an individual's PHI by the component to a business associate concerns the treatment of the individual in §20(a)(1) of Exhibit A, one commenter stated that business associates do not provide treatment. TDMHMR responds that the definition of "business associate" in 45 CFR §160.103 and §3(4)(A) of Exhibit A includes a person, other than a member of the component's workforce, who, on behalf of the component, performs or assists in the performance of "any other function or activity regulated by the Federal Privacy Rule." Therefore, a treatment provider who is not component employee or a member of its workforce could be a business associate.

Regarding business associate agreements in §20(c) of Exhibit A, one commenter stated that a conscious violation, a pattern or practice of violations of misuse of PHI, is a serious matter and should call for an immediate report to the Secretary of the United States Department of Heath and Human Services. The commenter recommended strengthening the provision in (c) by including the penalties that may be applied when the privacy laws are violated. TDMHMR declines to add penalties as recommended by the commenter because the only action a component may take against a business associate who violates the terms of the agreement are those described in §20(c)(1) and (2) and any others as described in the agreement itself. TDMHMR notes that penalties for violating the federal privacy regulations, which are described in federal law (42 USC §1320d-6, 42 USC §290ee-3(f), and 42 USC §290dd-3(f)), would be imposed by HHS and not TDMHMR or a component.

Regarding the Notice of Privacy Practices in Attachments BB and CC of Exhibit A, one commenter questioned why the component did not have to send out copies of the notice each time the component changed the notice's content. The commenter stated that some individuals may not have access to the Internet or be present at the facilities at which the new notice is posted. The commenter suggested that individuals be sent the revised notice. TDMHMR responds that the provision originates in 45 CFR §164.520(c)(2)(iv). TDMHMR declines to add the requirement as suggested by the commenter because it would be unreasonably burdensome and is not required by state or federal law. Further, only a small percentage of individuals would not have access to the Internet or would not go to a component's premises where they could obtain a revised notice or view a posted revised notice.

Regarding the fourth bullet on the first page of the Notice of Privacy Practices in Attachments BB and CC of Exhibit A, one commenter suggested that individuals be given a point of contact to report any suspected violations of the privacy laws. TDMHMR responds that the fourth page of the attachments lists several points of contact with whom individuals may file a complaint or get further information.

Regarding the first bullet in the section titled "Your Privacy Rights at ..." on the second page of the Notice of Privacy Practices in Attachments BB and CC of Exhibit A, one commenter suggested that some explanation of reasons be given regarding the statement "There are some reasons why we will not let you see or get a copy of your health information..." TDMHMR responds that the reasons for denying an individual assess to his or her health information are described in §15(d)(1) and (d)(2) of Exhibit A. TDMHMR notes that the notice states "if we deny your request [for access] we will tell you why." Additionally, on the last page of the notice, individuals are invited to contact the TDMHMR Privacy Officer for more information regarding the notice.

Regarding the third bullet in the section titled "Your Privacy Rights at ..." on the second page of the Notice of Privacy Practices in Attachments BB and CC of Exhibit A, one commenter stated that it would be helpful to know what would be included on the list instead of what would not be included. TDMHMR responds that the first part of the sentence states what will be included in the list (i.e., the disclosures of your health information that the component made to other people in the last six years). The list will include all disclosures except those described in the second sentence of the bullet.

Regarding the fourth bullet in the section titled "Your Privacy Rights at ..." on the second page of the Notice of Privacy Practices in Attachments BB and CC of Exhibit A, one commenter suggested adding language to state that the component will make a good faith effort to abide by an individual's request to restrict the way health information is used to the extent allowed by law. TDMHMR declines to add language as suggested by the commenter because it is possible that a component would not be able to "make a good faith effort to abide by" every request for restriction.

Regarding the introductory sentence on the third page of the Notice of Privacy Practices in Attachments BB and CC of Exhibit A, one commenter suggested that an assurance be given to individuals that, although their permission is not required, they will receive notification of the disclosure of health information. TDMHMR declines to add requirements for such assurance and notification as suggested by the commenter because it would be unreasonably burdensome and is not required by state or federal law. TDMHMR notes that individuals may request an accounting of disclosures if they so desire.

Regarding the fourteenth bullet on the third page of the Notice of Privacy Practices in Attachments BB and CC of Exhibit A, a commenter again expressed concern that PHI about an individual receiving mental retardation services could be disclosed without authorization when informing the individual's parent, guardian, relative, or friend of the individual's current physical condition. The commenter stated that the provision seems contrary to the intent of privacy laws and suggested that more restrictive parameters be delineated for releasing information regarding current physical and mental conditions to unauthorized individuals. TDMHMR responds that both state law (Texas Health and Safety Code, §595.010) and federal law (45 CFR §164.510(b)) authorizes such disclosures. TDMHMR notes that federal law (45 CFR §164.514(h)) and §4(e)(1) of Exhibit A requires a component to verify the identity of a person requesting health information.

Regarding the bolded sentence under "Payment" in the section titled "Treatment, Payment, and Health Care Operations" on the second page of the Notice of Privacy Practices in Attachment CC of Exhibit A, one commenter stated that the term "matching programs" should be defined, in order to make the statement clear to the average individual. TDMHMR responds that this sentence is included pursuant to 5 USC §552a(o)(1)(D), which requires an entity administering federal benefit programs to provide individualized notice to applicants and recipients of financial assistance under such programs that any information provided by them may be subject to verification through matching programs. TDMHMR declines to add a definition of "matching program" because the definition, which is contained in 5 USC §552a(a)(8), is extremely lengthy and complex and would not provide clarification. TDMHMR notes that on the last page of the notice, individuals are invited to contact the TDMHMR Privacy Officer for more information regarding the notice.

Regarding the notation on Attachment DD of Exhibit A relating to the form's appropriateness as the consent required by 42 CFR §2.31, one commenter asked "under 42 CFR, Part 2 is it not stated, 'This information has been ... and cannot be used to prosecute ...'?" The commenter stated that "it would seem appropriate to continue the use of that phrase on" Attachment DD of Exhibit A. The commenter also stated that "the federal law prohibits the use of a 'general release' for chemical dependency treatment." TDMHMR responds that, instead of including the information in Attachment DD, it has added language to the Notice of Privacy Practices in Attachments BB and CC stating that federal rules restrict any use of information about alcohol or drug abuse treatment to criminally investigate or prosecute any alcohol or drug abuse patient. TDMHMR notes that 42 CFR §2.32 and §14 of Exhibit A require a notice to accompany all disclosures of PHI that relate to alcohol or drug abuse treatment, and the notice states that 42 CFR Part 2 restricts any use of the disclosed PHI to criminally investigate or prosecute any alcohol or drug abuse patient. Additionally, Attachment DD should not be considered a "general release" because it requires a description of the specific types of information, including time period covered, to be disclosed, used, or received.

Regarding the "Note" portion of Attachment DD of Exhibit A, a commenter expressed concern about the clarity of the language, especially the term "re-disclosure." The commenter suggested replacing the phrase "the information disclosed pursuant to this authorization may not be protected by medical privacy laws and may be subject to re-disclosure by the recipient" be changed to state, "by signing this form your medical information may not be protected by medical privacy laws. The organization or facility that you are authorizing to receive your medical information may disclose that information to other entities." TDMHMR responds by adding clarifying language to address the commenter's issue.

One commenter asked whether the 42 CFR Part 2 protections apply to an individual with chemical dependency issues documented in his or her records if the individual is not receiving, and has never received, treatment for the dependency and the component does not provide chemical dependency services. TDMHMR responds that the situation referenced by the commenter is not addressed in federal or state law and suggests the commenter consult legal counsel for advice regarding compliance with applicable laws, rules, and regulations.

One commenter asked how the proposed rules impact the Texas Council for Offenders with Mental Impairments (TCOMI). TDMHMR responds that the rules do not apply to TCOMI and should have no impact on it except to the extent that a component's compliance with these rules affects how TCOMI receives, uses, or discloses PHI. TDMHMR notes that facilities, local authorities, and community centers currently may exchange PHI and other information relating to a special needs offender as permitted by §614.017 of the Texas Health and Safety Code, which is part of TCOMI's enabling legislation. However, the federal privacy rule preempts this state statute; therefore, the practice must cease on April 14, 2003, when the federal privacy rule becomes effective. TDMHMR also notes that a bill (Senate Bill 519) has been introduced in the 78th Texas Legislative Session which would *require* the exchange of certain information among the entities and persons described in §614.017(c)(1) of the Texas Health and Safety Code, rather than *permit* the exchange, which would allow components to continue to exchange information under §614.017. If Senate Bill 519 is passed, TDMHMR will amend Exhibit A to include the exchange of information for special needs offenders.

One commenter asked if it is a violation of privacy to use envelopes with the component's return address when mailing notices and reminders to individuals. The commenter noted that no one would know from the envelope that the individual was receiving MHMR services, unless the envelope identified the addressee as a "consumer." TDMHMR responds that the situation

referenced by the commenter is not specifically addressed in federal or state law and suggests the commenter consult legal counsel for advice regarding compliance with applicable laws, rules, and regulations.

The new sections are adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board (board) with broad rulemaking authority, and §533.009, which requires the board to adopt rules governing the exchange of patient and client records without the patient's or client's consent among department facilities, local mental health or mental retardation authorities, community centers, other designated providers, and subcontractees of mental health and mental retardation services.

§414.4. Requirements.

(a) TDMHMR Central Office and each facility, local authority, and community center shall comply with all applicable federal and state statutes, rules and regulations pertaining to privacy of protected health information (PHI) including, but not limited to, the federal and state statutes, rules and regulations described in §414.5 of this title (relating to Regulations and Statutes Governing Confidentiality of Protected Health Information).

(1) As set forth in 45 CFR Part 160 Subpart B, where a provision of 45 CFR Part 160 or 164 is contrary to a provision of state law, the federal regulation preempts the state law unless the provision of state law:

(A) is more stringent (as defined) than the provision of the federal regulation;

(B) provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention; or

(C) requires a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of providers or persons.

(2) TDMHMR's "Interpretive Guidance on Laws Pertaining to Privacy of Mental Health and Mental Retardation Records for the TDMHMR Service Delivery System," referenced as Exhibit A in §414.6 of this title (relating to Exhibits), provides an interpretation of the applicable federal and state statutes, rules and regulations described in §414.5 of this title, applying the preemption provisions described in paragraph (1) of this subsection. TDMHMR Central Office and all facilities must comply with the "Interpretive Guidance on Laws Pertaining to Privacy of Mental Health and Mental Retardation Records for the TDMHMR Service Delivery System."

(b) Information to be included in Notice of Privacy Practice.

(1) Each facility, local authority, and community center shall include in its Notice of Privacy Practice a statement that disclosures may be made between facilities, local authorities, community centers, their respective contract providers, and TDMHMR Central Office for the purpose of treatment, payment, or health care operations without the individual's consent as permitted by Texas Health and Safety Code, §533.009.

(2) TDMHMR Central Office and each facility, local authority, and community center shall include in its Notice of Privacy Practice a statement:

(A) that identifies it as a part of the TDMHMR service delivery system; and

(B) that individuals may file a complaint with TDMHMR Consumer Services and Rights Protection/Ombudsman Office by calling 1-800-252-8154 or writing to P.O. Box 12668, Austin, TX 78711.

(c) Each facility, local authority, and community center is responsible for ensuring that contracts with its contract providers require compliance with subsection (a) of this section.

§414.5. Regulations and Statutes Governing Confidentiality of Protected Health Information.

(a) Federal regulations. The following federal regulations pertain to privacy of protected health information (PHI):

(1) Code of Federal Regulations, Title 45, Parts 160 and 164, Federal Standards for Privacy of Individually Identifiable Health Information (i.e., Federal Privacy Rule), promulgated by the Secretary of the United States Department of Health and Human Services;

(2) Code of Federal Regulations, Title 42, Part 2, Confidentiality of Alcohol and Drug Abuse Patient Records, promulgated by the Secretary of the United States Department of Health and Human Services;

(3) Code of Federal Regulations, Title 34, Part 99, governing the disclosure of educational records of school-age children, promulgated by the Secretary of the United States Department of Education; and

(4) Code of Federal Regulations, Title 42, Part 51, Subpart D, and Code of Federal Regulations, Title 45, §1386.22, governing access to PHI by advocates for individuals with mental illness and mental retardation, promulgated by the Secretary of the United States Department of Health and Human Services.

(b) Federal statutes.

(1) The Health Insurance Portability and Accountability Act (HIPAA), 42 USC §1320d *et seq.*, provides the statutory authority for the United States Department of Health and Human Services to promulgate the Federal Privacy Rule.

(2) 42 USC §10805(a)(4) (Protection and Advocacy for Mentally Ill Individuals) and 42 USC §15043(a)(2)(I) (Protection and Advocacy of Individual Rights) provide the authority for access of PHI by Advocacy, Inc.

(3) 42 USC §290dd-2 provides the statutory authority to promulgate the federal regulations on confidentiality of alcohol and drug abuse patient records, referenced in subsection (a)(2) of this section.

(c) State statutes.

(1) Texas Health and Safety Code, Chapter 181, governing uses and disclosures of PHI in the State of Texas, applies portions of 45 CFR Parts 160 and 164 (Federal Privacy Rule) to most entities and persons not covered by HIPAA.

(2) Texas Open Records Act, Texas Government Code, Chapter 552, provides that all information collected, assembled, or maintained in any form by governmental bodies, and agencies operating in part or whole with state funds, in connection with the transaction of official business is public information; however, the act does set out certain exceptions. One such exception is information deemed confidential by law, such as PHI.

(3) Texas Health and Safety Code, §576.005 and Chapter 611, govern the confidentiality of PHI that relates to MHMR services.

(4) Texas Health and Safety Code, Chapter 81, Subchapter F, governs the confidentiality of information related to HIV/AIDS test results.

(5) The provisions for disclosure of PHI that relates to mental retardation services are contained in the Persons with Mental Retardation Act, Texas Health and Safety Code, Chapter 595. The provisions described in §576.005 and Chapters 595 and 611 of Texas Health and Safety Code should be interpreted together in reaching a determination regarding the use or disclosure of PHI that relates to mental retardation services.

(6) Texas Human Resources Code, Chapter 48, establishes authority for the Texas Department of Protective and Regulatory Services (TDPRS) to have access to PHI necessary to conduct investigations into allegations of abuse, neglect, and exploitation of individuals.

(7) Texas Medical Practice Act, Texas Occupations Code, Chapter 159, governs physician-patient communication.

(8) Texas Health and Safety Code, §533.009, governs the exchange of PHI between facilities, local authorities, community centers, and their respective contract providers.

(9) Texas Health and Safety Code, §595.005(c), governs the disclosure of educational records of individuals receiving mental retardation services.

(10) Texas Government Code, Chapter 559, provides that persons have a right to be informed about information that a state governmental body collects about them, and to have incorrect information that is possessed about them by a state governmental body corrected.

(11) Texas Family Code, Chapter 32, governs consent to treatment of a child by a non-parent or the child.

(12) Texas Health and Safety Code, Chapter 241, Subchapter G, governs the disclosure of PHI in hospitals licensed under the chapter.

(13) Texas Health and Safety Code, §614.017, governs the exchange of information relating to a special needs offender.

(14) Texas Government Code, §531.042, requires information regarding care and support options be given to at least one family member of a patient or client, if possible.

§414.6. Exhibit.

This subchapter references Exhibit A--"Interpretive Guidance on Laws Pertaining to Privacy of Mental Health and Mental Retardation Records for the TDMHMR Service Delivery System," copies of which are available by contacting TDMHMR, Policy Development, P.O. Box 12668, Austin, TX 78711-2668, or by calling toll free at 1-888-404-1511, extension 4516. The exhibit is also accessible via the Internet at www.mhmr.state.tx.us/hipaa.html.

§414.7. References.

Reference is made to the following state and federal statutes, rules, and regulations:

(1) 45 CFR Parts 160 and 164, and §1386.22;

(2) 42 CFR Part 2 and Part 51, Subpart D;

(3) 34 CFR Part 99;

(4) 42 USC §290dd-2, §1320d *et seq.*, §10805(a)(4), and §15043(a)(2)(I);

(5) Texas Health and Safety Code:

(A) Chapter 81, Subchapter F;

(B) Chapter 241, Subchapter G;

(C) Chapter 534, Subchapter A;

(D) Chapters 181; 595; and 611; and

(E) §§533.009, 533.035(a), 576.005, 595.005(c), and 614.017;

(6) Texas Government Code, Chapters 552 and 559, and §531.042;

(7) Texas Human Resources Code, Chapter 48;

(8) Texas Occupations Code, Chapter 159; and

(9) Texas Family Code, Chapter 32.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 3, 2003.

TRD-200302195
Rudy Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: April 23, 2003
Proposal publication date: February 7, 2003
For further information, please call: (512) 206-4516

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CHAPTER 417. AGENCY AND FACILITY RESPONSIBILITIES

SUBCHAPTER A. STANDARD OPERATING PROCEDURES

25 TAC §§417.2, 417.4, 417.49

The Texas Department of Mental Health and Mental Retardation (department) adopts the repeals of existing §§417.2, 417.4, and 417.49 of Chapter 417, Subchapter A, concerning standard operating procedures are adopted without changes to the proposal in the December 13, 2002, issue of the *Texas Register* (27 TexReg 11709). New Chapter 417, Subchapter A, concerning substantially the same matters is contemporaneously adopted in this issue of the *Texas Register*.

Sections 417.2, 417.4, and 417.49, describe the subchapter's application, definitions and references, to which minor revisions were necessary when the new sections regarding department procedures for reporting unauthorized departure, managing department and benefit funds, and the protecting the personal property of consumers and staff. The adoption of the repeal of the existing sections and adoption of the new sections are made according to the department's rule review plan as required by the Texas Government Code, §2001.039.

Comments were not received from the public.

The repeal is adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority.

The repeal affect Texas Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302265
Rudy Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: April 27, 2003
Proposal publication date: December 13, 2002
For further information, please call: (512) 206-4516

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25 TAC §§417.2, 417.4, 417.20, 417.23, 417.27 - 417.29, 417.33, 417.34, 417.38 - 417.46, 417.49

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new §§417.2, 417.4, 417.23, 417.27 - 417.29, 417.33, 417.34, 417.38 - 417.46 of Chapter 417, Subchapter A, concerning standard operating procedures with changes to the language proposed in the December 13, 2002, issue of the *Texas Register* (27 TexReg 11710). Section 417.20 and §417.49 are adopted without changes and the text will not be republished. Existing §§407.1 - 407.6 and §§407.22 - 407.24 of Chapter 407, Subchapter A, concerning financial services; §407.120 of Chapter 407, Subchapter C, concerning lease of department property; and §§417.2, 417.4, and 417.49, concerning application, definitions, and references of Chapter 417, Subchapter A, which the new sections would replace, are contemporaneously repealed in this issue of the *Texas Register*.

The adoption of new sections and repeals of existing sections are made according to the department's rule review plan required by Texas Government Code, §2001.039, and includes new sections regarding the procedures for long-term lease of department property, ensuring the safety of individuals' personal property and funds, managing department and benefit funds, and reporting unauthorized departures. The application section clarifies that the sections regarding personal funds apply only to state mental health facilities while the remaining sections apply to all state mental health and mental retardation facilities. The definitions section has been revised to include terms that are used in the new sections concerning lease of department property, personal funds, managing department and benefit funds, and unauthorized departures.

Throughout the subchapter minor grammatical changes were made, clarifying language was added, and unnecessary language was deleted (i.e., the term "facility staff" was replaced by the term "staff."

In §417.2, Application, the section numbers are revised consistent with the section numbers that apply only to State Mental Health Facilities (i.e., §§417.39 - 417.46). Section 417.47, Audit, was deleted as Chapter 411, Subchapter F, concerning internal audit provides the department's audit staff with the authority to conduct audits and investigations at State Mental Health and Mental Retardation Facilities.

A definition for the acronym "CEO" (i.e., chief executive officer) was added. Language was added to the term "facility" to clarify that a facility can be either a SMHF or a SMRF to reduce confusion about the applicability of §§417.39 - 417.46, concerning trust funds that apply only to State Mental Health Facilities definitions for the acronyms "SMHF" (i.e., State Mental Health Facilities) and "SMRF" (i.e., State Mental Retardation Facilities) to provide further clarification about the application of the subchapter. The definitions section was renumbered as a result of the acronyms and clarifying language that were added.

In §417.28, the minimum trust fund amount that may be transferred to the Central Office investment program has been changed from multiples of $5,000 to multiples of $2,500 because at many facilities consumer's trust fund balances did exceed the minimum investment of $5,000.

In §417.29, Benefit Funds: Use and Control, titles were added to subsections (a) - (h) to make the section easier to read.

Throughout §§417.39 - 417.46 the terms "facility" and "CEO" were replaced with the term "SMHF" to clarify that the sections apply only to SMHFs. However, in §417.44(2)(A) - (B) the term facility was retained as an individual may be transferred to a SMRF rather than another SMHF.

A new subsection (a) was added in §417.39 to reference the rules concerning the management of trust funds for persons who are receiving services from ICF/MR Program providers, including SMRFs. As a result of the addition, the remaining subsections were renumbered. In subsection (b) of the same section, the reference to the sections that apply only to SMHFs was revised consistent with the elimination of §417.47, Audit.

Unnecessary language was deleted from §417.41(b)(4) because it was repeated in subsection (c) of the same section.

Comments were received from the Evelyn Cherry, Garland, Texas and the Parent Association for the Retarded of Texas (PART), Austin, Texas.

The commenter indicated that fiscal note language regarding possible cost to family members and guests who may stay overnight in department facilities does not appear to apply to the subchapter. Further, the commenter requested clarification as to whether the possible cost applies only to family members or guests who stay overnight on campus while visiting a consumer.

The department responds that the language was inadvertently retained in the fiscal note language from the previous proposal. Section 417.15 sets forth the provisions for family members or guests who may stay overnight on campus while visiting a consumer. The facility CEO has the authority to waive or reduce the charges for overnight accommodations. There is a schedule of recommended charges in the *TDMHMR Fiscal Manual*.

The commenters expressed support for including playground equipment in the list of examples of items that can be paid for with benefit funds. The commenters noted that several years ago playground equipment was removed from campuses and further noted that adults receiving services enjoyed using playground equipment. The department appreciates the commenters' support.

The commenters expressed concern about the protection of individual's personal property specifically the language "the facility is limited in its ability to protect any personal property that an individual keeps on the unit..." and inventorying personal property "if a discrepancy arises, develop a process for documenting, investigating, and resolving the discrepancy" because the language seems to make it easier for staff to avoid responsibility when personal property disappears.

The department responds that it makes every effort to protect individual's personal property. Further, the department responds that the language "if an individual chooses to keep personal property on the unit" to serve as notice that protection

of personal property kept on the unit cannot be guaranteed and that property of any value should be held by the facility. The language "if a discrepancy arises, develop a process for documenting, investigating, and resolving the discrepancy" is included to require that staff adhere to processes for documenting and resolving discrepancies concerning personal property. The department notes that similar language appears in Chapter 404, Subchapter E, concerning rights of persons receiving mental health services.

The commenters asked that the term "LAR" (i.e., legally authorized representative) be added in several places in §417.38, Individual's Personal Property. The department agrees to add the term "LAR" as the commenters suggested.

The commenters requested that a distribution section, including advocacy groups, be added to the subchapter. The department responds that the §417.50, Distribution, was adopted at the September 2002 Board meeting. Although, advocacy groups were inadvertently omitted from the list the new subchapter will be distributed to such groups in hard copy and electronically, as appropriate. The department further responds that the distribution section will be amended section with the next revision to the subchapter.

The new sections are adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority, and Texas Government Code, §2001.039, which requires the department to review it rules.

The new sections affect Texas Health and Safety Code, §532.015; Texas Human Resources Code, §32.021; Texas Government Code, §531.021, and Texas Government Code, §2001.039;

§417.2. Application.

Except for §§417.39 - 417.46, concerning trust funds, that apply only to state hospitals, the subchapter applies to state hospitals, state schools, state centers, Central Office, and any entity that may become part of the Texas Department of Mental Health and Mental Retardation (TDMHMR).

§417.4. Definitions.

The following words and terms when used in this subchapter have the following meanings, unless the context clearly indicates otherwise.

(1) Budgeted amount--The amount of cash that may be disbursed to an individual at regular intervals, e.g., weekly or monthly for discretionary spending without obtaining a sales receipt for the expenditure.

(2) CEO--The chief executive officer of a state mental health facility or a state mental retardation facility.

(3) Commercial lease--A lease of real property to a private enterprise.

(4) Competitive bid--A competitive process for determining the award of a lease, more particularly described in Texas Health and Safety Code, §533.084 and §533.087.

(5) Department--The Texas Department of Mental Health and Mental Retardation (TDMHMR).

(6) Facility--A state mental health facility (SMHF) or a state mental retardation facility (SMRF) operated by the TDMHMR.

(7) Individual--A person receiving services from the Texas Department of Mental Health and Mental Retardation.

(8) LAR (legally authorized representative)--A person authorized by law to act on behalf of an individual with regard to a matter described in this subchapter, and may include a parent, guardian, or managing conservator of a minor individual, a guardian of an adult individual, or a personal representative of a deceased individual.

(9) Mental illness--An illness, disease, or condition (other than a sole diagnosis of epilepsy, senility, substance abuse or dependency, mental retardation, autism or pervasive developmental disorder) that:

(A) substantially impairs an individual's thought, perception of reality, emotional process, or judgment; or

(B) grossly impairs an individual's behavior as demonstrated by recent disturbed behavior.

(10) Mental retardation--Subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and originating during the developmental period.

(11) Material safety data sheet--The document provided by a manufacturer that describes a material's or part's chemical properties along with guidelines for proper use, storage, and disposal.

(12) Non-commercial group--A group of people associated with an organization, e.g., civic, fraternal, religious, social, service, community, or public employee organization.

(13) Pooled account--A trust fund account containing the personal funds of more than one individual.

(14) Prevailing market rate--A reasonable estimate of the annual rent for a real property based upon its fair market value that reflects the real property's condition, location, and other salient factors.

(15) Public benefit lease--A lease of non-surplus real property between the department and a federal or state agency, a unit of local government, a not-for-profit organization, or an entity that provides services to individuals and/or employees. Such a lease is determined or defined by the board as providing a public benefit.

(16) Public employee organization--An organization that represents department staff in legislative, human resource, and related issues.

(17) Sales receipt--A written statement issued by the seller that includes:

(A) the date it was created; and

(B) the cost of the item or service.

(18) SMHF--A state mental health facility (e.g., state hospital).

(19) SMRF--A state mental retardation facility (e.g., state school or state center).

(20) Surplus property--Real property designated by the Texas Mental Health and Mental Retardation Board (board) as having minimal value to the present delivery system as described in the department's long-range plan.

(21) Trust fund account--An account at a financial institution in the facility's control that contains personal funds.

(22) Unauthorized departure that may have unusual consequences--The unauthorized departure of an individual that causes a reasonably prudent staff member who has knowledge of the person's condition to believe that harm or injury to the individual or to others may occur as a result of the unauthorized departure, e.g., the unauthorized departure of an individual who the treatment staff believes to be

a danger to self or to others or the unauthorized departure of an individual who requires maintenance medication such as insulin.

(23) Unclaimed personal funds or property--Personal funds or property managed by the facility that has not been disbursed to the individual or LAR within 30 calendar days after the individual's discharge, e.g., if an individual dies and staff are unable to find the LAR or heir to the estate.

(24) Unidentified personal funds or property--Personal funds or property managed by the facility for which the facility cannot identify ownership.

§417.23. Unauthorized Departures That May Have Unusual Consequences.

The CEO or designee shall immediately if possible, but in no case more than one hour later make a missing person report to the appropriate law enforcement agency upon discovering an unauthorized departure that may have unusual consequences for an individual who:

(1) is unable to ensure his or her personal safety and/or is considered to be a danger to self or others; and

(2) is receiving court-ordered inpatient or residential services or is voluntarily receiving mental retardation residential services.

§417.27. Depositing Department Funds.

The CEO or designee is responsible for ensuring that:

(1) all funds received are deposited with the state treasurer or in an account that is insured under state or federal law.

(2) the balance of such account does not exceed the insured limit of the financial institution; and

(3) all funds that must be deposited in the State Treasury are deposited within three business days of receipt.

§417.28. Investing Department Funds.

(a) The CEO or designee must ensure that funds which are not required for current use are invested with Texas financial institutions or the Central Office investment plan. Earnings on invested funds other than trust funds shall be added to the funds from which earnings are derived. The interest rate and the availability for withdrawal in case of emergency must be considered in making investment selections.

(1) Texas financial institutions. If the Texas financial institution is insured under state or federal law, the funds may be invested in certificates of deposit or savings accounts. If the investment amount exceeds the limits of state and federal insurance the investment source must pledge additional securities equal to the investment amount.

(2) Central Office investment program. Central Office offers a short term fund, current interest rate, investment plan for the benefit of all facilities. Funds may be transferred to Central Office, Financial Services in multiples of $2,500 for immediate return upon request. Interest payments are remitted by Central Office, Financial Services at the end of each month.

(b) A register of investments, including individuals' personal funds must be maintained in the office of the CEO or designee, including:

(1) name of financial institution;

(2) a description of each investment;

(3) the amount and date of the investment;

(4) interest due dates;

(5) interest paid dates;

(6) maturity date; and

(7) reinvestment information.

(c) The CEO or designee must use the register of investments to verify collection of income and principal.

§417.29. Benefit Funds: Use and Control.

(a) Authority. As authorized by the Texas Health and Safety Code, §551.004, the CEO must be the trustee of a special fund designated as the benefit fund. The CEO may expend the money in any such fund for the education or entertainment of individuals or for the actual expense of maintaining the fund at the financial institution.

(b) Source of funds. The source of benefit funds are:

(1) private donations or gifts; and

(2) interest earned from investment of benefit funds.

(c) Use of funds. Except for specific purpose funds, benefit funds may be used only for the purposes of education or entertainment of individuals and be of general benefit to the facility's population. However, this does not mean or imply that every individual must benefit from each expenditure from the benefit fund. Benefit funds must not be spent in a manner that shows partiality or preferential treatment of an individual or selected groups of individuals. Expenditures from the benefit fund must be supported by sales receipts to show the exact purpose and, if practical, to show the name of the individuals' benefiting from the expenditure.

(d) Allowable expenditures. Expenditures from the benefit funds may include items such as:

(1) supplies for behavior therapy programs, which involve a token economy or point level system;

(2) outings for individuals, including admission fees and meals for those staff who are required to accompany the individuals;

(3) coffee for individuals;

(4) religious items;

(5) educational books and supplies;

(6) salaries of temporary teachers, including athletic instructors and recreation assistants;

(7) playground equipment, televisions, record players, and stereos, for use by individuals as a whole in the living areas; and

(8) grocery items purchased for classes in home economics.

(e) Unallowable expenditures. Expenditures that cannot be made from the benefit fund include:

(1) travel of state employees;

(2) operating supplies;

(3) supplies for volunteer center training program;

(4) nursery stock;

(5) clothing for individuals;

(6) cash issues to individuals with no personal funds.

(7) purchase of canteen coupon books for individuals with no personal funds;

(8) staff salary augmentation;

(9) transportation for individuals' home visits; and

(10) furniture and equipment normally purchased from state appropriated funds.

(f) Prohibition on use of funds. Unless prohibited by department policy or state or federal laws and regulations, funds that are donated for a specific purpose must be used for that purpose. If the purpose for the funds is prohibited, the donor is contacted and asked to specify a purpose that permits expenditure in compliance with department policy or state or federal law and regulations.

(g) Depositing funds. The CEO or designee must ensure that all benefit fund receipts are deposited in a financial institution insured by state or federal and all expenditures are made by check according to the *TDMHMR Fiscal Manual*.

(h) Administrative expenses. The actual expense of maintaining benefit funds may include expenditures to cover administrative errors which arise in the administration or disbursement of benefit funds and personal funds, provided the following restrictions are met:

(1) the amount of benefit funds expended to cover any single loss does not exceed $250;

(2) in each instance of loss, prior approval for the use of benefit funds to cover the administrative error must be obtained from the CEO;

(3) the circumstances surrounding each administrative error must be documented and attached in the supporting records;

(4) for auditing purposes, the expenditure, if approved and made, must be charged to cash shortage;

(5) benefit funds must not be used to cover losses that result from the gross negligence of any employee or employees;

(6) the facility in which the administrative error occurred must take the action necessary to correct the error and/or prevent its recurrence, including, but not limited to, counseling staff on the correct procedure for the administration and disbursement of benefit funds and personal funds; and

(7) employees responsible for administrative errors in the administration or disbursement of benefit funds and personal funds may be subject to disciplinary action.

§417.33. Mail for Staff Residing On Campus.

(a) Staff mail. Except as provided by subsection (b) of this section, all mail addressed to staff is delivered unopened to the addressee. Routine, indiscriminate opening of an employee's mail is prohibited. Unless living on grounds, staff must not have personal mail delivered to the facility.

(b) Authority to open mail. If the CEO determines that it is in the best interest of the facility to maintain fiscal control over monies belonging to the facility, an individual, or to control contraband, the CEO has the authority to open any mail addressed to a staff member, office, or section of the facility (except personal mail addressed to staff or their families living on the grounds or mail marked "personal" or "confidential"). Mail addressed to an employee (except that indicated in subsection (a) of this section) can be opened only in the presence of the employee.

§417.34. Commercial Solicitation on Grounds.

The CEO is responsible for developing and implementing local procedures regarding commercial solicitation on the grounds of the facility that include the requirement for staff to direct sales representatives to those staff who are responsible for ordering the types of products being offered, e.g., drug representatives are directed to the pharmacy director or the given the times, dates, and locations of the meetings of the executive formulary committee.

§417.38. Individual's Personal Property.

(a) Local procedures. The CEO or designee is responsible for developing and implementing local procedures to ensure an individual's right to reasonable protection of personal property including clothing and mail from theft or loss consistent with Chapter 404, Subchapter E, concerning Rights of Persons Receiving Mental Health Services, and Chapter 405, Subchapter Y, concerning Client Rights--Mental Retardation Services or any other department rules that concern the rights of individuals.

(b) Personal property. The CEO or designee is responsible for developing and implementing written processes that protect each individual's personal property that include:

(1) advising individuals and LARs that the facility is limited in its ability to protect any personal property that an individual keeps on the unit, however, if loss or theft of such property is reported staff must make every effort to find and return the missing property to the owner;

(2) documenting the receipt of any personal property that is to be held under the facility's control;

(3) physically inventorying personal property under the facility's control and documenting personal property received from individuals to ensure it is accounted for and if a discrepancy arises develop a process for documenting, investigating, and resolving the discrepancy;

(4) documenting and honoring an individual's request for the return of any or all of his or her personal property previously under the facility's control.

(c) Returning personal property. If an individual is discharged from the facility, staff must upon discharge or a soon as possible thereafter document and return to the individual or LAR all of the individual's personal property under the facility's control.

(d) Individual's personal mail. Except as described in this section and department rules concerning the rights of individuals, an individual's personal mail must be delivered unopened to the addressee. If staff have reason to believe that mail addressed to an individual is an invoice and the facility is responsible for its payment, then the mail must be opened by the individual and witnessed by two staff. If the mail contains such an invoice, it is forwarded to accounts payable for processing, an explanation of the situation is given to the individual, and the situation is documented in the individual's record.

§417.39. Protecting an Individual's Personal Funds.

(a) Rules concerning the personal funds of individuals receiving services from a state mental retardation facility (SMRF) are in Chapter 419, Subchapter E, concerning ICF/MR Program.

(b) The state mental health facility (SMHF) must implement §§417.39 - 417.46 of this title according to the generally accepted accounting principles of the American Institute of Certified Public Accountants.

(c) The CEO must develop and implement local procedures regarding personal funds that protect the financial interest of individuals and, at a minimum, require the SMHF to allow individuals to hold and manage their personal funds to the extent of their abilities.

§417.40. Notice Regarding Personal Funds.

At the time of admission to the SMHF, and if changes to services or charges occur, staff must provide each individual or LAR with written notification containing the following information:

(1) a written explanation of §417.41 of this title (relating to Determining Management of Personal Funds), which describes who may manage personal funds;

(2) a statement that the admitting physician determines whether the individual has the ability to manage his or her personal funds and if, an individual is unable to manage such funds, the funds are deposited in the trust fund account for no longer than seven calendar days when the treating physician reevaluates the admitting physician's determination;

(3) a statement that the individual, CEO, or LAR may request that the Social Security Administration appoint a representative payee to receive the individual's federal benefits in accordance with 20 CFR Part 416, Subpart F;

(4) a statement that, if the facility manages the individual's personal funds, staff must make available the individual's personal funds ledger upon the individual's or LAR's request but in no case longer than 30 calendar days; and

(5) a statement that at the request of the individual or LAR, or if the individual is discharged from the SMHF, the SMHF must whenever possible disburse the individual's personal funds to the individual or LAR upon discharge but in no event more than 30 calendar days after the request or discharge, if the SMHF manages the individual's personal funds.

(6) a statement that the facility is not responsible for personal funds mailed directly to individuals; and

(7) a statement that the SMHF maintains a trust fund to protect personal funds and such funds including cash and checks that are to be deposited in the trust fund must be mailed to the cashier's attention.

§417.41. Determining Management of Personal Funds.

(a) Within seven business days after an individual is admitted to the SMHF, the treating physician must determine if the individual has the ability to manage his or her personal funds.

(b) If an individual does not have an LAR and is determined by the treating physician to have the ability to decide who manages his or her personal funds or if an individual has an LAR, the facility must allow the individual or LAR to choose one of the following to manage his or her personal funds and document such choice as determined by local procedures:

(1) the individual, if the individual is determined to have the ability to manage his or her personal funds;

(2) the individual's LAR;

(3) another person identified by the individual or LAR who has agreed in writing to manage the individual's personal funds; or

(4) the facility.

(c) If an individual is determined not to have the ability to decide who manages his or her personal funds and the individual has no LAR, the SMHF must manage the individual's personal funds in accordance with this subchapter.

(d) The treating physician must reassess an individual's understanding of financial management at the individual's or LAR's request.

§417.42. SMHF--Managed Personal Funds.

(a) Accounting for personal funds. If the facility manages an individual's personal funds, the SMHF must comply with this section and ensure that:

(1) a complete accounting of personal funds entrusted to the SMHF is maintained;

(2) personal funds are not commingled with facility funds or the funds of any person other than another individual for whom the SMHF manages personal funds; and

(3) an individual's personal funds are only expended for that individual's use and benefit.

(b) Account requirements. The SMHF must manage personal funds in a pooled trust fund account.

(1) The trust fund account must be insured under federal or state law.

(2) The SMHF must retain all bank statements from financial institutions regarding trust fund accounts.

(3) Within 30 calendar days after receiving the bank statement, the facility must reconcile the bank statement with the general ledger as described in subsection (c) of this section and personal funds ledger as described in subsection (h)(5) of this section.

(4) Each business day, staff must reconcile:

(A) each individual's transactions with the trust fund control ledger; and

(B) the personal funds ledger with the trust fund control ledger.

(c) General ledger. The SMHF must maintain a general ledger that separately identifies each financial transaction, including:

(1) the name of the individual for whom the transaction was made;

(2) the date and amount of the transaction, including interest;

(3) the balance after the transaction; and

(4) identify the SMHF name in the account title and the type of account, e.g., Austin State Hospital, Trust Fund Account.

(d) Investment. Unless an exception is granted by the director, State Mental Health Facilities and written documentation of such is maintained at the facility, the SMHF must invest at least 75% of the average monthly balance of the total held in trust for the previous six months in an insured Texas financial institution.

(e) Interest. If personal funds accrue interest, the SMHF must prorate and distribute the interest earned to each participating individual at the end of the month.

(f) Depositing personal funds. The SMHF must deposit in the trust fund account all funds that it receives on behalf of an individual.

(g) Access to personal funds. The treating physician must determine the individual's ability to manage his or her personal funds and:

(1) if there is a need for a budgeted amount, set the amount, and document the amount in the individual's medical record; and

(2) if there is a need to restrict the individual's use of personal funds the treating physician must document the need for the restriction in the individual's medical record.

(h) Personal funds documentation. Staff must maintain a personal funds documentation for each individual that includes:

(1) the name of the individual;

(2) the name of the individual's LAR and representative payee, as applicable;

(3) the date of the individual's admission to the SMHF;

(4) the individual's budgeted amount;

(5) a personal funds ledger that includes the date and amount of each transaction and the balance after each transaction; and

(6) any contribution acknowledgment as described in §417.46 of this title (relating to Contributions).

(i) Documenting expenditures and deposits.

(1) Expenditures.

(A) Staff must retain a sales receipt for each expenditure made on behalf of an individual.

(i) If a sales receipt documents an expenditure for more than one individual, the SMHF must indicate on the sales receipt the amount allocated to each individual.

(ii) If a sales receipt does not include the specific item or service purchased or the name of the seller, staff must attach such documentation.

(B) Staff must explain each expenditure to the individual and request that the individual sign the receipt. If staff determine that the individual does not understand the explanation, the individual does not sign the receipt, or the individual's signature is illegible, a witness to the expenditure must sign the receipt. The witness cannot be responsible for managing personal funds or responsible for supervising persons performing such duties.

(2) Deposits. Except for deposits made electronically, staff must retain a deposit slip issued by the financial institution for each deposit.

§417.43. Requests for Personal Funds from Trust Fund Accounts.

If staff receive a request, from an individual or other person except staff to expend an individual's personal funds without written evidence supporting the disbursement, a written request specifying the amount and purpose of the expenditure is signed by the requestor, the facility may release such funds to the requestor if the funds recipient acknowledges receiving the funds in writing.

§417.44. Returning Individual's Personal Funds on Discharge.

If an individual is discharged from the facility, staff must upon discharge or in no case more than 30 calendar days after the discharge:

(1) reconcile the personal funds ledger to the trust fund control ledger and the trust fund control ledger to the general ledger;

(2) transfer all personal funds managed by the facility:

(A) to the facility receiving the individual, if the individual is discharged to another facility; or

(B) to the individual or LAR, if the individual is not discharged to another SMHF;

(C) the copy of a check serves as documentation for the distribution of personal funds.

(3) provide to the admitting SMHF, individual, or LAR the individual's current personal funds documentation.

§417.45. Unclaimed Personal Funds and Property.

(a) If a person makes a request for an individual's unclaimed personal funds or property that:

(1) exceeds $500 and provides written authorization from the probate court to receive such funds or property, staff release the funds or property.

(2) is $500 or less and the CEO or designee is reasonably certain that the person is the lawful heir and that there is no concern for a future dispute over the disbursed funds or property, facility staff release the funds or property.

(b) If no request for the unclaimed funds or property is received, staff must make a good faith effort to locate the individual to whom the funds or property belong or the LAR. If the individual or LAR:

(1) is located or a request for the personal funds or property is received, staff must transfer the funds or property to the individual or LAR; or

(2) is not located, staff must maintain the personal funds in a bank account as described in §417.42(b) of this title (relating to SMHF--Managed Personal Funds) or maintain the property in a secure location.

(A) The SMHF must hold the unclaimed personal funds or property for three years.

(B) At the end of three years if no request for the funds or property is received, the SMHF must transfer to State Comptroller's Office the unclaimed funds or property according to the *Holder Information Report* instructions published by the State Comptroller's Office.

§419.46. Contributions.

If the individual or LAR makes a contribution to the SMHF using personal funds, the SMHF and the contributor must sign and date an acknowledgement that the SMHF's services are not predicated on a contribution and the contribution is voluntary. The acknowledgement must be made a part of the individual's personal funds documentation. There are additional requirements for accepting contributions in Chapter 417, Subchapter G, concerning community relations.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302262
Rudy Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: April 27, 2003
Proposal publication date: December 13, 2002
For further information, please call: (512) 206-4516

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SUBCHAPTER D. PERMANENT IMPROVEMENTS DONATED BY INDIVIDUALS OR COMMUNITY GROUPS

25 TAC §§417.151 - 417.160

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new Chapter 417, Subchapter D, §§417.151, 417.152, 417.155 - 417.160, concerning permanent improvements donated by individuals or community groups without changes to the proposed text published in the December 6, 2002, issue of the *Texas Register* (27 TexReg 11449). Section 417.153 and §417.154 are adopted with changes to the proposed text. The new sections replace Chapter 410, Subchapter C, §§410.101 - 410.122, which contained substantially the same issues, are contemporaneously repealed in this issue of the *Texas Register*.

The adoption of new §§417.151 - 417.160 and the contemporaneous repeals of §§410.101 - 410.122 are made to describe the procedures and approval process for individuals and community groups to donate a permanent improvement to a facility.

The adoption of the new rules and repeals fulfill the requirements of Texas Government Code, §2001.039, concerning the periodic review of department rules.

In §417.153, the definition of the term "construction" an error in capitalization was corrected.

In §417.154(a), the abbreviation of permanent improvement, i.e., (PI improvement) that should have read (improvement) was corrected.

Comments were not received from the public.

The new sections are adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority and Texas Government Code, §2001.039, concerning the periodic review of department rules.

§417.153. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Asset Management--The Central Office division whose staff are responsible for overseeing TDMHMR's real property.

(2) Board--The Texas Board of Mental Health and Mental Retardation.

(3) Business entity--A sole proprietorship (including a person), partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law.

(4) Community group--A volunteer services council that is affiliated with TDMHMR or a group of people associated with an organization (e.g. civic, fraternal, corporate, religious, social, service, community, or educational).

(5) Construction--The implementation of a physical improvement (e.g., erecting, remodeling, renovating, or altering a building or addition thereto, gazebo, pavilion, road, sidewalk, fountain, or pond) and/or installing or extending a building system (e.g., roofing, mechanical, plumbing, or electrical system) that is integral to the durability and habitability of a building (e.g., air conditioning units, water or wastewater distribution lines, electrical wiring located in walls or underground, and subflooring or foundation work).

(6) Construction documents--Construction drawings, specifications, and all addenda issued prior to, and all modifications issued after execution of the contract.

(7) Dedicated construction account--A unique, restricted interest-bearing account insured by an agency of the federal government that is established for the sole purpose of ensuring that sufficient funds are in place prior to initiating construction of a permanent improvement.

(8) Donor--A person, community group, or business entity who wants to donate a permanent improvement.

(9) Director, facility community relations--The staff person who is responsible for coordinating the community relations functions, volunteer programs, and fundraising at a facility.

(10) Endowment fund--A permanent, restricted fund established and maintained by the volunteer services council to fund, by generating interest income from the principal fund, the ongoing operating expenses for a specific permanent improvement.

(11) Facility--A state school, state hospital, state center, or other real property, except Central Office, that is operated by the Texas Department of Mental Health and Mental Retardation (TDMHMR).

(12) Facility chief executive officer (CEO)--The chief administrator of a facility.

(13) Landscaping--An improvement involving the systematic installation of plant materials (e.g., trees, shrubs, grass, blooming plants, irrigation systems, and/or grading, clearing, or other alteration of the existing topography and composition of the land).

(14) Local project manager--A facility staff person designated by the permanent improvement committee who acts on behalf of the permanent improvement committee in dealing with the design professional and contractor for the duration of the improvement's construction.

(15) Permanent improvement (improvement)--A facility improvement that requires construction or an improvement consisting of landscaping.

(16) Permanent improvement committee (PI committee)--The committee that is appointed by the executive committee of the facility's volunteer services council for the purpose of overseeing and/or donating a permanent improvement.

(17) SMHMRFs--State Mental Health and Mental Retardation Facilities.

(18) TDMHMR--The Texas Department of Mental Health and Mental Retardation.

(19) Volunteer services council (VSC)--A facility's 501(c)(3) organization that is formed for generating resources on behalf of the facility and to appoint a permanent improvement committee to implement permanent improvements.

(20) Volunteer services council (VSC) board--The board of directors of the facility's volunteer services council.

(21) Volunteer services council (VSC) chair--The primary officer of the board of directors of the facility volunteer services council, elected according to the VSC bylaws.

§417.154. Permanent Improvement Process.

(a) The facility CEO, with assistance from the director, facility community relations, and the VSC chair, must submit a written description of the proposed permanent improvement (improvement) by completing and submitting the Permanent Improvement Concept form referred to in §417.159 of this title.

(b) If the concept is approved by the commissioner or designee as described in §417.155 of this title (relating to Permanent Improvement Approval), the facility CEO with assistance from the director, facility community relations, and the VSC chair, submit a completed Permanent Improvement Proposal form, which is referred to in §417.159 of this title (relating to References).

(c) The director, facility community relations, or VSC chair may consult with the donor throughout all phases of the review and approval process, including:

(1) the proposal review process;

(2) the design, fundraising, and construction review process; and

(3) the acceptance process.

(d) If requested by the facility CEO, the donor must establish an endowment fund for ongoing maintenance and support for the improvement.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302267
Rudy Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: April 27, 2003
Proposal publication date: December 6, 2002
For further information, please call: (512) 206-4516

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SUBCHAPTER K. ABUSE, NEGLECT, AND EXPLOITATION IN TDMHMR FACILITIES

25 TAC §§417.501 - 417.518

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the repeals of §§417.501 - 417.518 of Chapter 417, Subchapter K, concerning abuse, neglect, and exploitation in TDMHMR facilities, without changes to the proposal as published in the November 29, 2002, issue of the *Texas Register* (27 TexReg 11044). New §§417.501 - 417.505 and §§417.507 - 417.518 of Chapter 417, Subchapter K, concerning the same, which replace the repealed sections, are contemporaneously adopted in this issue of the *Texas Register*.

The repeals allow for the adoption of new sections governing the same matters.

No comments on the proposed repeals were received.

The repeals are adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board (board) with broad rulemaking authority; the Texas Human Resources Code, Chapter 48, which requires the reporting and investigations of abuse, neglect, and exploitation of elderly and disabled persons; §48.255, which requires TDMHMR and the Texas Department of Protective and Regulatory Services (TDPRS) to develop joint rules to facilitate investigations in facilities operated by TDMHMR; the Texas Family Code, Chapter 261, which requires the reporting and investigations of abuse or neglect of a child; §261.404, which requires TDMHMR and TDPRS to develop joint rules to facilitate investigations of a child receiving services in a facility operated by TDMHMR; and the Texas Civil Practice and Remedies Code, §81.006, which requires the reporting of alleged sexual exploitation by a mental health services provider to the county prosecuting attorney.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 3, 2003.

TRD-200302193
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Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: April 23, 2003
Proposal publication date: November 29, 2002
For further information, please call: (512) 206-4516

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25 TAC §§417.501 - 417.505, 417.507 - 417.518

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new §§417.501 - 417.505 and §§417.507 - 417.518 of Chapter 417, Subchapter K, concerning abuse, neglect, and exploitation in TDMHMR facilities. Sections 417.503 - 417.505, 417.507 - 417.510, 417.512, and 417.515 - 417.517 are adopted with changes to the proposed text as published in the November 29, 2002, issue of the *Texas Register* (27 TexReg 11045). Sections 417.501, 417.502, 417.511. 417.513, 417.514, and 417.518 are adopted without changes. The repeals of existing §§417.501 - 417.518 of Chapter 417, Subchapter K, concerning the same, which the new sections replace, are contemporaneously adopted in this issue of the *Texas Register*.

The new rules prescribe the procedures for reporting allegations of abuse, neglect, and exploitation of persons served in TDMHMR facilities to the Texas Department of Protective and Regulatory Services (TDPRS); for facilitating TDPRS investigations of allegations; and for ensuring the safety and protection of persons served involved in allegations. Additionally, the new rules prescribe the disciplinary action to be taken when an employee or agent is found to have committed abuse, neglect, or exploitation.

Certain definitions and procedures have been revised to either reference TDPRS rules governing investigations in TDMHMR facilities or to be consistent with TDPRS rules. The definition of "facility" has been modified to include any entity providing mental health or mental retardation services that is operated by TDMHMR. The definition of "non-serious physical injury" has been revised to provide the criteria for a non-serious physical injury (i.e., an injury requiring minor first aid) and to permit a registered nurse or advanced practice nurse, as well as a physician, to apply the criteria to determine whether an injury is non-serious. The definition of "serious physical injury" has been revised to provide the criteria for a serious physical injury (i.e., any injury requiring medical intervention or hospitalization) and to provide an alternate criteria (i.e., any injury determined by a physician or advanced practice nurse to be serious). Either criteria is sufficient to determine an injury as serious. The purpose of the alternate criteria is to allow a physician or advanced practice nurse to categorize a lesser injury as serious if the physician or advanced practice nurse determines that it is appropriate to do so. For example, a bruise generally requires minor first aid, but a physician or advanced practice nurse may determine a bruise on the face to be serious. A new definition of "medical intervention" has been added.

Reference to the Client Injury/Incident Report form has been changed to client injury assessment because the term is inclusive of an electronic reporting system, which some facilities began using on September 1, 2002. The new rules do not include data collection requirements as specified in the repealed rules.

Upon adoption, a definition of "advanced practice nurse" has been added in §417.503. The definition of "department" has

been deleted and replaced with "TDMHMR." A definition of "primary contact" has been added, which uses the descriptive language in proposed §417.508(b)(5)(C). Additionally the term has been added in §§417.505(a)(4), 417.507(a), 417.508(b)(5), 417.509(f), 417.510(l), and 417.512(f), where guardians and parents are mentioned. The definition of "sexually transmitted disease" has been deleted because the term is self-evident to the physicians who diagnosis such diseases. The definition of "sexual exploitation" has been deleted in §417.503, but a reference to the definition of "sexual exploitation" in the Texas Civil Practice and Remedies Code has been added in §417.504(b)(1)(B)(viii) and §417.508(d), where the term is used.

Language has been added to §417.507(a) that prohibits retaliatory action against a family member of a person served, the guardian of a person served, or the primary contact of a person served who in good faith reports an allegation. In §417.508(b)(1), reference to a registered nurse, advanced practice nurse, or physician completing the "Seriousness of Physical Injury" portion of the Client Abuse and Neglect Report (AN-1-A) form has been deleted because completion of that portion of the form is not necessary if the same information is recorded on the client injury assessment by a registered nurse, advanced practice nurse, or physician, as appropriate. In §417.508(b)(2), reference to the "Guidelines for Separation of Alleged Victim and Alleged Perpetrator During Abuse/Neglect Investigations" has been deleted. New language has been added requiring any action taken to ensure the protection of the alleged victim to be appropriate within the context of the allegation. Additionally, the Human Resources Operating Instruction is referenced as it relates to reassigning the employee and granting emergency leave as possible actions. Language has been modified in §417.508(b)(5) and §417.510(k) to ensure consistent notifications are made to appropriate persons (e.g., alleged victim and/or guardian or parent if the alleged victim is a child, primary contact). Clarifying language has been added in §417.508(e). Language regarding a written reprimand resulting from confirmed abuse or neglect has been deleted in §417.512(d) and (f)(2) because a non-probationary employee may file a grievance in response to any of the disciplinary actions. Section 417.516 has been reorganized to reflect the re-lettering of exhibits.

Written comments on the proposal were received from the Parent Association for the Retarded of Texas (PART), Austin; American Habilitation Services, Inc., Houston; and the parent of a state school resident, Garland.

One commenter asked if local mental retardation authorities (MRAs) are considered TDMHMR facilities under §417.502(a) and, if so, would the rules apply to a private provider that contracts with an MRA to provide services to people with developmental disabilities within the MRA's specified service area. The commenter also asked that, if the rules apply to the private provider because it contracts with a particular MRA, then would the rules apply to the private provider at locations in other areas of the state at which the private provider delivered the same or similar services (e.g., MRLA, CLASS, HCS, HCS-O or ICF/MR services). TDMHMR responds that MRAs are not considered TDMHMR facilities. Facilities are owned and operated by TDMHMR.

Two commenters suggested adding to the definition of "serious physical injury" the example used in the preamble proposal to illustrate how the alternate criteria for determining serious physical injury could be used. The commenters wrote, "This must be stated somewhere in this document so they will know it matters if it is a bruise on the head instead of the arm. We have already experienced this situation so don't say the medical personnel will already know this. It must be spelled out clearly." TDMHMR responds that the example merely illustrates how the criteria could be applied in a particular situation, if a physician or advanced practice nurse determines it is appropriate to do so. Stating that any facial bruise is a serious physical injury does not allow medical staff to freely exercise medical judgment; therefore, TDMHMR declines to add the example as suggested.

Regarding the purpose section in §417.501, two commenters objected to the deletion of language stating that one of the subchapter's purposes is to define and prohibit abuse, neglect, and exploitation in TDMRMR facilities. The commenters observed that the statement was still valid and wrote, "this document should define and prohibit all of this. Too much of the definitions of abuse, neglect, and exploitation are being removed from this document!" TDMHMR responds that the language was deleted because it is not a true statement. State law prohibits abuse, neglect, and exploitation of disabled persons and state law authorizes TDPRS to define "abuse," "neglect," and "exploitation." TDMHMR notes that the rules still prohibit the abuse, neglect, and exploitation of persons served (see §417.504(a)) and still contain definitions for "abuse," "neglect," and "exploitation" (see §417.504(b)), which originate in TDPRS's rules (Chapter 711 of Title 40 (concerning Investigations in TDMHMR Facilities and Related Programs)).

Regarding the exceptions to what is not considered abuse, neglect, and exploitation in §417.504(c)(3), two commenters suggested adding the phrase "or restriction of a person's movement for staff convenience" after the proposed language that states "such actions do not include acts of unnecessary force or the inappropriate use of restraints or seclusion, including PMAB." The commenters noted that, although the additional phrase would be redundant, they recommended including it "so staff and facility administration don't think this is 'vague' or 'confusing.'" TDMHMR responds that it declines to add the phrase as suggested because the action it describes (i.e., restriction of a person's movement for staff convenience) is an inappropriate use of restraints, which is already stated.

Regarding general complaints in §417.504(c)(4), two commenters stated, "This is very clear that 'general complaints' do not include 'a specific incident or allegation involving a specific person served' that is to be 'investigated administratively by the head of the facility.' Some facility administrations do not know this and MIGHT APPEAL SOMETHING THEY SHOULD NOT APPEAL." TDMHMR responds that the commenters' issue is unclear and notes that these rules do not address appealing the outcome of a complaint that is investigated administratively by the facility.

Two commenters supported the provision regarding disciplinary action for making a false statement of fact during an investigation in §417.505(d). TDMHMR responds that it appreciates the support and notes that the provision has been in place many years.

Regarding prohibition against retaliatory action for reporting an allegation in §417.507(a), two commenters stated that recent legislation added protection from retaliation for family members and guardians and requested that language be added to the subsection to reflect such. TDMHMR responds by adding language in §417.507(a) prohibiting retaliatory action against a family member of a person served or the guardian of a person served who in good faith reports an allegation.

Regarding the requirement to report to the prosecuting attorney any alleged sexual exploitation committed by a mental health services provider in §417.508(d), two commenters suggested the requirement be extended for *any* staff who is alleged to have committed sexual exploitation. TDMHMR responds that §417.508(d) highlights a state statute that mandates certain actions be taken by a specific person in response to a specific allegation being committed by a specific type of employee. Any employee or agent alleged to have committed sexual exploitation will be reported to law enforcement by TDPRS. TDPRS rules state that the investigator notifies law enforcement of any allegation involving serious physical injury, *sexual abuse*, or death of an adult person served and of any allegation involving a child. (See §711.401 of Title 40 (relating to Who and when does the investigator notify of an allegation and when is the reporter revealed?).)

Regarding the investigative report containing an analysis of the evidence that includes how the evidence was weighted and what testimony was considered credible in §417.510(a)(3), two commenters stated that the "head of the facility should also weigh the 'credibility' of testimony before appealing, contesting or asking for a review and be sure their actions are based on the truth, not how it could affect an employee's career." TDMHMR responds that it agrees with the commenters.

Regarding prompt notification in §417.510(k), two commenters stated that "a week or more to notify the guardian is not 'promptly'" and requested that "promptly" be defined as within 24 hours. TDMHMR responds that notification in §417.510(k) is to the victim or guardian, or parent if the (alleged) victim is a child, regarding the final finding, the method to appeal the finding, and of the right to receive a copy of the investigative report. This detailed information is written and notification to the guardian or parent is by mail. Therefore, depending upon mail service, "promptly" may be a week. Although the rules provide the parameters for which notification is made, guardians and parents may request immediate notification of the final finding by phone.

Regarding reference to Chapter 711, Subchapter M of Title 40 (concerning Requesting an Appeal if You Are the Reporter, Alleged Victim, Legal Guardian, or With Advocacy, Incorporated) in §417.510(k)(2), two commenters stated, "Yes, people forget Advocacy, Inc. can be called in by the LAR to help in this kind of situation." TDMHMR responds that the commenters' point is unclear.

Regarding staff training that includes practices and attitudes that support the prevention of abuse, neglect, and exploitation in §417.515(a)(1)(G), two commenters stated that "this would be a good thing if it is done by facility administration. If employees are shown that they can get away with abuse, neglect, or exploitation with little or no disciplinary actions then it reinforces this bad behavior." TDMHMR responds that the training curriculum is developed by TDMHMR System Human Resources and each facility is responsible for using the curriculum to conduct training for its employees and agents. Regarding employees getting away with abuse, neglect, or exploitation, §417.512(c) requires the head of the facility to take prompt and proper disciplinary action (in accordance with the rules) when an allegation involving an employee/agent is confirmed.

The new sections are adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; the Texas Human Resources Code, Chapter 48, which requires the reporting and investigations of abuse, neglect, and exploitation of elderly and disabled persons; §48.255, which requires TDMHMR and TDPRS to develop joint rules to facilitate investigations in facilities operated by TDMHMR; the Texas Family Code, Chapter 261, which requires the reporting and investigations of abuse or neglect of a child; §261.404, which requires TDMHMR and TDPRS to develop joint rules to facilitate investigations of a child receiving services in a facility operated by TDMHMR; and the Texas Civil Practice and Remedies Code, §81.006, which requires the reporting of alleged sexual exploitation by a mental health services provider to the county prosecuting attorney.

§417.503. Definitions.

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

(1) Adult Protective Services (APS) investigator--An employee of the Texas Department of Protective and Regulatory Services (TDPRS) with expertise and demonstrated competence in conducting investigations.

(2) Advanced practice nurse (APN)--A registered nurse approved by the Board of Nurse Examiners for the State of Texas to practice as an advanced practice nurse on the basis of completion of an advanced educational program. The term includes a nurse practitioner, nurse midwife, nurse anesthetist, and clinical nurse specialist. The term is synonymous with advanced nurse practitioner.

(3) Agent--Any individual not employed by the facility but working under the auspices of the facility, (e.g., a volunteer, a student).

(4) Allegation--A report by an individual suspecting or having knowledge that a person served has been or is in a state of abuse, neglect, or exploitation as defined in this subchapter.

(5) Child--A person served under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed pursuant to the Texas Family Code, Chapter 31.

(6) Clinical practice--Relates to the demonstration of professional competence in nursing, dental, pharmacy, or medical practice as described, respectively, in the Nursing Practice Act, Vocational Nurse Act, Dental Practice Act, Pharmacy Practice Act, or Medical Practice Act.

(7) Confirmed--Term used to describe an allegation which is determined to be supported by the preponderance of evidence.

(8) Contractor--Any organization, entity, or individual who contracts with a facility to provide mental health and mental retardation services. The term includes a local independent school district with which a facility has a memorandum of understanding (MOU) for educational services.

(9) Designee--A staff member immediately available who is temporarily or permanently appointed to assume designated responsibilities of the head of the facility.

(10) Facility--A state hospital, state school, state center, or other entity providing mental retardation or mental health services that is operated by the Texas Department of Mental Health and Mental Retardation.

(11) Guardian--An individual appointed and qualified as a guardian of the person under the Probate Code, Chapter 13.

(12) Head of the facility--The superintendent or executive director of a facility, or designee. (If the superintendent or executive director is the alleged perpetrator, then the designee assumes all responsibilities of the head of the facility described in this subchapter.)

(13) Incitement--To spur to action or instigate into activity; implies responsibility for initiating another's actions.

(14) Inconclusive--Term used to describe an allegation leading to no conclusion or definite result due to lack of witnesses or other relevant evidence.

(15) Medical intervention--Treatment by a licensed medical doctor, osteopath, podiatrist, dentist, physician's assistant, or advanced practice nurse (APN). For the purposes of this subchapter, the term does not include first aid, an examination, diagnostics (e.g., x-ray, blood test), or the prescribing of oral or topical medication.

(16) Non-serious physical injury--Any injury requiring minor first aid and determined not to be serious by a registered nurse, advanced practice nurse (APN), or physician.

(17) Office of Consumer Services and Rights Protection - Ombudsman--The office located at the Texas Department of Mental Health and Mental Retardation's Central Office.

(18) Peer review--A review of clinical and/or medical practice(s) by peer physicians; a review of clinical and/or dental practice(s) by peer dentists; a review of clinical and/or pharmacy practice(s) by peer pharmacists; or a review of clinical and/or nursing practice(s) by peer nurses.

(19) Perpetrator--A person who has committed an act of abuse, neglect, or exploitation.

(20) Perpetrator unknown--Term used to describe instances in which abuse, neglect, or exploitation is evident but positive identification of the responsible person(s) cannot be made, and in which self-injury has been eliminated as the cause.

(21) Person served--Any person registered or assigned in the Client Assignment and Registration (CARE) system who is receiving services from a facility or contractor.

(22) Preponderance of evidence--The greater weight of evidence, or evidence which is more credible and convincing to the mind.

(23) PMAB or Prevention and Management of Aggressive Behavior--TDMHMR's proprietary risk management program that uses the least intrusive, most effective options to reduce the risk of injury for persons served and for staff from acts or potential acts of aggression.

(24) Primary contact--In cases in which the alleged victim is an adult with mental retardation who is unable to authorize the disclosure of protected health information and who does not have a guardian, the individual designated as the alleged victim's correspondent who receives all other information about the alleged victim (e.g., spouse, parent).

(25) Reporter--The individual who reports an allegation of abuse, neglect, or exploitation.

(26) Retaliatory action--Any action intended to inflict emotional or physical harm or inconvenience on a person that is taken because the person has reported abuse, neglect, or exploitation. This includes, but is not limited to, harassment, disciplinary measures, discrimination, reprimand, threat, and criticism.

(27) Review authority--An individual or panel of individuals who, at the discretion and request of the head of the facility, reviews selected cases of abuse, neglect, or exploitation, including those that are confirmed, unconfirmed, unfounded, or inconclusive. The review authority may include a member of the facility's public responsibility committee.

(28) Serious physical injury--Any injury requiring medical intervention or hospitalization or any injury determined to be serious by a physician or advanced practice nurse (APN).

(29) TDMHMR--The Texas Department of Mental Health and Mental Retardation.

(30) TDPRS--The Texas Department of Protective and Regulatory Services.

(31) Unconfirmed--Term used to describe an allegation in which a preponderance of evidence exists to prove that abuse, neglect, or exploitation did not occur.

(32) Unfounded--Term used to describe an allegation that is spurious or patently without factual basis.

§417.504. Prohibition and Definitions of Abuse, Neglect, and Exploitation.

(a) Abuse, neglect, and exploitation of any person served is prohibited.

(b) Consistent with Chapter 711 of Title 40 (concerning Investigations in TDMHMR Facilities and Related Programs), the terms "abuse," "neglect," and "exploitation" are defined as follows when the alleged perpetrator is an employee, agent, contractor, or is unknown.

(1) Abuse is:

(A) physical abuse, which is:

(i) an act or failure to act performed knowingly, recklessly, or intentionally, including incitement to act, which caused or may have caused physical injury or death to a person served;

(ii) an act of inappropriate or excessive force or corporal punishment, regardless of whether the act results in a physical injury to a person served; or

(iii) the use of chemical or bodily restraints on a person served not in compliance with federal and state laws and regulations, including:

(I) Chapter 405, Subchapter F of this title (concerning Voluntary and Involuntary Behavioral Interventions in Mental Health Programs); and

(II) Chapter 405, Subchapter H of this title (concerning Behavior Management - Facilities Serving Persons with Mental Retardation);

(B) sexual abuse, which is any sexual activity involving an employee, agent, or contractor and a person served, including but not limited to:

(i) kissing a person served with sexual intent;

(ii) hugging a person served with sexual intent;

(iii) stroking a person served with sexual intent;

(iv) fondling a person served with sexual intent;

(v) engaging in with a person served:

(I) sexual conduct as defined in the Texas Penal Code, §43.01; or

(II) any activity that is obscene as defined in the Texas Penal Code, §43.21;

(vi) requesting, soliciting, or compelling a person served to engage in:

(I) sexual conduct as defined in the Texas Penal Code, §43.01; or

(II) any activity that is obscene as defined in the Texas Penal Code, §43.21;

(vii) in the presence of a person served:

(I) engaging in or displaying any activity that is obscene, as defined in the Texas Penal Code §43.21; or

(II) requesting, soliciting, or compelling another person to engage in any activity that is obscene, as defined in the Texas Penal Code §43.21;

(viii) committing sexual exploitation, as defined in the Texas Civil Practice and Remedies Code, §81.001, against a person served. A copy of the Texas Civil Practice and Remedies Code, §81.001, is referenced as Exhibit A in §417.516 of this title (relating to Exhibits);

(ix) committing sexual assault as defined in the Texas Penal Code §22.011, against a person served;

(x) committing aggravated sexual assault as defined in the Texas Penal Code, §22.021, against a person served; and

(xi) causing, permitting, encouraging, engaging in, or allowing the photographing, filming, videotaping, or depicting of a person served if the employee, agent, or contractor knew or should have known that the resulting photograph, film, videotape, or depiction of the person served is obscene as defined in the Texas Penal Code, §43.21, or is pornographic; and

(C) verbal/emotional abuse, which is any act or use of verbal or other communication, including gestures, to:

(i) curse, vilify, or degrade a person served; or

(ii) threaten a person served with physical or emotional harm.

(2) Neglect is a negligent act or omission by any individual responsible for providing services to a person served, which caused or may have caused physical or emotional injury or death to a person served or which placed a person served at risk of physical or emotional injury or death. Neglect includes, but is not limited to, the failure to:

(A) establish or carry out an appropriate individual program plan or treatment plan for a person served;

(B) provide adequate nutrition, clothing, or health care to a specific person served; or

(C) provide a safe environment for a specific person served, including the failure to maintain adequate numbers of appropriately trained staff.

(3) Exploitation is the illegal or improper act or process of using a person served or the resources of a person served for monetary or personal benefit, profit, or gain.

(c) Abuse, neglect, or exploitation does not include:

(1) the proper use of restraints and seclusion, including PMAB, and the approved application of behavior modification techniques as described in:

(A) Chapter 405, Subchapter F of this title, relating to Voluntary and Involuntary Behavioral Interventions in Mental Health Programs;

(B) Chapter 404, Subchapter E of this title, relating to Rights of Persons Receiving Mental Health Services; and

(C) Chapter 405, Subchapter H of this title, relating to Behavior Management--Facilities Serving Persons With Mental Retardation;

(2) other actions taken in accordance with TDMHMR rules;

(3) such actions as an employee/agent/contractor may reasonably believe to be immediately necessary to avoid imminent harm to self, persons served, or other individuals if such actions are limited only to those actions reasonably believed to be necessary under the existing circumstances. Such actions do not include acts of unnecessary force or the inappropriate use of restraints or seclusion, including PMAB; or

(4) general complaints (e.g., regarding rights violations; theft of property; the daily administrative operations of a facility; the failure to carry out individual program/treatment plans or the failure to maintain adequate numbers of appropriately trained staff) that do not relate to a specific incident or allegation involving a specific person served. (Within 24 hours of receipt of such a complaint, the APS investigator refers the complaint to the head of the facility using the Adult Protective Services Referral Form, who ensures the complaint is investigated administratively by the head of the facility, the facility rights officer, or other appropriate parties.)

§417.505. Reporting Responsibilities of All TDMHMR Employees, Agents, and Contractors: Reports to Texas Department of Protective and Regulatory Services (TDPRS).

(a) Reporting suspected abuse, neglect, or exploitation.

(1) Each employee/agent/contractor who suspects or has knowledge that a person served is being abused, neglected, or exploited shall make a verbal report to TDPRS immediately, if possible, but in no case more than one hour after suspicion or after learning of the incident, by calling 1-800-647-7418.

(2) Each employee/agent/contractor who suspects or has knowledge that a person served has been abused, neglected, or exploited, including prior to admission, during an absence, or while in residence at the facility, shall make a verbal report to TDPRS immediately, if possible, but in no case more than one hour after suspicion or after learning of the incident, by calling 1-800-647-7418.

(3) If the person making the allegation is not an employee/agent/contractor (e.g., a person served, a guest), staff shall assist the person in making the report, if necessary.

(b) Any pregnancy of a person served, provided there is medical verification that there is reasonable expectation that conception could have occurred while the person was a resident of the facility or contractor, or any diagnosis of a sexually transmitted disease in a person served which could have occurred while the person was a resident of the facility or contractor, shall be reported in accordance with this subchapter as possible abuse or neglect.

(c) If an aggressive action by a person served, including nonconsensual sexual activity between persons served, occurs as a result of possible neglect, then the action is reported as neglect in accordance with this subchapter.

(d) Failure to make reports as required by this section within the allotted time period without sufficient justification is considered a violation of this section and makes the employee/agent subject to disciplinary action and possible criminal prosecution. An employee/agent found to have made a false statement of fact during an investigation is also subject to disciplinary action.

(e) In addition to reporting to TDPRS, employees shall take appropriate steps to secure evidence related to an allegation, if any,

consistent with "Guidelines for Securing Evidence," referenced as Exhibit B in §417.516 of this title (relating to Exhibits).

§417.507. Prohibition Against Retaliatory Action.

(a) Retaliatory action. Any employee/agent or any individual affiliated with an employee/agent is prohibited from engaging in retaliatory action against a person served, a family member of a person served, the guardian of a person served, the primary contact of a person served, or an employee/agent who in good faith reports an allegation.

(1) Any person who believes he or she is being subjected to retaliatory action upon reporting an allegation, or who believes an allegation has been ignored, should immediately contact the head of the facility. The person may also contact:

(A) the Office of Consumer Services and Rights Protection - Ombudsman at the dedicated toll-free number for facilities at 1-800-252-8154; or

(B) the Office of the Attorney General at 512/463-2185 (Consumer Protection Division) which, under the Whistleblower Act, Texas Civil Statutes, Article 6252-16a, may prosecute a supervisor who suspends or terminates a public employee for reporting a violation of law to law enforcement authorities.

(2) Retaliatory action against a person served which might be considered abuse, neglect, or exploitation is reported to TDPRS in accordance with this subchapter.

(b) Disciplinary action. Any employee/agent found to have engaged in retaliatory action is subject to disciplinary action.

§417.508. Responsibilities of the Head of the Facility.

(a) All allegations are investigated in accordance with Chapter 711 of Title 40 (concerning Investigations in TDMHMR Facilities and Related Programs).

(b) Immediately upon notification of an allegation by the APS investigator, the head of the facility takes measures to ensure the safety of the alleged victim(s), including the following actions:

(1) As necessary, the head of the facility ensures immediate and on-going medical attention is provided to the alleged victim and any other person served involved in the incident (e.g., examination for and treatment of injuries, screening and treatment for sexually transmitted diseases). The examination and treatment of abuse/neglect-related injuries is documented on the client injury assessment, with a copy submitted to the APS investigator. All issues relating to clinical practice are referred to the medical/clinical director for consultation.

(2) The head of the facility ensures the protection of the alleged victim. Action taken to ensure the protection of the alleged victim must be appropriate within the context of the allegation and may include:

(A) reassigning the employee/agent to a non-direct care area in accordance with the Human Resources Operating Instruction 407-12;

(B) allowing the employee/agent to remain in his or her current position pending investigation;

(C) granting the employee emergency leave in accordance with the Human Resources Operating Instruction 407-12; or

(D) suspending the agent pending investigation.

(3) As necessary, the head of the facility ensures psychological attention is provided to the alleged victim and any other person served who may have witnessed or been affected by the incident. The psychological attention shall be provided in a timely manner while preserving the integrity of the investigation.

(4) If the alleged perpetrator is known but is not an employee/agent (e.g., family member, friend, guest), the head of the facility imposes a restriction on the alleged perpetrator's access to the alleged victim pending investigation. The restriction should be documented in the record of the alleged victim.

(5) Immediately, but in no case later than 24 hours after notification of an allegation, the head of the facility notifies the following individuals of the allegation:

(A) the alleged victim (if appropriate); and

(B) the alleged victim's guardian or primary contact (as defined), or parent if the alleged victim is a child.

(c) The head of the facility designates a contact staff person to coordinate with the APS investigator to ensure private interview space, private telephones, and employees/agents are available to the APS investigator. The head of the facility shall require employees/agents to cooperate with APS investigators so that the investigators are afforded immediate access to all records and evidence and provided keys as are necessary to conduct an investigation in a timely manner. The head of the facility shall assist in whatever way possible to make employees/agents who are relevant to the investigation available in an expeditious manner. Employees/agents who fail to cooperate with an investigation are subject to disciplinary action.

(d) Reports regarding alleged "sexual exploitation" committed by a "mental health services provider" (as defined in the Texas Civil Practice and Remedies Code, §81.001) are made by the head of the facility to the prosecuting attorney in the county in which the alleged sexual exploitation occurred and any state licensing board that has responsibility for the mental health services provider's licensing in accordance with the Texas Civil Practice and Remedies Code, §81.006. A copy of the Texas Civil Practice and Remedies Code, §81.001 and §81.006, is referenced as Exhibit A in §517.516 of this title (relating to Exhibits).

(e) At facilities that operate an intermediate care facility for the mentally retarded (ICF/MR), the head of the facility must report those allegations that are considered reportable incidents to the Texas Department of Human Services (TDHS), ICF/MR/RC Department in accordance with the memorandum of understanding, referenced as Exhibit C in §417.516 of this title (relating to Exhibits), between TDMHMR, TDHS, and Texas Department of Protective and Regulatory Services.

§417.509. Peer Review.

(a) If the allegation involves the actions of a physician, dentist, pharmacist, registered nurse, or licensed vocational nurse, then a determination of whether the allegation involves the clinical practice, as defined in §417.503 of this title (relating to Definitions), of the physician, dentist, pharmacist, registered nurse, or licensed vocational nurse is made by the head of the facility, the APS investigator, and the facility medical\dental\nursing\pharmacy director, as appropriate to the discipline involved.

(1) If the allegation does not involve clinical practice the APS investigator pursues an investigation.

(2) If the allegation does involve clinical practice the APS investigator refers the allegation to the head of the facility, who immediately refers the allegation to the facility medical\dental\nursing\pharmacy director, as appropriate to the discipline involved, for review for possible peer review as follows:

(A) for allegations involving physicians, pharmacists, and dentists, Investigative Medical Peer Review Operating Instruction 417-19; and

(B) for allegations involving registered nurses and licensed vocational nurses, Investigative Nursing Peer Review Operating Instruction 408-1.

(3) If the allegation involves clinical practice and non-clinical issues, then the allegation is referred to peer review in accordance with paragraph (2) of this subsection and is investigated by the APS investigator.

(4) If a determination of whether the allegation involves clinical practice cannot be made, then:

(A) the allegation is referred to peer review in accordance with paragraph (2) of this subsection and is investigated by the APS investigator; or

(B) the regional APS program administrator and the head of the facility jointly agree to use a previously mutually agreed-upon physician/dental/nursing/pharmacy consultant, as appropriate to the discipline involved, to make the final determination within 24 hours. The facility is responsible for the costs of the consultant's services.

(b) If the allegation involves the facility medical\dental\nursing\pharmacy director, the head of the facility refers the allegation to the TDMHMR medical\dental\nursing\pharmacy director, as appropriate to the discipline involved, for review for possible peer review in accordance with subsection (a)(2)(A) or (B) of this section. If the allegation involves the TDMHMR pharmacy director, then the head of the facility refers the allegation to the TDMHMR medical director for review for possible peer review in accordance with subsection (a)(2)(A) of this section.

(c) All allegations involving physicians, pharmacists, nurses (RN or LVN), and dentists, regardless of type or clinical/non-clinical practice, are reported by the head of the facility to the TDMHMR medical\nursing\dental\pharmacy director, as appropriate to the discipline, within five working days of the allegation. The report may be brief, but will include;

(1) the date of the alleged incident;

(2) name of the alleged victim and alleged perpetrator;

(3) a brief description of the incident; and

(4) a brief description of the investigation planned.

(d) The TDMHMR medical\dental\nursing\pharmacy director, as appropriate to the discipline involved, ensures that reports of allegations of abuse and neglect are made, if required by law, to the licensing authority for the discipline under review, i.e., the Texas Board of Medical Examiners for physicians, the State Board of Dental Examiners for dentists, the Texas State Board of Pharmacy, the Board of Nurse Examiners for the State of Texas for registered nurses, or the Board of Vocational Nurse Examiners for licensed vocational nurses.

(e) Upon receipt of an allegation involving physician misconduct or malpractice, the TDMHMR medical director reports the allegation to the Texas Board of Medical Examiners in accordance with §533.006 of the Texas Health and Safety Code and the memorandum of understanding, referenced as Exhibit D in §417.516 of this title (relating to Exhibits), between TDMHMR, TDPRS, and the Texas Board of Medical Examiners.

(f) When an allegation is determined to involve the clinical practice of a physician, nurse (RN or LVN), pharmacist, or dentist, then the head of the facility ensures that the alleged victim, guardian, or primary contact, or parent (if the alleged victim is a child) are informed that the allegation has been referred for peer review.

§417.510. Completion of the Investigation.

(a) The APS investigator sends a copy of the investigative report to the head of the facility in accordance with Chapter 711, Subchapter G of Title 40 (concerning Release of Report and Findings). The investigative report includes:

(1) a statement of the allegation(s);

(2) a summary of the investigation;

(3) an analysis of the evidence, including:

(A) factual information related to what occurred;

(B) how the evidence was weighed; and

(C) what testimony was considered credible;

(4) a finding that the allegation is confirmed, unconfirmed, inconclusive, or unfounded;

(5) recommendations resulting from the investigation;

(6) the name of the perpetrator or alleged perpetrator or the designation of "perpetrator unknown";

(7) a recommended classification for each allegation as described in §417.512(a) of this title (relating to Classifications and Disciplinary Actions);

(8) the exam and treatment of abuse/neglect-related injuries documented on the client injury assessment;

(9) photographs relevant to the investigation, including photographs showing the existence of injuries or the non-existence of injuries, when appropriate;

(10) all witness statements and supporting documents; and

(11) a signed and dated Client Abuse and Neglect Report (AN-1-A) form, referenced as Exhibit E in §417.516 of this title (relating to Exhibits), reflecting the information contained in paragraphs (4), (6), and (7) of this section.

(b) Upon receiving the investigative report from the APS investigator, the head of the facility may submit the report and concerns articulated by the APS investigator to a review authority for review.

(1) The review authority may interview witnesses in the course of its review.

(2) If the review authority is reviewing a case determined by the APS investigator to be unfounded, it may consult with the APS investigator if appropriate. If the review authority determines that there is good cause to reopen the investigation (e.g., new evidence or information that was not previously available during the investigation), the head of the facility may contact the local APS supervisor to request that the case be re-opened.

(3) The review authority submits a report of its review to the head of the facility.

(c) The head of the facility:

(1) reviews the APS investigator's report;

(2) reviews the review authority's report, if applicable; and

(3) interviews witnesses, if necessary.

(d) The rights of employees who appear before the review authority or the head of the facility are outlined in "Procedures in Facility Abuse, Neglect, and Exploitation Investigations and *Thurston* Rebuttal Proceedings," referenced as Exhibit F in §417.516 of this title (relating to Exhibits).

(e) The head of the facility may not change a confirmed finding. However, if the head of the facility disagrees with the APS investigator's finding of unconfirmed, inconclusive, or unfounded, the head of the facility may elect to change the finding to confirmed. If the head of the facility elects to change the finding to confirmed, then the confirmed finding cannot be appealed to TDPRS.

(f) If the head of the facility believes that the methodology used in conducting the investigation was flawed (e.g., failure to collect or consider evidence, such as witnesses' statement, progress notes, test results), the head of the facility may request a review in accordance with Chapter 711, Subchapter K of Title 40 (concerning Requesting a Review of Finding if You Are the Administrator or Contractor CEO).

(g) If the head the facility disagrees with:

(1) the APS investigator's finding, the head of the facility may contest the finding by requesting a review in accordance with Chapter 711, Subchapter K of Title 40 (concerning Requesting a Review of Finding if You Are the Administrator or Contractor CEO).

(2) the APS review as described in §711.1007 of Title 40 (relating to How is the Review of a Finding Conducted?), the head of the facility may contest the review by apprising the TDMHMR director of state mental health facilities or state mental retardation facilities, as appropriate. If the TDMHMR director also disagrees with the APS review, the TDMHMR director may request a decision by the TDMHMR commissioner and the TDPRS executive director. The decision of the TDMHMR commissioner and the TDPRS executive director may not be contested.

(h) The final finding is the last uncontested finding, which may be:

(1) the APS investigator's finding in accordance with subsection (a)(4) of this section;

(2) the head of the facility's confirmed finding in accordance with subsection (e) of this section;

(3) the APS finding in accordance with subsection (g)(1) of this section; or

(4) the TDMHMR commissioner and the TDPRS executive director's decision in accordance with subsection (g)(2) of this section.

(i) Within 30 calendar days of receipt of the investigative report or the final finding, the head of the facility is responsible for completing the Client Abuse and Neglect Report (AN-1-A) form, referenced as Exhibit E in §417.516 of this title (relating to Exhibits), and ensuring the information is entered into the Client Abuse and Neglect Reporting System (CANRS).

(j) The APS investigator notifies the reporter in accordance with §711.609 of Title 40 (relating to How and When is the Reporter Notified of the Finding?).

(k) The head of the facility ensures that the (alleged) victim or guardian or parent if the (alleged) victim is a child is promptly notified of:

(1) the final finding and if any previous findings were contested;

(2) the method of appealing the final finding as described in Chapter 711, Subchapter M of Title 40 (concerning Requesting an Appeal if You Are the Reporter, Alleged Victim, Legal Guardian, or With Advocacy, Incorporated), if the final finding was not made by the head of the facility as provided by subsection (e) of this section; and

(3) the right to receive a copy of the investigative report in accordance with §417.511(b) of this title (relating to Confidentiality of Investigative Process and Report) upon request.

(l) The head of the facility ensures that the primary contact is promptly notified of the final finding.

(m) The head of the facility informs the perpetrator or alleged perpetrator of the final finding.

(n) If the (alleged) perpetrator and (alleged) victim will again be in close proximity following an investigation, the head of the facility is responsible for ensuring appropriate reconciliation efforts are considered, offered, and provided in accordance with "Therapeutic Reconciliation," referenced as Exhibit G in §417.516 of this title (relating to Exhibits).

(o) The head of the facility shall establish a mechanism for evaluating any recommendations concerning problematic patterns or trends identified during the investigation by the APS investigator and the review authority, if applicable.

§417.512. Classifications and Disciplinary Actions.

(a) The APS investigator recommends a classification for each allegation as follows:

(1) Class I Abuse, if the allegation involves:

(A) physical abuse which caused or may have caused serious physical injury; or

(B) sexual abuse.

(2) Class II Abuse, if the allegation involves:

(A) physical abuse which caused or may have caused non-serious physical injury; or

(B) exploitation.

(3) Class III Abuse, if the allegation involves verbal/emotional abuse.

(4) Neglect, if the allegation involves neglect.

(b) Under no circumstances may the head of the facility change a recommended classification to a lower classification (e.g., Class I to Class II). However, the head of the facility may change a recommended classification to a higher classification (e.g., Class II to Class I) in accordance with the evidence and subsection (a) of this section.

(c) The head of the facility is responsible for taking prompt and proper disciplinary action when an allegation involving an employee/agent is confirmed.

(1) Disciplinary action against an employee is based on criteria including, but not limited to:

(A) the seriousness of the abuse, neglect, and/or exploitation;

(B) the circumstances surrounding the incident;

(C) the employee's work record; and

(D) repeat violations and the length of time between violations.

(2) When an allegation has been confirmed the head of the facility takes the following disciplinary action.

(A) Class I Abuse. The employee/agent is dismissed.

(B) Class II Abuse.

(i) The employee is placed on suspension for up to 10 days, demoted, or dismissed. If the employee is exempt under the provisions of the Fair Labor Standards Act (FLSA), the suspension shall be in compliance with relevant provisions of the FLSA and current TDMHMR personnel policies.

(ii) The agent is dismissed.

(C) Class III Abuse or Neglect.

(i) The employee receives a written reprimand which becomes a part of the employee's personnel file, or the employee is placed on suspension for up to 10 days, demoted, or dismissed. If the employee is exempt under the provisions of the FLSA the suspension shall be in compliance with relevant provisions of the FLSA and current TDMHMR personnel policies.

(ii) The agent is dismissed.

(d) When disciplinary action is taken against an employee based on confirmed abuse or neglect, the head of a facility notifies the employee in writing of the disciplinary action taken and any right to a grievance hearing the employee may have under TDMHMR's internal policies and procedures relating to employee grievances. If the employee files a grievance in response to disciplinary action resulting from confirmed abuse or neglect, the head of the facility, upon the employee's written request, provides the employee with a copy of or access to the investigative report. Before receiving or inspecting the report, the employee is required to complete a document acknowledging that the report's content must be kept confidential. Additional documentary evidence, if any, may be accessed by the employee in accordance with procedures outlined in the Human Resources Operating Instruction 407-12, §18 (relating to Employee Grievances).

(e) When disciplinary action is taken against an agent as a result of confirmed abuse or neglect, the head of a facility notifies the agent in writing of the disciplinary action taken.

(f) The head of the facility ensures the victim, guardian, or primary contact, or parent if the victim is a child is promptly notified of:

(1) the disciplinary action taken against the employee/agent;

(2) the employee's right to request a grievance hearing to dispute the disciplinary action; and

(3) an offer to inform the victim, guardian, primary contact, or parent if the employee files a grievance if such information is requested.

(g) If Advocacy, Inc. informs the head of the facility that it represents the victim of confirmed Class I abuse, the head of the facility will notify Advocacy, Inc. if the dismissed employee requests a grievance hearing.

(h) If requested by the head of the facility, the APS investigator who conducted the investigation shall provide consultation and testimony at the grievance hearing.

(i) The head of the facility provides the APS director with a copy of hearings officers' decisions of employee grievances that involve TDPRS investigations.

§417.515. Staff Training in Identifying, Reporting, and Preventing Abuse, Neglect, and Exploitation.

(a) This subchapter shall be thoroughly and periodically explained to all employees/agents of each facility as follows:

(1) All new employees/agents who will provide direct services to persons served and all new employees/agents who will routinely perform job duties in proximity to persons served shall receive training on the contents of this subchapter prior to performing their duties and annually thereafter. The training will include:

(A) an explanation and examples of the acts and signs of possible abuse, neglect, and exploitation;

(B) the effects of abuse, neglect, and exploitation;

(C) an explanation that abuse, neglect, and exploitation of persons served is prohibited;

(D) the disciplinary consequences for:

(i) committing abuse, neglect, and exploitation; and

(ii) failure to cooperate with an investigation;

(E) the procedures for reporting allegations of abuse, neglect, and exploitation;

(F) a definition of retaliatory action, an explanation that retaliatory action is prohibited, and an explanation of the consequences of retaliatory action;

(G) practices and attitudes that support the prevention of abuse, neglect, and exploitation; and

(H) PMAB.

(2) All new employees/agents who will not provide direct services to persons served and who will not routinely perform any job duty in proximity to persons served shall receive training on the contents of this subchapter within two months of employment or placement and every two years thereafter. The training will include:

(A) an explanation and examples of the acts and signs of possible abuse, neglect, and exploitation;

(B) the effects of abuse, neglect, and exploitation;

(C) an explanation that abuse, neglect, and exploitation of persons served is prohibited;

(D) the disciplinary consequences for:

(i) committing abuse, neglect, and exploitation; and

(ii) failure to cooperate with an investigation;

(E) the procedures for reporting allegations of abuse, neglect, and exploitation; and

(F) a definition of retaliatory action, an explanation that retaliatory action is prohibited, and an explanation of the consequences of retaliatory action.

(3) Physicians shall receive additional training on how to identify signs and symptoms of abuse, neglect, and exploitation.

(4) All new employees who will provide direct services to persons served shall receive training on the procedures for securing evidence in accordance with "Guidelines for Securing Evidence," referenced as Exhibit B in §417.516 of this title (relating to Exhibits) prior to performing their duties and annually thereafter.

(5) Within 90 days after the effective date of this subchapter, the head of the facility shall inform all current employees/agents/contractors of changes to policies and procedures as a result of this subchapter.

(b) All supervisory personnel have a continuing responsibility to keep employees/agents informed of current rules and policies

governing abuse, neglect, and exploitation and to ensure that employees/agents receive training in accordance with this section.

(c) Instructional materials, audiovisual, and/or other training aids concerning this subchapter are developed and available through the TDMHMR System Human Resource Development, Central Office.

(d) Records of all training content and activities related to course titles shall be kept by each facility. Records shall also be kept on each employee/agent receiving training in compliance with this section, which include:

(1) the employee/agent's name and signature;

(2) the course title;

(3) the result of any assessment;

(4) the date of the training; and

(5) the name of the person facilitating, monitoring, or conducting the training.

§417.516. Exhibits.

The following exhibits referenced in this subchapter are available from the Texas Department of Mental Health and Mental Retardation, Office of Policy Development, P.O. Box 12668, Austin, TX 78711-2668.

(1) Exhibit A--Texas Civil Practice and Remedies Code, §81.001 and §81.006;

(2) Exhibit B--"Guidelines for Securing Evidence";

(3) Exhibit C--Memorandum of Understanding between TDMHMR, TDHS, and TDPRS concerning Reportable Incidents in State Schools, State Centers, State Operated Community-based MHMR Services, and Community MHMR Centers with Intermediate Care Facilities for the Mentally Retarded (ICF/MR);

(4) Exhibit D--Memorandum of Understanding between TDPRS, Texas Board of Medical Examiners, and TDMHMR concerning Mandatory Reporting of Physician Misconduct or Malpractice;

(5) Exhibit E--Client Abuse and Neglect Report (AN-1-A) form;

(6) Exhibit F--"Procedures in Facility Abuse, Neglect, and Exploitation Investigations and *Thurston* Rebuttal Proceedings"; and

(7) Exhibit G--"Therapeutic Reconciliation."

§417.517. References.

Reference is made to the following statutes, rules, and TDMHMR operating instructions:

(1) Texas Health and Safety Code, Chapters 242, 481, and 577;

(2) Probate Code, Chapter 13;

(3) Whistleblower Act, Texas Civil Statutes, Article 6252-16a;

(4) Texas Penal Code, §§22.011, 22.021, 43.01, and 43.21;

(5) Texas Family Code, Chapter 31;

(6) Chapter 404, Subchapter E of this title (relating to Rights of Persons Receiving Mental Health Services);

(7) Chapter 405, Subchapter F of this title (relating to Voluntary and Involuntary Behavioral Interventions in Mental Health Programs;

(8) Chapter 405, Subchapter H of this title (relating to Behavior Management--Facilities Serving Persons With Mental Retardation);

(9) Chapter 711 of Title 40 (concerning Investigations in TDMHMR Facilities and Related Programs).

(10) Human Resources Operating Instruction 407-12;

(11) Investigative Medical Peer Review Operating Instruction, 417-19;

(12) Investigative Nursing Peer Review Operating Instruction, 408-1;

(13) Texas Civil Practice and Remedies Code, §81.006; and

(14) 42 USC §10805(a)(4) and §15043(a)(2)(I).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 3, 2003.

TRD-200302196
Rudy Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: April 23, 2003
Proposal publication date: February 7, 2003
For further information, please call: (512) 206-4516

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER D. PUBLIC INFORMATION POLICIES

37 TAC §§1.51 - 1.58

The Texas Department of Public Safety adopts amendments to §§1.51-1.58, concerning Public Information Policies, without changes to the proposed text as published in the January 31, 2003, issue of the *Texas Register* (28 TexReg 908) and will not be republished.

Amendment to §1.51 is necessary because some of the information that peace officers and other department employees have access to is confidential. The previous rule provided department employees with discretion over the release of information. After certain changes were made to the Texas Public Information Act, employees are now expected to refer these type calls to the Public Information Office instead of answering them on their own.

Amendments to §§1.52, 1.53, and 1.56-1.58 are necessary for clarification purposes only and are not substantive in nature. Amendment to §1.54 is necessary because the rule as previously adopted was incomplete. Amendment to §1.55(a) was

necessary for clarification purposes only and was not substantive in nature.

One written comment was received by the department. The written comment was received from Mr. Ronald D. Stevens of Graham, Texas.

Mr. Stevens comment as well as the department's response thereto, is summarized below:

COMMENT: Mr. Stevens inquired whether the Public Information Office would answer questions from the general public, as well as from the news media.

RESPONSE: The department's Public Information Office will continue to answer questions from the general public, as well as from the news media. No changes were made as a result of this comment.

The amendments are adopted pursuant to Texas Government Code, §411.004(3) and §411.006(4), which provides the Public Safety Commission with the authority to adopt rules necessary for carrying out the department's work. The Director, subject to the approval of the Commission, shall have the authority to adopt rules considered necessary for the control of the department.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302147
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: April 21, 2003
Proposal publication date: January 31, 2003
For further information, please call: (512) 424-2135

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37 TAC §1.60

The Texas Department of Public Safety adopts the repeal of §1.60, concerning Requests for Department of Public Safety Press Cards, without changes to the proposed text as published in the January 31, 2003, issue of the *Texas Register* (28 TexReg 910).

Repeal of the section is necessary due to the director having determined that the issuance of press cards is not necessary for the department's accomplishment of its statutory responsibilities nor does this program substantially enhance the department's accomplishment of those responsibilities.

No comments were received regarding adoption of the repeal.

The repeal is adopted pursuant to Texas Government Code, §411.004(3) and §411.006(4), which provides the Public Safety Commission with the authority to adopt rules necessary for carrying out the department's work. The Director, subject to the approval of the Commission, shall have the authority to adopt rules considered necessary for the control of the department.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302145
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: April 21, 2003
Proposal publication date: January 31, 2003
For further information, please call: (512) 424-2135

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SUBCHAPTER E. VIDEOTAPES AND PHOTOGRAPHS

37 TAC §1.71

The Texas Department of Public Safety adopts an amendment to §1.71, concerning Videotapes and Photographs, without changes to the proposed text as published in the January 31, 2003, issue of the *Texas Register* (28 TexReg 910) and will not be republished.

Amendment to the section is necessary to clarify that the department will make documents which are requested by the public available to them under the guidelines of the Texas Public Information Act.

No comments were received regarding adoption of the amendment.

The amendment is adopted pursuant to Texas Government Code, §411.004(3) and §411.006(4), which provides the Public Safety Commission with the authority to adopt rules necessary for carrying out the department's work. The Director, subject to the approval of the Commission, shall have the authority to adopt rules considered necessary for the control of the department.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302146
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: April 21, 2003
Proposal publication date: January 31, 2003
For further information, please call: (512) 424-2135

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SUBCHAPTER W. SENATE BILL 1074 VIDEO UNITS

37 TAC §1.285

The Texas Department of Public Safety adopts an amendment to §1.285(1), concerning the order in which vouchers for video units will be awarded to law enforcement agencies for the purpose of installing video and audio equipment as described by Article 2.135(a)(1)(A) of the Texas Code of Criminal Procedure, without changes to the proposed text as published in the December 27, 2002, issue of the *Texas Register* (27 TexReg 12165).

The purpose of the amendment to §1.285(1) is to have the rule more closely reflect what the department believes is the legislative intent regarding Article 2.137(a) of the Texas Code of Criminal Procedure. Therefore, §1.285(1) is amended to include marshals of an incorporated city, town, or village that are the primary law enforcement agency in their jurisdiction.

No comments were received regarding adoption of the amendment.

The amendment is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Article 2.137(a) of the Texas Code of Criminal Procedure, which requires the department to adopt rules for providing funds or video and audio equipment to law enforcement agencies for the purpose of installing video and audio equipment as described by Article 2.135(a)(1)(A) of the Texas Code of Criminal Procedure, including specifying criteria to prioritize funding or equipment provided to law enforcement agencies; and Article 2.138 of the Texas Code of Criminal Procedure, which authorizes the department to adopt rules to implement Articles 2.131-2.137 of the Texas Code of Criminal Procedure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302135
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: April 21, 2003
Proposal publication date: December 27, 2002
For further information, please call: (512) 424-2135

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CHAPTER 11. COMMERCIAL VEHICLE REGISTRATION

SUBCHAPTER A. COMMERCIAL VEHICLE REGISTRATION ENFORCEMENT

37 TAC §11.3, §11.4

The Texas Department of Public Safety adopts amendments to §11.3 and §11.4, relating to Commercial Vehicle Registration, without changes to the proposed text as published in the December 27, 2002, issue of the *Texas Register* (27 TexReg 12166).

§11.3 is amended so that the current Texas Transportation Code chapter that addresses vehicle registration is reflected in the rule.

Amendment to §11.4 is necessary in order to update the definition of the term "apportionable vehicle."

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302136
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: April 21, 2003
Proposal publication date: December 27, 2002
For further information, please call: (512) 424-2135

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SUBCHAPTER D. WEIGHT LAW ENFORCEMENT

37 TAC §11.52

The Texas Department of Public Safety adopts an amendment to §11.52, relating to Commercial Vehicle Registration, without changes to the proposed text as published in the December 27, 2002, issue of the *Texas Register* (27 TexReg 12166).

Amendment to §11.52 is necessary in order to cite to an additional section of Texas Transportation Code, Chapter 621.

No comments were received regarding adoption of the amendment.

The amendment is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302137
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: April 21, 2003
Proposal publication date: December 27, 2002
For further information, please call: (512) 424-2135

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CHAPTER 16. COMMERCIAL DRIVERS LICENSE

SUBCHAPTER A. LICENSING REQUIREMENTS, QUALIFICATIONS, RESTRICTIONS, AND ENDORSEMENTS

37 TAC §16.13

The Texas Department of Public Safety adopts an amendment to §16.13, concerning Farm-Related Service Industry Waiver, without changes to the proposed text as published in the December 27, 2002, issue of the *Texas Register* (27 TexReg 12167).

§16.13(c)(4)(D) is amended to delete the specific listing of serious traffic violations and replace the listing with the appropriate Texas Transportation Code, §522.003(25). This will allow for the rule to track legislative changes without further amendments.

No comments were received regarding adoption of the amendment.

The amendment is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §522.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302138
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: April 21, 2003
Proposal publication date: December 27, 2002
For further information, please call: (512) 424-2135

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SUBCHAPTER B. APPLICATION REQUIREMENTS AND EXAMINATIONS

37 TAC §16.41

The Texas Department of Public Safety adopts the repeal of §16.41, concerning Nonresident Commercial Driver Licenses, without changes to the proposed text as published in the December 27, 2002, issue of the *Texas Register* (27 TexReg 12169) and will not be republished.

The section is repealed because statutory authority provides for the issuance of a Nonresident Commercial Driver License at the discretion of the department. Therefore, this does not need to be restated by rule.

No comments were received regarding adoption of the repeal.

The repeal is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §522.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302139
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: April 21, 2003
Proposal publication date: December 27, 2002
For further information, please call: (512) 424-2135

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SUBCHAPTER C. CHANGE OF LICENSE STATUS, RENEWALS, SURRENDER OF LICENSE, FEES

37 TAC §16.74

The Texas Department of Public Safety adopts the repeal of §16.74, concerning Fees, without changes to the proposed text as published in the December 27, 2002, issue of the *Texas Register* (27 TexReg 12169) and will not be republished.

The section is being repealed as the need for this rule no longer exists. The rule previously provided for the staggering of the fee structure which expired in December, 2001.

No comments were received regarding adoption of the repeal.

The repeal is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §522.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302140
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: April 21, 2003
Proposal publication date: December 27, 2002
For further information, please call: (512) 424-2135

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SUBCHAPTER D. SANCTIONS AND DISQUALIFICATIONS

37 TAC §16.93, §16.99

The Texas Department of Public Safety adopts amendments to §16.93 and §16.99, concerning Sanctions and Disqualifications, without changes to the proposed text as published in the December 27, 2002, issue of the *Texas Register* (27 TexReg 12170) and will not be republished.

Section 16.93 is amended to eliminate language in rule that is specific in statute; clarify the use of offenses for suspension, disqualification, and habitual violator cases and provide direction to the Transportation Code cite; and clarify statutory reference with regard to offenses that may be used in these cases.

Section 16.99(b) is amended to correctly name the bureau responsible for reinstatement in this instance. This bureau was previously known as the Driver Improvement and Control Bureau.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §522.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2003.

TRD-200302141
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: April 21, 2003
Proposal publication date: December 27, 2002
For further information, please call: (512) 424-2135

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 44. COMMUNITY CARE FOR AGED AND DISABLED PROJECT CHOICE

The Texas Department of Human Services (DHS) adopts the repeal of all the rules in Chapter 44, §§44.1, 44.101 - 44.104, and 44.201 - 44.207, without changes to the proposal published in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1156).

Justification for the repeals is to eliminate an obsolete rule chapter from the DHS rule base. Beginning in 1999, DHS operated two small client services programs in pilot sites as part of Project CHOICE (Consumers Have Options for Independence in Community Environments), which was funded by a grant to the Texas Health and Human Services Commission (HHSC). Project CHOICE ended when grant funding ceased in 2000. DHS, therefore, no longer needs the rules governing this discontinued program in its rule base.

DHS received no comments regarding adoption of the repeals.

SUBCHAPTER A. DEFINITIONS

40 TAC §44.1

The repeal is adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides HHSC with the authority to administer federal medical assistance funds.

The repeal implements the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 2, 2003.

TRD-200302187
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: April 22, 2003
Proposal publication date: February 7, 2003
For further information, please call: (512) 438-3734

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SUBCHAPTER B. TRANSITION TO LIFE IN THE COMMUNITY PROGRAM

40 TAC §§44.101 - 44.104

The repeals are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides HHSC with the authority to administer federal medical assistance funds.

The repeals implement the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 2, 2003.

TRD-200302188
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: April 22, 2003
Proposal publication date: February 7, 2003
For further information, please call: (512) 438-3734

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SUBCHAPTER C. PRESUMPTIVE ELIGIBILITY THROUGH THE PROJECT CHOICE PROGRAM

40 TAC §§44.201 - 44.207

The repeals are adopted under the Human Resources Code, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Government Code, §531.021, which provides HHSC with the authority to administer federal medical assistance funds.

The repeals implement the Human Resources Code, §§22.0001 - 22.038 and §§32.001 - 32.053.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 2, 2003.

TRD-200302189
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: April 22, 2003
Proposal publication date: February 7, 2003
For further information, please call: (512) 438-3734

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PART 2. TEXAS REHABILITATION COMMISSION

CHAPTER 104. DUE PROCESS HEARINGS, AND MEDIATION BY APPLICANTS/CLIENTS OF DETERMINATIONS BY AGENCY PERSONNEL THAT AFFECT THE PROVISION OF VOCATIONAL REHABILITATION SERVICES

The Texas Rehabilitation Commission (TRC) adopts amendments to Chapter 104 of Title 40, Texas Administrative Code, concerning due process hearings and mediation. This adoption amends §§104.1-104.3, repeals §§104.4-104.9 and adds new §§104.4-104.8, without changes to the proposed text as published in the February 7, 2003, issue of the *Texas Register* (28 TexReg 1158) and will not be republished.

The amendments are adopted to eliminate the distinction between formal and informal appeal procedures, and to re-designate the procedures as "due process hearings" in accordance with terminology in final rules effective January 22, 2001 issued by the Office of Special Education and Rehabilitative Services, US Department of Education, published at 34 CFR §361.57.

No comments were received regarding adoption of the rules.

40 TAC §§104.1 - 104.3

The amendments are adopted under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302284
Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
Effective date: April 27, 2003
Proposal publication date: February 7, 2003
For further information, please call: (512) 424-4050

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CHAPTER 104. INFORMAL APPEALS, AND MEDIATION BY APPLICANTS/CLIENTS OF DETERMINATIONS BY AGENCY PERSONNEL THAT AFFECT THE PROVISION OF VOCATIONAL REHABILITATION SERVICES

40 TAC §§104.4 - 104.9

The repeals are adopted under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302285
Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
Effective date: April 27, 2003
Proposal publication date: February 7, 2003
For further information, please call: (512) 424-4050

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CHAPTER 104. DUE PROCESS HEARINGS, AND MEDIATION BY APPLICANTS/CLIENTS OF DETERMINATIONS BY AGENCY PERSONNEL THAT AFFECT THE PROVISION OF VOCATIONAL REHABILITATION SERVICES

40 TAC §§104.4 - 104.8

The new sections are adopted under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302286
Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
Effective date: April 27, 2003
Proposal publication date: February 7, 2003
For further information, please call: (512) 424-4050

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CHAPTER 106. PURCHASE OF GOODS AND SERVICES BY TEXAS REHABILITATION COMMISSION

The Texas Rehabilitation Commission (TRC) adopts a change to Title 40, Chapter 106, Subchapters A (General), §106.31, D (Purchase of Goods and Services), §106.105, K (Historically Underutilized Businesses), §106.353 and §106.355, M (Miscellaneous Requirements), §106.451, and N (General Requirements for Contractors) §106.459, concerning purchase of goods and

services by TRC, without changes to the proposed text as published in the December 27, 2002, issue of the *Texas Register* (27 TexReg 12175) and will not be republished.

The change is necessary to make technical corrections to the text of the rules.

No comments were received regarding adoption of the rules.

SUBCHAPTER A. GENERAL

40 TAC §106.31

The amendment is adopted under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302288
Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
Effective date: April 27, 2003
Proposal publication date: December 27, 2002
For further information, please call: (512) 424-4050

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SUBCHAPTER D. PURCHASE OF GOODS AND SERVICES

40 TAC §106.105

The amendment is adopted under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302289
Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
Effective date: April 27, 2003
Proposal publication date: December 27, 2002
For further information, please call: (512) 424-4050

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SUBCHAPTER K. HISTORICALLY UNDERUTILIZED BUSINESSES

40 TAC §106.353, §106.355

The amendment is adopted under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 27, 2003.

TRD-200302290
Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
Effective date: April 27, 2003
Proposal publication date: December 27, 2002
For further information, please call: (512) 424-4050

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SUBCHAPTER M. MISCELLANEOUS REQUIREMENTS

40 TAC §106.451

The amendment is adopted under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302291
Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
Effective date: April 27, 2003
Proposal publication date: December 27, 2002
For further information, please call: (512) 424-4050

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SUBCHAPTER N. CONTRACT ADMINISTRATION

40 TAC §106.459

The amendment is adopted under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2003.

TRD-200302292

Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
Effective date: April 27, 2003
Proposal publication date: December 27, 2002
For further information, please call: (512) 424-4050

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PART 6. TEXAS COMMISSION FOR THE DEAF AND HARD OF HEARING

CHAPTER 182. SPECIALIZED TELECOMMUNICATIONS ASSISTANCE PROGRAM

SUBCHAPTER B. PROGRAM ELIGIBILITY

40 TAC §182.28

The Texas Commission for the Deaf and Hard of Hearing adopts new §182.28, concerning Incomplete Applicant Files without changes to the text as published in the December 6, 2002, issue of the *Texas Register* (27 TexReg 11496).

This rule will reduce the length of time a voucher is valid.

No comments were received regarding the new section.

The new section is adopted under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to remove from the processing system an incomplete applicant file when no response is received.

No other statute, code or article is affected by the new section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 4, 2003.

TRD-200302210
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Effective date: April 24, 2003
Proposal publication date: December 6, 2002
For further information, please call: (512) 407-3250

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas State Library and Archives Commission

Title 13, Part 1

The Texas State Library and Archives Commission proposes to review its rules in 13 TAC Chapter 2 concerning the general policies and procedures of the Commission pursuant to the requirements of the Government Code, §2001.039.

The rules were adopted pursuant to the Government Code, §441, which requires the Texas State Library and Archives Commission to adopt and establish policies and adopt rules relating to the operation of the agency and its various programs. The rules are necessary to carry out the statutory obligations of the Texas State Library and Archives Commission in the management of the agency and its programs.

Comments on the commission's review of its rules in Chapter 2 may be directed to Donna Osborne, Director, Administrative Services, Box 12927, Austin, TX 78711. For further information or questions concerning this proposal, please contact Ms. Osborne at (512)463-5440 or at dosborne@tsl.state.tx.us.

TRD-200302200
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Filed: April 3, 2003

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The Texas State Library and Archives Commission proposes to review its rules in 13 TAC Chapter 5 concerning the certification of county librarians pursuant to the requirements of the Government Code, §2001.039.

The rules were adopted pursuant to the Government Code, §441.007 that requires the Texas State Library and Archives Commission to adopt policies regarding the certification of county librarians. The rules are necessary to carry out the statutory obligations of the Texas State Library and Archives Commission for the certification of county librarians.

Comments on the commission's review of its rules in Chapter 5 may be directed to Deborah Littrell, Director, Library Development Division, Box 12927, Austin, TX 78711. For further information or questions concerning this proposal, please contact Ms. Littrell at (512) 463-5456 or at deborah.littrell@tsl.state.tx.us.

TRD-200302199
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Filed: April 3, 2003

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Adopted Rule Reviews

Texas Department of Economic Development

Title 10, Part 5

Pursuant to the notice of proposed rule review published in the December 27, 2002, *Texas Register* (27 TexReg 12382), Texas Economic Development (agency) has reviewed and considered for readoption, revision, or repeal the rules in Title 10, Part 5, Chapters 162 (relating to the Texas Exporters Loan Fund), 170 (relating to revenue bonds for development of employment - industrial and health resources), 172 (relating to the Texas Rural Economic Development Program), 174 (relating to the Defense Economic Adjustment Assistance Grant Program), 175 (relating to Defense Economic Readjustment Zones), 178 (relating to the Texas Community Development Program), 180 (relating to industrial projects), 181 (relating to the Texas Leverage Fund Program), 182, Subchapter A (relating to business assistance and the Business Permit Office), 182, Subchapter B (relating to business assistance and the Linked Deposit Program), 183 (relating to the governing board investment policy), 185 (rules for the Texas Small Business Industrial Development Corporation revenue bond programs), 187 (relating to the Capital Access Program), 190 (relating to procedures of the board), 192 (relating to open records charges), 195 (relating to memoranda of understanding), 196 (relating to advisory committees), 197 (relating to private donations) and 198 (relating to advertising rules).

The agency has assessed whether the reason for adopting these rules continues to exist. As a result of the review, the agency has determined that the reason for adoption of the rules continues to exist. Therefore, the agency readopts these rules. No comments were received regarding the review of these rules.

The agency has also reviewed and considered for readoption, revision, or repeal the rules in Title 10, Part 5, Chapter 160 (relating to product commercialization), Chapter 161 (relating to the Rural Industrial Development Finance Plan), 162 (relating to the Texas Exporters Loan Fund), 178 (relating to the Texas community development program), and 192 (relating to open records charges). As a result of the review, the agency has determined that the reason for adoption of the rules, which dealt with expired and repealed programs, did not continue to exist. Therefore, the agency has repealed these rules. No comments were received regarding the review of these rules.

TRD-200302233

Tracye McDaniel
Deputy Executive Director
Texas Department of Economic Development
Filed: April 4, 2003

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Texas Commission on Environmental Quality

Title 30, Part 1

The Texas Commission on Environmental Quality (commission) adopts the rules review and readopts Chapter 70, Enforcement, without changes, in accordance with Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. Any updates, consistency issues, or other changes, if needed, will be addressed in a separate rulemaking. The notice of intention to review was published in the January 10, 2003 issue of the *Texas Register* (28 TexReg 487).

CHAPTER SUMMARY

Chapter 70 provides for general rules governing enforcement actions before the commission and consists of three subchapters.

Subchapter A, Enforcement Generally, states the purpose of the chapter; defines terms used in the chapter; authorizes the use of enforcement guidelines that announce the manner in which the agency expects to exercise its discretion in future proceedings; authorizes the use of information demonstrating possible violations from private individuals and provides the criteria for evaluating the value and credibility of information received; describes the remedies available to the commission in enforcement actions; authorizes the executive director to institute legal proceedings to enforce and compel compliance; provides for exemption from enforcement violations caused solely by an act of God, war, strike, riot, or other catastrophe; states that a party asserting inability to pay a recommended penalty shall have the burden of establishing that a lesser penalty is justified; authorizes the use of installment payments of an administrative penalty; authorizes the use of agreed orders and requires certain procedures for public notice and comment; and requires that parties are given notice of rulings, orders, or decisions.

Subchapter B, Mandatory Enforcement Hearings, requires the executive director to monitor compliance with all permits and licenses issued by the commission and requires certain actions if the evidence available indicates substantial noncompliance.

Subchapter C, Enforcement Referrals to State Office of Administrative Hearings (SOAH), authorizes the use of an Executive Director's Preliminary Report to initiate enforcement action; spells out the procedures for pleadings other than the Executive Director's Preliminary Report; authorizes the executive director to file a petition as the instrument for initiating an enforcement action; requires the executive director to give written notice of the Executive Director's Preliminary Report to the respondent and spells out procedures; authorizes a respondent to file with the chief clerk a written response to the Executive Director's Preliminary Report or a pleading which may deny the alleged violations and/or the amount of the penalty; authorizes the use of and spells out the procedures for default orders if any respondent to an Executive Director's Preliminary Report or petition initiating an enforcement action fails to timely file an answer; requires that, if required by law, an enforcement hearing shall be held before any final enforcement order is issued and, if an enforcement hearing is not required, authorizes the commission to hold a hearing on its own motion, or upon the request of the executive director, before issuing a final enforcement order or to direct SOAH to hold such a hearing; provides that in a contested enforcement case, unless the commission chooses to hear the case itself, SOAH shall have the delegated authority to preside over the case; and spells out the procedures for referring to SOAH.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a preliminary review and determined that the basis for the rules in Chapter 70 continue to exist. The rules are needed to implement the commission's enforcement authority under Texas Water Code (TWC), §7.002 to enforce the laws within the commission's jurisdiction. The commission is required to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state, and to adopt reasonable procedural rules to be followed in a commission hearing (TWC, §5.103). The commission is required to adopt rules of practice stating the nature of all available formal and informal procedures (Texas Government Code, §2001.004). The rules also authorize the executive director to pursue an enforcement matter through court action (by referring the matter to the Texas Attorney General), as is contemplated in TWC, §5.230.

This review revealed that revisions are needed to improve clarity, consistency, and readability. The commission intends to consider correction of these items in a separate rulemaking (Rule Log Number 2002-063-070-AD).

PUBLIC COMMENT

The public comment period closed on February 10, 2003. No comments were received.

TRD-200302226
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: April 4, 2003

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The Texas Commission on Environmental Quality (commission) adopts the rules review and readopts Chapter 285, On-Site Sewage Facilities, without changes, in accordance with Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. Any updates, consistency issues, or other changes, if needed, will be addressed in a separate rulemaking. The notice of intention to review was published in the January 10, 2003 issue of the *Texas Register* (28 TexReg 488).

CHAPTER SUMMARY

Chapter 285 provides the requirements for on-site sewage facilities (OSSF). Subchapter A contains the general provisions of the rules including purpose and applicability, definitions, general requirements, facility planning requirements, submittal requirements for planning materials, cluster systems requirements, maintenance requirements, and multiple OSSF systems on one large tract of land requirements. Subchapter B includes the requirements for the local administration of the OSSF program. Subchapter C includes the requirements for the commission's administration of the OSSF program in areas where no authorized agent exists. Subchapter D contains the planning, construction, and installation standards for OSSFs. Subchapter E contains the requirements for OSSFs in the Edwards Aquifer recharge zone. Subchapter F contains the licensing and registration requirements for installers, apprentices, designated representatives, and site evaluators. Subchapter G contains the criteria for enforcement. Subchapter H

contains the requirements for treatment and disposal of greywater. Subchapter I contains the Appendices.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a review and determined that the reasons for the rules in Chapter 285 continue to exist. The rules in this chapter protect the public health and welfare by providing a comprehensive regulatory program for the management of OSSFs, as prescribed by Texas Health and Safety Code (THSC), Chapter 366, On-Site Sewage Disposal Systems. Additionally, the rules are needed to implement THSC, Chapter 366, including THSC, §366.001, which provides the policy and purpose of Chapter 366; THSC, §366.011, which provides for the commission's general supervision and authority over the location, design, construction, installation, and proper functioning of the OSSF; THSC, §366.012, which provides the commission authority to adopt rules concerning on-site sewage disposal systems; THSC, §366.053, which provides the commission authority to adopt rules and procedures relating to the submission, review, and approval or rejection of permit applications; THSC, §366.058, which requires the commission to adopt rules addressing permit fees; THSC, §366.059, as amended by House Bill 2912, §3.09, 77th Legislature, 2001, which allows the commission to assess a reasonable and appropriate charge-back fee; and THSC, §366.072, which provides the authority for the commission to adopt rules for registration.

PUBLIC COMMENT

The public comment period closed on February 10, 2003. No comments were received.

TRD-200302311
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: April 7, 2003

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The Texas Commission on Environmental Quality (commission) adopts the rules review and readopts Chapter 309, Domestic Wastewater Effluent Limitation and Plant Siting, in accordance with Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. Any updates, consistency issues, or other changes, if needed, will be addressed in a separate rulemaking. The notice of intention to review was published in the January 17, 2003 issue of the *Texas Register* (28 TexReg 551).

CHAPTER SUMMARY

Chapter 309 provides for effluent limitations for domestic wastewater in Subchapter A, location standards in Subchapter B, and land disposal of sewage effluent in Subchapter C. Subchapter A includes effluent quality limitations for treated domestic sewage, which will be required for permittees as appropriate to maintain water quality in accordance with the commission's surface water quality standards. Subchapter B establishes minimum standards for the location of domestic wastewater treatment facilities including definitions, considerations for determining site selection, and unsuitable site characteristics. Subchapter C outlines the components of a required technical report for the design of the wastewater disposal system as well as the requirements of irrigation disposal systems and percolation disposal systems.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a review and determined that the reasons for the rules in Chapter 309 continue to exist. The rules are needed to provide regulations to support the state water quality management program regarding domestic wastewater treatment facilities to minimize possible contamination of ground and surface water and the possibility of exposing the public to nuisance conditions. The rules are needed under Texas Water Code, §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas; §5.105, which provides the commission's authority to, by rule, establish and approve general policy of the commission; §5.120, which provides the commission's authority to administer the law to promote conservation and protection of the quality of the environment; §26.034, which provides the commission's authority to adopt rules for the approval of disposal system plans; and §26.041, which provides the commission's authority to set standards to prevent the discharge of waste that is injurious to the public health.

PUBLIC COMMENT

The comment period closed February 18, 2003. No comments were received.

TRD-200302310
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: April 7, 2003

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Texas State Board of Medical Examiners

Title 22, Part 9

The Texas State Board of Medical Examiners adopts the review of Chapter 167, (§§167.1-167.8), concerning Reinstatement and Reissuance, pursuant to the Texas Government Code, §2001.039.

The Texas State Board of Medical Examiners contemporaneously adopts amendments to §§167.1, 167.2, 167.4-167.6, elsewhere in this issue of the *Texas Register*.

The proposed review was published in the February 28, 2003, issue of the *Texas Register* (28 TexReg 1909).

No comments were received regarding adoption of the rule review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of Chapter 167, Reinstatement and Reissuance.

TRD-200302277
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Filed: April 7, 2003

♦ ♦ ♦

The Texas State Board of Medical Examiners adopts the review of Chapter 169, (§§169.1-169.8), concerning Authority of Physicians to Supply Drugs, pursuant to the Texas Government Code, §2001.039.

The Texas State Board of Medical Examiners contemporaneously adopts amendments to §§169.1-169.5 and 169.7, elsewhere in this issue of the *Texas Register*.

The proposed review was published in the February 28, 2003, issue of the *Texas Register* (28 TexReg 1909).

No comments were received regarding adoption of the rule review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the rule review of Chapter 169, Authority of Physicians to Supply Drugs.

TRD-200302278
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Filed: April 7, 2003

♦ ♦ ♦

The Texas State Board of Medical Examiners adopts the review of Chapter 196, (§§196.1-196.5), concerning Voluntary Surrender of a Medical License, pursuant to the Texas Government Code, §2001.039.

The Texas State Board of Medical Examiners contemporaneously adopts amendments to §§196.1-196.5, elsewhere in this issue of the *Texas Register*.

The proposed review was published in the February 28, 2003, issue of the *Texas Register* (28 TexReg 1909).

No comments were received regarding adoption of the rule review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of Chapter 196, Voluntary Surrender of a Medical License.

TRD-200302279
Donald W. Patrick , MD, JD
Executive Director
Texas State Board of Medical Examiners
Filed: April 7, 2003

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The Texas State Board of Medical Examiners adopts the review of Chapter 198, (§§198.1), concerning Unlicensed Practice, pursuant to the Texas Government Code, §2001.039.

The proposed review was published in the February 28, 2003, issue of the *Texas Register* (28 TexReg 1909).

No comments were received regarding adoption of the rule review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of Chapter 198, Unlicensed Practice.

TRD-200302280
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Filed: April 7, 2003

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure 1: 16 TAC Chapter 25--Preamble

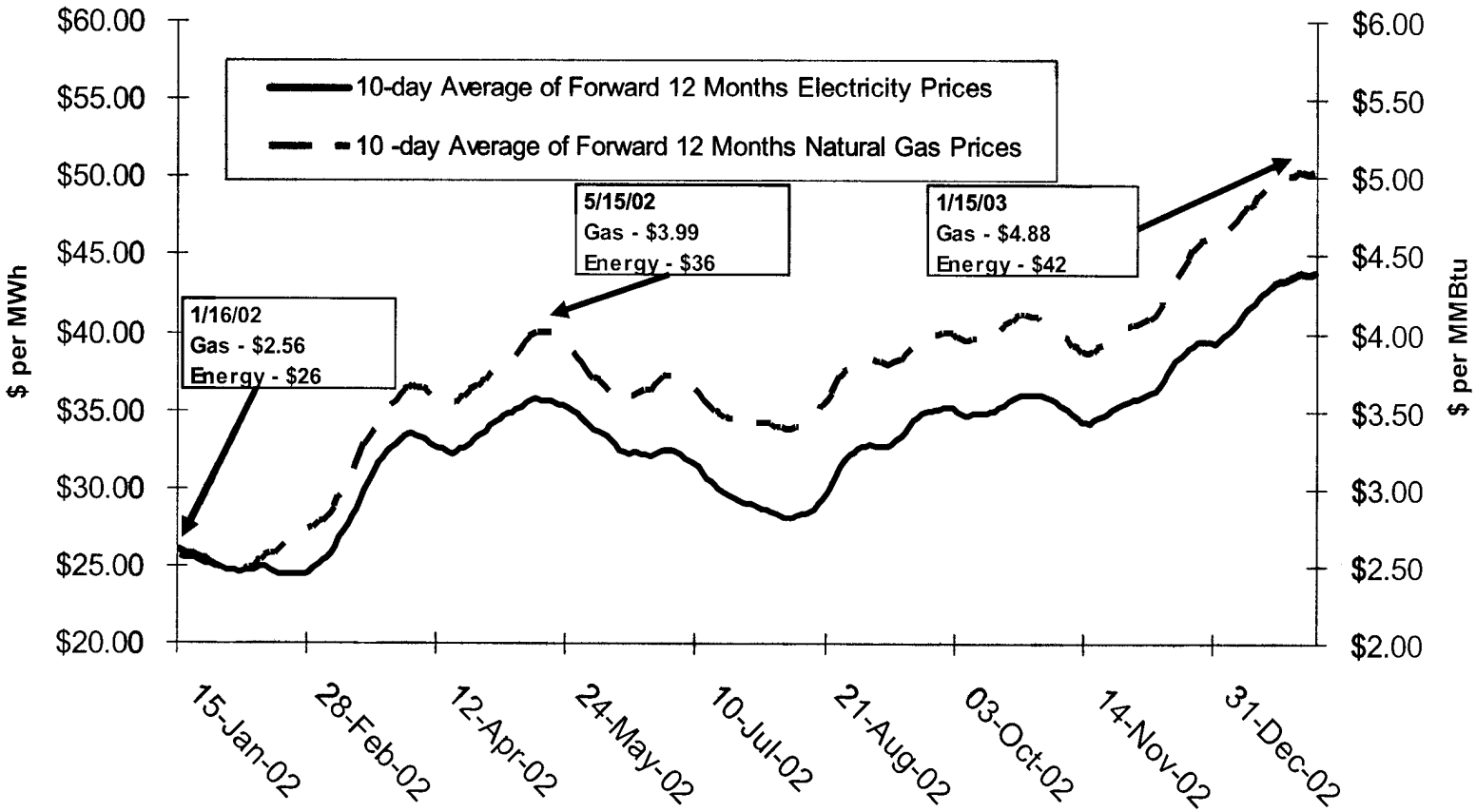
	Seller's Choice Long Term	Seller's Choice Short Term	Zone Long Term Spread	Zone Short Term Spread
Trading Vol. MW per day (1)	500	3,000	500	1,500
# Active Participants (2)	10	20	5	10
# Active Brokers (3)	2	2	2	2
Bid/Ask Spread ($/MWh)	$1.00	$0.50	$0.50	$0.25
% Reported from Electronic Trading Platform Transactions	50%	50%	50%	50%

Figure 2: 16 TAC Chapter 25--Preamble

Capacity Auction Conclusion Date	Auction Period Average NYMEX 1-YR Strip Gas Price ($/MMBtu)	1-YR Strip Baseload Capacity Auction Price for Houston Delivery ($/MWh)
September 19, 2001	3.17	24.57
October 17, 2002	4.04	30.67
Percent Increase	27%	25%

Figure 3: 16 TAC Chapter 25--Preamble

Comparison of Natural Gas and ERCOT Electricity Futures Prices



IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were deemed administratively complete for the following projects(s) during the period of March 28, 2003, through April 3, 2003. The public comment period for these projects will close at 5:00 p.m. on May 9, 2003.

FEDERAL AGENCY ACTIONS:

Applicant: Petro-Guard Production, LLC; Location: The proposed project sites are located in State Tract 198 S/2, Espiritu Santo Bay, Calhoun County. The project sites can be located on the U.S.G.S. quadrangle map entitled: Long Island, Texas. Approximate UTM Coordinates: Zone 14; Easting: 740000; Northing: 3240250. Project Description: The applicant proposes to install, operate and maintain structures and equipment necessary for drilling Well No. 1. Such activities include installation of typical marine barges and keyways, and production structures with attendant facilities. No fill will be required for the proposed project. Deep-water access is available to the proposed site; therefore, no dredging is proposed. Bay bottom at the site is composed of firm sand and approximate bottom elevations range from -4.7 to -5.4 feet Mean Low Tide. Surveys show no seagrass, oysters, or oyster reefs within 500 feet of the proposed drill site. CCC Project No.: 03-0103-F1; Type of Application: U.S.A.C.E. permit application #22984 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403). NOTE: The consistency review for this project may be conducted by the Texas Railroad Commission as part of its certification under §401 of the Clean Water Act.

Applicant: Matagorda County Navigation District No. 1; Location: The proposed project is located along Tres Palacios Bay, Turning Basin No. 1, South 11th and 12th Streets in Palacios, Matagorda County. The project sites can be located on the U.S.G.S. quadrangle map entitled: Palacios, Texas. Approximate UTM Coordinates: Zone 14; Easting: 771124; Northing: 3177417. Project Description: The applicant proposes to place 3,750 cubic yards of fill below the high tide line for the construction of 621 feet of bulkhead along Turning Basin No. 1. The project will take place on the western and eastern shores of Turning Basin No. 1. Existing bulkhead along the eastern part of Turning Basin No. 1 will be replaced with 200 feet of new bulkhead. On the western shore, 421 feet of new bulkhead will be placed and will square the harbor for docking shrimp boats. CCC Project No.: 03-0104-F1; Type of Application: U.S.A.C.E. permit application #22934 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §125-1387).

Applicant: Jack Lack; Location: The proposed project is located one-half block east of the intersection of 13th Street wand Water Street, Port O'Connor, Calhoun County. The project sites can be located on the U.S.G.S. quadrangle map entitled: Port O'Connor, Texas. Approximate UTM Coordinates: Zone 14; Easting: 753200; Northing: 3148600. Project Description: The applicant proposes to construct approximately 390 feet of bulkhead and backfill approximately 0.59 acres of upper-saltmarsh wetlands adjacent to the Gulf Intracoastal Waterway (GIWW). In addition, 3 piers will be constructed that will consist of an 8-foot-wide by 63-foot-long walkway with a 4- by 48-foot terminal T-head. Four 10-foot boat slips would be constructed on the landward side of each T-head. The end of the proposed piers will be located approximately 200 feet from the centerline of the GIWW in water approximately -8 feet (mean high water) deep. No dredging is proposed for the project. The purpose of the project is to build a marine docking and service facility and to fill the property to a suitable elevation for building construction. As mitigation for wetland impacts, the applicant would excavate 0.6 acres of upland across the GIWW from the proposed project and adjacent to Barroom Bay and plant the area with smooth cordgrass near the mitigation site. CCC Project No.: 03-0105-F1; Type of Application: U.S.A.C.E. permit application #22722 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §125-1387).

Applicant: Pier Properties Incorporated; Location: The proposed project is located off the Galveston Seawall, at 2215 Seawall Boulevard, between Murdoch's Bathhouse and the Mermaid Pier, in Galveston, Galveston County. The project sites can be located on the U.S.G.S. quadrangle map entitled: Galveston, Texas. Approximate UTM Coordinates: Zone 15; Easting: 326384; Northing: 3241227. Project Description: The applicant proposes to place new pilings just north of and adjacent to existing unusable pilings. New pilings are to be placed to support a proposed connection between two existing piers. The new construction will enlarge existing retail space. The applicant has not proposed to remove the existing pilings. CCC Project No.: 03-0112-F1; Type of Application: U.S.A.C.E. permit application #22968 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Applicant: Lower Neches Valley Authority; Location: The proposed project is located in wetlands adjacent to the Neches River, at the Neches River Salt Water Barrier project, 6790 Bigner Road, in Beaumont, Jefferson County. The project sites can be located on the U.S.G.S. quadrangle map entitled: Pine Forest, Texas. Approximate UTM Coordinates: Zone 15; Easting: 392632; Northing: 3336463. Project Description: The applicant proposes to construct recreational fishing piers, nature observation trails, and boardwalks at the Neches River Saltwater Barrier project. The work includes the retention of temporary fill for a construction access road that is part of the Saltwater Barrier project and construction of boardwalks and observation areas in the adjacent sloughs and wetlands. The fishing piers and boardwalks will be pile supported. The fishing pier for Area A will be approximately 500 feet in length. The loop trail around the existing

sand pit pond will be approximately 3,000 feet in length. The pier at Area B will be approximately 100 feet in length terminating with a gazebo observation deck. Trails and boardwalks for Area C will include approximately 2,000 feet of natural trails with boardwalks installed where necessary to elevate the path to approximately 4 feet of elevation. Construction methods for the boardwalks will make use of All Terrain Vehicles and boats to carry construction materials to the sites. Hand clearing of some brush will be undertaken on portions of the trails; however, no heavy equipment will be used to transport construction materials or to install the boardwalks. The existing access road consists of timber mat bridges that will be replaced with concrete slabs to span the sloughs to maintain water flow. CCC Project No.: 03-0113-F1; Type of Application: U.S.A.C.E. permit application #22998 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §125-1387). NOTE: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality as part of its certification under §401 of the Clean Water Act.

Applicant: Harris County Toll Road Authority; Location: The proposed project is located at the intersection of the Sam Houston Parkway (Beltway 8) and the Houston Ship Channel, in eastern Harris County. The project sites can be located on the U.S.G.S. quadrangle map entitled: Pasadena, Texas. Approximate UTM Coordinates: Zone 15; Easting: 292482; Northing: 3291186. Project Description: The applicant proposes to place stone riprap around the two support piers of the Beltway 8 Bridge. The top of the riprap placement will be at an elevation of 2 feet above the ordinary high water mark. The proposed riprap area will be 75 feet by 50 feet around the base of the piers. The surface slopes at 2:1 to the top of natural ground. With a maximum expected depth of 12 feet from the top of the proposed riprap to natural ground, the final dimensions of the footprint of each stone island will be 125 feet by 100 feet. One half of a ton will be the minimum size to be placed around the base of the piers. The stone will be transported and placed by barge. CCC Project No.: 03-0114-F1; Type of Application: U.S.A.C.E. permit application #22989 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §125-1387).

FEDERAL AGENCY ACTIVITIES:

Applicant: U.S. Army Corps of Engineers, Galveston District; Location: The proposed shoreline demonstration site is located in Jefferson County, Texas, about 10 miles southwest of Sabine Pass between High Island and Sea Rim State Park, seaward of State Highway 87. Project Description: The proposed shoreline demonstration project will be constructed along 2,500 linear feet of severely eroding shoreline at the eastern end of the McFaddin National Wildlife Refuge (NWR). The proposed project will involve the installation of groins perpendicular to the Gulf beach, beach nourishment, and construction of a dune within and adjacent to the McFaddin NWR boundary and on state-owned lands. The work will include placement of six sand-filled geotube groins varying in length from 175 to 260 feet along a 1,250-foot reach of severely eroding shoreline within and adjacent to the McFaddin NWR. The project site is situated on lands owned and managed by the U.S. Fish and Wildlife Service and the Texas General Land Office. The groins will be constructed of 5-foot high geotubes with a circumference of 30 feet and will act to establish five separate compartments. Four of the cells will receive beach nourishment with the fifth cell acting as a control. Two cells will be filled with sand near ambient sand diameter and two cells will be filled with larger grain sand. A dune of about 2,500 linear feet will be constructed with half of the dune length outside the designated groin field area. Fifty percent of the dune will be comprised of a clay core covered by sand, while the remaining half will be comprised of only sand. The dune elevation will be about 11.0 feet Mean Sea Level. The proposed plan will include monitoring the project features. Monitoring will include surveying, sediment sampling, and photographic records. Primary project objectives are to determine the effectiveness of the beach nourishment and dune field on existing erosion. Project monitoring is scheduled to last 3 years. If required, the project may be removed. All material needed for the construction of the groin field, beach nourishment, and dune creation will be obtained from offsite upland sources. Sand used for the geotubes and beach nourishment will be temporarily stockpiled on site. Sand for the geotubes will be combined with water, taken offshore from the Gulf, to make a slurry and pumped to the geotube. The pipelines used to carry the water will be installed in a manner in which impacts to the environment will be avoided. Sand used for beach nourishment will be well-graded, beach quality material that is clean, nonorganic, cohesionless, and free from impurities. Sand and clay will be imported from offsite for the construction of the dune. Typical equipment used during the construction of the project may include, but not be limited to, graders, loaders, bulldozers, fill trucks, and hoppers. Also, equipment used to make a slurry to fill the geotubes will include a water intake pump and pipes. All construction vehicles and equipment will reach the project site by existing access roads. CCC Project No.: 03-0108-F2; Type of Application: This public notice is issued in accordance with the provisions of Federal regulations, Title 33 CFR 337.l and Title 40 CFR 230, concerning the policy, practice and procedures to be followed by the U.S. Army Corps of Engineers in conjunction with disposition of dredged or fill material in navigable waters.

Applicant: U.S. Army Corps of Engineers; Location: Gulf Intracoastal Waterway in the Laguna Madre, Texas. Project Description: Submission of the Consistency Determination for Maintenance Dredging of the Gulf Intracoastal Waterway--Laguna Madre, Texas. The applicant is also requesting incorporation, by reference, of the Draft Environmental Impact Statement (EIS) for this project that was enclosed separately. The Consistency Determination may also be found in the Draft EIS as Appendix F. Based on analysis and comments received and comments received during public coordination and resource agency review, through the interagency coordination team assembled for this project, of earlier versions of the Draft EIS and pursuant to 31 TAC §506.28(b), the applicant asserts that no changes to the Consistency Determination are needed. 31 TAC §506.28(b) requires the Council to issue a consistency agreement for this project upon fulfillment of the requirements in the rule. CCC Project No.: 03-0117-F6; Type of Application: Submission of Consistency Determination and request to incorporate, by reference, the Draft EIS for the project Maintenance Dredging of the Gulf Intracoastal Waterway--Laguna Madre, Texas. The Draft EIS is available on the Galveston District, Corps of Engineer web page at *www.swg.usace.army.mil*. NOTE: The Corps' public comment period for this project will close at 5:00 p.m. on May 19, 2003. Comments on consistency with the CMP goals and policies should be submitted to the Council Secretary by 5:00 p.m. on May 9, 2003.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Diane P. Garcia, Council Secretary, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at 512/475-0680.

TRD-200302345

Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: April 9, 2003

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Comptroller of Public Accounts

Notice of Additional Contract Awards

Notice of Awards: Pursuant to Chapter 403 and 404, and Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces this notice of a contract award.

The Comptroller's Request for Qualifications 148b (RFQ) related to this contract award was published in the October 25, 2003 *Texas Register* at (27 TexReg 10186).

The contractor will provide Professional Contract Auditing Services as authorized by S.B. 1458 77th Legislature for the Audit Division of the Comptroller as described in the Comptroller's RFQ.

Notice of this award will be published in the Texas Register on April 18, 2003. The Comptroller announces that three (3) additional contracts were awarded as of April 3, 2003, as follows:

A contract is awarded to Johnson, Cerda & Hopkins, P.C., 2656 South Loop West, Ste., 100, Houston, Texas 77054 Audits will be assigned in $50,000 increments or packages but no contract auditor shall have more than six (6) Audit Packages totaling $300,000 in fees at any one time. The term of the contract is March 30, 2003 through August 31, 2003.

A contract is awarded to Noel L. Carino, 2314 Parkhaven Dr., Sugar Land, Texas 77478. Audits will be assigned in $50,000 increments or packages but no contract auditor shall have more than six (6) Audit Packages totaling $300,000 in fees at any one time. The term of the contract is March 30, 2003 through August 31, 2003.

A contract is awarded to Hasmukh (Harry) Patel, 6065 Hillcroft Ave., Suite 502, Houston, Texas 77081-1197. Audits will be assigned in $50,000 increments or packages but no contract auditor shall have more than six (6) Audit Packages totaling $300,000 in fees at any one time. The term of the contract is April 3, 2003 through August 31, 2003.

TRD-200302343
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: April 9, 2003

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Notice of Award

Pursuant to Section 1201.027, Texas Government Code and Chapter 2254, Subchapter B, Texas Government Code, and Chapter 404, Subchapter H, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces this notice of contract award.

The original notice of request for proposals (RFP #153a) was published in the February 7, 2003 issue of the *Texas Register* (28 TexReg 1260).

The consultant will advise and assist the Comptroller by providing financial advisor services in connection with the issuance of Tax and Revenue Anticipation Notes and provide research, analysis, and advice regarding bond and securities issues.

The contract is awarded to RBC Dain Rauscher Inc., Cityplace, Suite 2400, 2711 North Haskell Avenue, Dallas, Texas 75204-2936. The total amount of the contract is estimated at $90,000.00. The contract was executed on April 2, 2003. The term of the contract is April 2, 2003, through August 31, 2005.

TRD-200302316
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: April 8, 2003

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Notice of Award

Pursuant to Chapter 2254, Chapter B, and Sections 403.011 and 403.020 Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces this notice of consulting contract award.

The notice of request for proposals (RFP #151a) was published in the January 31, 2003, issue of the *Texas Register* (28 TexReg 986).

The consultant will assist Comptroller in conducting a management and performance review of the Llano Independent School District.

The contract was awarded to Infosys Development Group, Inc., 3400 Bissonnet, Suite 175, Houston, Texas 77005. The total amount of this contract is not to exceed $80,080.00.

The term of the contract is March 31, 2003 through August 31, 2003. The final report is due on or before July 9, 2003.

TRD-200302317
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: April 8, 2003

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Notice of Request for Information

Pursuant to Chapters 2305 and 403, Texas Government Code, the Office of the Comptroller of Public Accounts (Comptroller), on behalf of the State Energy Conservation Office (SECO) Renewable Energy Demonstration Program (REDP), issues this Request for Information (RFI #155b) from Texas Independent School Districts (Districts or ISDs) to participate in the Texas Solar for Schools Program (Program). SECO requests information from Districts interested in working with SECO and its contractor to implement the Program, including installation of a small-scale solar energy system; a hands-on monitoring system; renewable energy education course materials; and implementation of a community outreach program.

Comptroller anticipates involving up to ten Districts to receive a small-scale solar energy system at a school, participate in developing a community outreach program, and other activities. The Districts selected, if any, will be required to provide a funding share of the total equipment and installation costs either monetarily or in the form of equipment or labor. Funding may be secured through partnerships between the Districts and local businesses, public utilities, and other organizations. Districts will be expected to work with SECO's contractor to identify potential sponsors and to determine the eligibility of the funding proposed.

Contact: Parties interested in submitting information in response to this RFI should contact Pam Groce, State Energy Conservation Office, Comptroller of Public Accounts, 111 East 17th Street, Room 1114, Austin, Texas, 78744, telephone number: (512) 463-1931, no later than 5:00 p.m. Central Zone Time (CZT), on or before Friday, May 2, 2003. All written inquiries and questions must be received at the location

specified above, prior to 5:00 p.m. (CZT) on the deadline set forth above in order to be considered.

Closing Date: All responses to this RFI must be submitted no later than 5:00 p.m. (CZT), on Monday, May 19, 2003. Respondents are solely responsible for ensuring timely receipt of all responses at the location set forth above on or before the deadline; responses received after this time and date will not be considered.

Responses: Comptroller and SECO reserve the right, in their sole judgment and discretion, to accept or reject any or all responses received. Responses received by the deadline will be subject to evaluation by Comptroller, SECO, and/or a committee and all responses shall become the property of SECO and Comptroller. Responses will be public information and available to any requester. Neither Comptroller nor SECO is under any legal or other obligation to issue any solicitation or execute a contract or make any selection on the basis of this notice or any responses received as a result of the issuance of this RFI. Neither SECO nor Comptroller shall pay for any costs incurred by any District, or any other entity in responding to this RFI. All responses must be submitted in the format designed and provided by SECO. The RFI format is located on the SECO web site--http://www.seco.cpa.state.tx.us/seco_rfi.htm or can be requested by telephone (800) 531-544, EXT. 3-1931. Respondent Districts are required to:

* Submit a completed application form;

* Secure required cost-share no later than September 1, 2003 (installations will be scheduled September through December 2003);

* Complete a pre-survey (prior to installation) and a post-survey (following educational training) to determine the effects of the program on renewable energy awareness within the school;

* Designate a TSSP Coordinator at the school who will be responsible for fulfilling the school's obligations to the program;

* Organize a dedication ceremony and public outreach activities after the system has been installed.

TRD-200302335
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: April 9, 2003

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 04/14/03 - 04/20/03 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 04/14/03 - 04/20/03 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200302318
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: April 8, 2003

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Education Service Center, Region XIV

Request for Applications Concerning K-12 School-Community Partnerships Grant Program

Filing Authority. This Request for Applications (RFA) is authorized under the National and Community Service Act of 1990, 42 USC 12521 et seq. (Learn and Serve America School-based Programs)

Eligible Applicants. The Texas Center for Service-Learning, a statewide initiative of Region 14 Education Service Center (ESC) in partnership with the Texas Education Agency, is requesting applications from public school districts, open enrollment charter schools, and shared services arrangements of public school districts in Texas.

Description. Grant activities are for model initiatives that use the S.T.A.R.S. model of service-learning (Student leadership, Thoughtful service, Authentic learning, Reflective practice, and Substantive partnerships) to meet district and/or campus improvement goals. Region 14 ESC will issue grants to eligible applicants to: (1) engage K-12 students in community service activities as a structured element of an instructional program; (2) focus service activities to address key goals such as improved academic performance, enhanced personal responsibility and civic-mindedness, increased parental involvement., etc.; (3) use service as a strategy to meet real community needs; (4) utilize teacher-facilitated reflection in a variety of formats (written, verbal, visual, electronic) to promote critical thinking and analytical skills in preparing for, implementing, and evaluating service-learning experiences; (5) develop meaningful partnerships with organizations and individuals (including parents and community members of all ages) to implement the project successfully and sustain service-learning as a regular instructional practice; (6) collect information about successful or model efforts for the purpose of project replication, adoption, and adaptation; (7) ensure participation in all required trainings and meetings offered through TxCSL and/or through participating regional Education Service Centers; and (8) meet all evaluation requirements as specified in the RFA and/or by TxCSL and the program evaluator. Applicants must also ensure that their programs address the Texas Learn and Serve America statewide goals as identified in the RFA.

Dates of Project. All services and activities related to this proposal will be conducted within specified dates. The starting date will be no earlier than September 1, 2003, with an ending date of no later than August 31, 2004. Programs will be eligible for two years of continuation funding based on evidence of satisfactory progress.

Project Amount. A range of contracts will be awarded to a maximum of $100,000 to allow for a variety of models in small, medium, and large districts. A total of $1,200,000 is available for grant awards. Continuation funding through August 31, 2006, will be based on satisfactory progress and on general budget approval by the Corporation for National and Community Service (CNCS), the Texas Education Agency, and Region 14 ESC. This project is funded 100% from CNCS federal funds.

Selection Criteria. Proposals will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Region 14 ESC will base its selection on, among other things, the demonstrated competence and qualifications of the applicant. Special consideration will be given to ensure geographic and organizational diversity among applicants. Region 14 ESC reserves the right to select from

the highest ranking proposals those that address all requirements in the RFA.

Region 14 ESC is not obligated to execute a resulting grant award, provide funds, or endorse any proposal submitted in response to this RFA. This RFA does not commit Region 14 ESC to pay any costs incurred before a NOGA is executed. The issuance of this RFA does not obligate Region 14 ESC to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of the RFA may be obtained by writing the Texas Center for Service-Learning, 2538 S. Congress Avenue, Suite 300, Austin, Texas 78704; by calling 1-877-441-1147 or (512) 441-1147; or by downloading the application from the Texas Center website at www.txcsl.org.

Further Information. For clarifying information about the RFA, contact program staff members Elizabeth Manning (emanning@esc14.net) or Leslie McLain (lmclain@esc14.net) at the Texas Center for Service-Learning at 1-877-441-1147 or (512) 441-1147. Technical assistance will also be provided through TETN teleconferences on Tuesday, April 29 from 2:00 to 4:00 p.m. and on Friday May 2 from 9:30 a.m. to 12:00 p.m. Advance registration is requested for both teleconferences by faxing the TETN registration form available for downloading from www.txcsl.org to (512) 441-1181 no later than one day prior to the date of the TETN.

Deadline for Receipt of Proposals. Proposals must be received by mail or delivery service at the Texas Center for Service-Learning by 5:00 p.m. (Central Standard Time), Friday, May 30, 2003, to be considered. Facsimile and e-mail copies will not be accepted.

TRD-200302336
Terry Harlow
Executive Director
Education Service Center, Region XIV
Filed: April 9, 2003

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Texas Commission on Environmental Quality

Notice of Application and Preliminary Decision for a Municipal Solid Waste Permit

For the Period of April 1, 2003.

APPLICATION Waste Corporation of Texas, L.P., One Riverway, Suite 1400, Houston, Texas 77056, has applied to the Texas Commission on Environmental Quality (TCEQ) for a permit amendment to authorize the expansion of a Type IV municipal solid waste landfill facility that will dispose of brush, construction-demolition waste, rubbish that is free of putrescible waste and free of household waste, Class 3 nonhazardous industrial waste, man-made inert materials, and yard waste. The expanded landfill facility is to be located on a 114.5 acre site approximately 0.1 miles east of the intersection of Genoa-Red Bluff Road and Old Highway 3 (Old Galveston Road) on the south side of Genoa-Red Bluff Road approximately 16 miles southeast of downtown Houston, Harris County, Texas.

The TCEQ executive director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The executive director has made a preliminary decision to issue this draft permit. The permit application, executive director's preliminary decision, and draft permit are available for viewing and copying at the South Houston Branch of the Harris County Public Library, 607 Avenue A, South Houston, Texas 77587.

MAILING LISTS. You may ask to be placed on a mailing list to obtain additional information regarding this application by sending a request to the Office of the Chief Clerk at the address below. You may also ask to be on a county-wide mailing list to receive public notices for TCEQ permits in the county.

PUBLIC COMMENT / PUBLIC MEETING. You may submit public comments or request a public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit comment or to ask questions about the application. The TCEQ will hold a public meeting if the executive director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

You may submit additional written public comment to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 within 30 days from the date of newspaper publication of this notice.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for public comments, the executive director will consider the comments and prepare a response to all relevant and material or significant public comments. **The response to comments, along with the executive director's decision on the application, will be mailed to everyone who submitted public comments or who requested to be on a mailing list for this application. If comments are received, the mailing will also provide instructions for requesting a contested case hearing or reconsideration of the executive director's decision.** A contested case hearing is a legal proceeding similar to a civil trial in a state district court.

A contested case hearing will only be granted based on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised during the public comment period and not withdrawn. Issues that are not raised in public comments may not be considered during a hearing.

EXECUTIVE DIRECTOR ACTION. The executive director may issue final approval of the application unless a timely contested case hearing request or request for reconsideration is filed. If a timely hearing request or request for reconsideration is filed, the executive director will not issue final approval of the permit and will forward the application and requests to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

INFORMATION. If you need more information about this permit application or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us.

Further information may also be obtained from Mr. B. Jeffrey Hobby, P.E., Waste Corporation of Texas, L.P., at the address stated above or by calling Mr. Hobby at (281) 443-2404.

TRD-200302328
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: April 8, 2003

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Notice of Application and Preliminary Decision for Hazardous Waste Compliance Plan

For the Period of April 3, 2003

APPLICATION Chevron Environmental Services Company, 5959 Corporate Drive, Houston, Texas 77036, has applied to the Texas

Commission on Environmental Quality (TCEQ) for a Class 3 modification to the compliance plan. The modification will authorize the remediation of hydrocarbon impacted soils, modify the location of Point of Compliance wells, indicator parameters have been changed to benzene, toluene, ethyl benezene and xylenes and sampling frequency has been changed from quarterly to semiannual. The compliance period has been modified based on dates of operation and actual closure. Accordingly, cost estimates for financial assurance has been updated. Financial assurance has been modified to add soil corrective measures and update financial assurance based on current costs for the groundwater corrective measure. The facility, a decommissioned petroleum refinery, is located at 315 South Grand Street, Amarillo, in Potter County, Texas. This application was submitted to the TCEQ on July 12, 2002.

The TCEQ executive director has completed the technical review of the application and prepared a draft compliance plan. The draft compliance plan, if approved, would establish the conditions under which the facility must operate. The executive director has made a preliminary decision that this compliance plan, if issued, meets all statutory and regulatory requirements. The compliance plan application, executive director's preliminary decision, and draft compliance plan are available for viewing and copying at Amarillo Public Library, 413 East 4th Street, Amarillo, Texas 79101.

PUBLIC COMMENT / PUBLIC MEETING. You may submit public comments or request a public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. Generally, the TCEQ will hold a public meeting if the executive director determines that there is a significant degree of public interest in the application, if requested in writing by an affected person, or if requested by a local legislator. A public meeting is not a contested case hearing.

Written public comments and requests for a public meeting must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 within 45 days from the date of newspaper publication of this notice.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for public comments, the executive director will consider the comments and prepare a response to all relevant and material or significant public comments. **The response to comments, along with the executive director's decision on the application, will be mailed to everyone who submitted public comments or requested to be on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting a contested case hearing or reconsideration of the executive director's decision.** A contested case hearing is a legal proceeding similar to a civil trial in a state district court.

A contested case hearing will only be granted based on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised during the public comment period and not withdrawn. Issues that are not raised in public comments may not be considered during a hearing.

EXECUTIVE DIRECTOR ACTION. The executive director may issue final approval of the application unless a timely contested case hearing request or request for reconsideration is filed. If a timely hearing request or request for reconsideration is filed, the executive director will not issue final approval of the compliance plan and will forward the application and requests to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

MAILING LIST. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: (1) the mailing list for this specific application; (2) the permanent mailing list for a specific applicant name and permit number; and/or (3) the permanent mailing list for a specific county. Clearly specify which mailing list(s) to which you wish to be added and send your request to the TCEQ Office of the Chief Clerk at the address below. Unless you otherwise specify, you will be included only on the mailing list for this specific application.

INFORMATION. If you need more information about this permit application or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. The permittee's compliance history during the life of the permit being modified is available from the Office of Public Assistance.

Further information may also be obtained from Chevron Environmental Services Company at the address stated above or by calling Mr. Tommy Thompson at (713) 219-5257.

TRD-200302326
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: April 8, 2003

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Notice of Opportunity to Participate in Permitting Matters

A person may request to be added to a mailing list for public notices processed through the Office of the Chief Clerk for air, water, and waste permitting activities at the TCEQ. You may request to be added to: (1) a permanent mailing list for a specific applicant name and permit number; and/or (2) a permanent mailing list for a specific county or counties.

Note that a request to be added to a mailing list for a specific county will result in notification of all permitting matters affecting that particular county.

To be added to a mailing list, send us your name and address, clearly specifying which mailing list(s) to which you wish to be added. Your written request should be sent to the TCEQ, Office of the Chief Clerk, Mail Code 105, P. O. Box 13087, Austin, TX 78711-3087.

Individual members of the public who wish to inquire about the information contained in this notice, or to inquire about other agency permit applications or permitting processes, should call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040.

TRD-200302325
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: April 8, 2003

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Notice of Water Quality Applications

The following notices were issued during the period of March 31, 2003 through April 8, 2003.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P O Box 13087, Austin Texas 78711-3087,

WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE.

AQUASOURCE UTILITY, INC. has applied for a renewal of TPDES Permit No. 12996-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day. The facility is located at 11400 Green River Drive on the northeast corner of the crossing of Greens Bayou by Green River Drive in Harris County, Texas.

RONALD ALLEN BENNER has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 04001, to authorize the discharge of mariculture wastewater at a daily average flow not to exceed 4,000,000 gallons per day via Outfall 001. The applicant operates a mariculture facility. The plant site is located on the east side of County Road 316 approximately 0.25 miles north of the intersection of County Road 304 and County Road 316, approximately 2.2 miles east of the intersection of State Highway 172 and County Road 304, and 3.4 miles south of the intersection of State Highways 35 and 172, near the City of Port Alto, Calhoun County, Texas.

COTTONWOOD ENERGY COMPANY, LP which proposes to operates the Cottonwood Energy Project, a combined cycle electric power generating facility, has applied for a major amendment to TPDES Permit No. 04230 to add wastestreams (oil/water separator effluent, evaporative cooler blowdown, auxiliary boiler flush water, plant wash water, and domestic wastewater) to the authorized wastestreams discharging via Outfall 001, to remove Outfalls 101 and 201 (internal monitoring points), and to increase the effluent limitations for free available chlorine at Outfall 001. The current permit authorizes the discharge of cooling tower blowdown and low volume wastewater at a daily average flow not to exceed 2,250,000 gallons per day via Outfall 001. The facility is located southwest of the City of Ruliff, west of Indian Lake Road, approximately 0.75 miles south of the intersection of Indian Lake Road and Hartburg Road, Newton County, Texas.

CRANE CO. has applied for a renewal of TPDES Permit No. 12456-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 5,000 gallons per day. The facility is located immediately west of Johnson Road and approximately 9.8 miles west of the City of Conroe central business district on the southside of Farm-to-Market Road 2854 in Montgomery County, Texas.

CITY OF DENISON has applied for a renewal of TPDES Permit No. 10079-003, which authorizes the discharge of treated domestic wastewater an annual average flow not to exceed 6,000,000 gallons per day. The facility is located east of the City of Denison, approximately 1,600 feet east and 2,200 feet north of the intersection of Center Street and Farm-to-Market Road 120 in Grayson County, Texas.

FOSTER UTILITIES LLC provider of wastewater collection, treatment and disposal services, has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14428-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 165,000 gallons per day. The facility will be located within the Foster Development, Ltd. subdivision, approximately 800 feet west of U.S. Highway 183, approximately 2,100 feet south of County Road 263, and approximately 7,100 feet north of the South Fork of the San Gabriel River in Williamson County, Texas.

FOREST GLEN, INC. has applied for a renewal of TPDES Permit No. 11844-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The facility is located approximately 6 miles southeast of the intersection of U.S. Highway 190 and Farm-to-Market Road 2296 in Walker County, Texas.

SANDRA LEE GOODWIN has applied for a renewal of TPDES Permit No. 12617-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 35,000 gallons per day. The facility is located at 1719 Gault Road, approximately 1,200 feet west of the intersection of Gault Road and Aldine-Westfield Road in Harris County, Texas.

HARRIS COUNTY has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. 13027-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 10,000 gallons per day. The facility is located at 25011 West Hardy Road in Harris County, Texas. The treated effluent is discharged to Lemm Gully; thence to Cypress Creek in Segment No. 1009 of the San Jacinto River Basin.

HARRIS COUNTY FRESH WATER SUPPLY DISTRICT NO. 51 has applied for a renewal of TPDES Permit No. 10032-001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 6,300,000 gallons per day. The facility is located at 14701 Woodforest Boulevard, east of Carpenters Bayou in Harris County, Texas.

CITY OF HAWKINS has submitted application for a new permit, Proposed Permit No.04546, to authorize the land application of sewage sludge for beneficial use on 20.996 acres. This permit will not authorize a discharge of pollutants into waters in the State. The land application site is located approximately 1,500 feet west of Farm-to-Market Road 14 at a point approximately 6,500 feet north of the intersection of U.S. Highway 69 and Farm-to-Market Road 14 in Wood County, Texas.

CITY OF MENARD has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 10345-002, to authorize the discharge of filter backwash water at a daily average flow not to exceed 94,000 gallons per day. The facility will be located on Farm-to-Market Road 2092, approximately 1 mile west of the intersection of U.S. Highway 83 and Farm-to-Market Road 2092 in Menard County, Texas.

NEWPARK SHIPBUILDING - BRADY ISLAND, INC. which operates a centralized waste treatment facility and a construction, repair, cleaning and gas-freeing service for ships, barges, and tank trucks, has applied for a major amendment to TPDES Permit No. 02034 to authorize the relocation of Outfall 001 from the south side of the island to the north side; a less stringent effluent limitation for total copper via Outfall 001; remove Outfall 002; remove the discharge of storm water via Outfalls 003, 004, and 005; and add the discharge of ballast/void space water on an intermittent and flow variable basis via newly proposed Outfall 006. The current permit authorizes the discharge of process wastewater at a daily average flow not to exceed 100,000 gallons per day via Outfall 001; storm water runoff on an intermittent and flow variable basis via Outfall 002; and process wastewater and storm water runoff on an intermittent and flow variable basis via Outfalls 003, 004 and 005. The facility is located at 8502 Cypress Street, on Brady Island between the Houston Ship Channel and Old Buffalo Bayou in the City of Houston, Harris County, Texas.

NEWPORT MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. 11329-001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,000,000 gallons per day The draft permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 990,000 gallons per day. The facility is located west of the confluence of Gum Gully and Jackson Bayou, approximately 1.8 miles northwest of the intersection of Farm-to-Market Road 2100 and U.S. Highway 90 in Harris County, Texas

NORTHWEST HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 20 has applied for a renewal of TPDES Permit No. 13625-001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,100,000 gallons per day. The facility is located approximately 6,500 feet north and 8,700 feet east of the intersection of Farm-to-Market Road 1960 and Stuebner Airline Road, approximately 2 1/4 miles northeast of the same intersection in Harris County, Texas.

REAGENT CHEMICAL & RESEARCH, INC. which operates a hydrochloric acid bulk terminal, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 04552, to authorize the discharge of railcar rinsewater on an intermittent and flow variable basis via Outfall 001; trailer rinsewater on an intermittent and flow variable basis via Outfall 002; and steam condensate and storm water on an intermittent and flow variable basis via Outfall 003. The facility is located at 2250 Appelt Drive, approximately 0.6 miles north of the intersection of Appelt Drive and Jacintoport Boulevard, Harris County, Texas.

CITY OF ROMA has applied for a renewal of TPDES Permit No. 11212-002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,000,000 gallons per day. The facility is located approximately 900 feet south of U.S. Highway 83, approximately 4,900 feet southeast of the intersection of U.S. Highway 83 and the U.S. Customs Toll Bridge Road in Starr County, Texas.

CITY OF SUNSET has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14422-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The facility will be located approximately 1,000 feet north northwest of the intersection of U.S. Highway 287 and State Highway 101 West and west of the City of Sunset in Montague County, Texas.

SYNAGRO OF TEXAS-CDR, INC. has submitted application for a new permit, Proposed Permit No. 04506, to authorize the land application of sewage sludge for beneficial use on 139 acres. This permit will not authorize a discharge of pollutants into waters in the State. The land application site is located 0.5 mile east of the intersection of Farm-to-Market Road 1305 and County Road 4225, approximately 5 miles north of the City Poynor in Henderson County, Texas.

TEXAS PARKS AND WILDLIFE DEPARTMENT has applied for a renewal of TPDES Permit No. 11692-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 14,000 gallons per day. The facility is located adjacent to State Highway 87, approximately 12 miles west of the intersection of Farm-to-Market Road 3322 and State Highway 87 in Jefferson County, Texas.

TOMMY JOE THOMAS has applied for a renewal of TPDES Permit No. 12919-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 18,000 gallons per day. The facility is located on the 9800 Block of Deer Trail Drive approximately one mile northwest of the intersection of Farm-to-Market Road 149 and Interstate Highway 45 in Harris County, Texas.

VAITHI DEVELOPMENT, INC. has applied for a renewal of TPDES Permit No. 12527-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 10,000 gallons per day. The facility is located at 14718 Kuykendahl Road between Farm-to-Market Road 1960 and Interstate Highway 45 in Harris County, Texas.

WEST TEXAS UTILITIES COMPANY which operates the Paint Creek Power Station, has applied for a renewal of TPDES Permit No. 00963, which authorizes the discharge of once-through cooling water and cooling tower blowdown at a daily average flow not to exceed 253,800,000 gallons per day via Outfall 001, and low volume wastewater on a flow variable basis via Outfall 002. The facility is located approximately two miles south of the east end of Farm-to-Market Road 2082, on the northeast side of Lake Stamford, Haskell County, Texas.

TRD-200302327
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: April 8, 2003

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Proposal for Decision

The State Office Administrative Hearing issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on April 1, 2003 Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Lindon Stewart; SOAH Docket No. 582-02-2950; TCEQ Docket No. 2001-0305-AIR-E. In the matter to be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105 TCEQ PO Box 13087, Austin Texas 78711-3087. If you have any questions or need assistance, please contact Doug Kitts, Chief Clerk's Office, (512) 239-3317.

TRD-200302324
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: April 8, 2003

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Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Miller at (512) 463-5800 or (800) 325-8506.

Deadline: Personal Financial Statement due February 11, 2002

Domingo Garcia, P.O. Box 2910, Austin, Texas 78768-2910

Deadline: Personal Financial Statement due April 30, 2002

Dawn Elise Reveley, 1330 Spanish Oaks Estates, Cedar Park, Texas 78613

Deadline: Personal Financial Statement due June 20, 2002

Janice B. Howard, 8542 Hidden Hollow Ct., Missouri City, Texas 77459

Deadline: Personal Financial Statement due July 1, 2002

Heriberto Silva, P.O. Box 249, Garciasville, Texas 78547

Susan Lee Hargrave, P.O. Box 2496, Cedar Hill, Texas 75106-2496

Jacqueline G. Humphrey, Hudgins/Humphrey, 1800 S. Washington St., #315, Amarillo, Texas 79102

Deborah Hammond, 109 S. Cuernavaca Dr., Austin, Texas 78733-5234

Susan C. Mengden-Ellis, 431 Northridge, San Antonio, Texas 78209

William H. Watson, 4510 Ave. Q, Lubbock, Texas 79408

Ron Lucey, 4800 N. Lamar, Admin Bldg. #220, Austin, Texas 78756

Deadline: Personal Financial Statement due September 9, 2002

Michael Rubin, 900 Henderson Ave., Apt. #2215, Houston, Texas 77034

Deadline: 8 Days Before an Election Report due April 1, 2002

Bart C. Standley, Conservative Republicans Of Harris County PAC, 3323 Richmond Ave. #C, Houston, Texas 77098-3007

Deadline: 30 Days Before an Election Report due October 7, 2002

Kelton Dillard, Republican Liberty PAC, 1907 B Kenwood, Austin, Texas 78704

Deadline: 8 Days Before an Election Report due October 28, 2002

Bernard C. Amadi, P.O. Box 300925, Houston, Texas 77230

Harless Benthul, Associated Builders & Contractors Of Greater Houston PAC, 3910 Kirby Dr. #131, Houston, Texas 77098-4151

Bobby E. Hearn Jr., 5909 Springtide Dr., Fort Worth, Texas 76135

Guy C. Jackson III, Chambers County Democratic Executive Committee (CEC), P.O. Drawer D, Anahuac, Texas 77514

Jesse R. Molina, 1301 N. Houston St., Fort Worth, Texas 76106

Stella M. Morrison, 1015 East Gulfway Dr., Port Arthur, Texas 77640

Chilton Roberts, Texas Assn. Of Mortgage Brokers PAC, 502 E. 11th St. #400, Austin, Texas 78701

David C. Scott, 2309 35th, Lubbock, Texas 79401

Tim Turnipseed, 7410 Quaker #34, Lubbock, Texas 79424

Deadline: Semiannual J/COH Report due January 15, 2003

Said Abakoui, 1211 San Dario Ave. #302, Laredo, Texas 78040

Lynda Akin, 5868 Westheimer Rd. #302, Houston, Texas 77057-5641

J.M. "Chuy" Alvarez, 501 N. Britton Ave., Rio Grande City, Texas 78582

John G. Anderson, P.O. Box 984, Tomball, Texas 77377-0984

David Arevalo, 627 Delaware, San Antonio, Texas 78210

Kathleen Ballanfant, 5160 Spruce, Bellaire, Texas 77401

Donna Ballard, 4009 Ridgecrest Trail, Carrollton, Texas 75007-1625

Boyd W. Bauer, P.O. Box 1436, Beeville, Texas 78104

Burgess Beall, 2428 Central Ave., #201, Alameda, California 94501-4536

Theo Bedard, 2813 Buckingham Rd. #398, Richardson, Texas 75081-5499

Stephen P. Birch, 4912 Haverwood Ln. Apt. #818, Dallas, Texas 75287-4422

Sherril Alan Blackmon, 1012 S. Gloucester, Irving, Texas 75062

Michael J. Bolzenius, 12015 Newport Shore Dr., Houston, Texas 77065-3920

Stacey L. Bourland, 919A W. 25th St., Houston, Texas 77008-1825

Sherry L. Boyles, 815-A Brazos Street, PMB 561, Austin, Texas 78701-9996

Howard Bridges Jr., 434 W. Kiest Blvd. #100, Dallas, Texas 75224

James R. Bridges, 5447 Willis, Dallas, Texas 75206

David F. Bristol, P.O. Box 1871, Frisco, Texas 75034

Robert A. Brooks, 1237 E. Cober Dr., Grand Prairie, Texas 75051

Mary D. Guevara Capello, P.O. Box 6031, Laredo, Texas 78042-6031

Shannon L. Carr, 800 N. LBJ Dr. #1234, San Marcos, Texas 78666

Shene Casey, 256 CR 3101, Greenville, Texas 75402

Richard H. Chenevert, 1300 Crossing Pl. #2511, Austin, Texas 78741

M.B. Cohen, 5314 Braesheather, Houston, Texas 77096

Gerry N. Crawford, Rt. 16, Box 2161, Lufkin, Texas 75901

Jeff Daiell, 15213 SW Fwy., Ste. 126, Sugar Land, Texas 77478

Chloe N. Daniel, P.O. Box 810570, Dallas, Texas 75381-0570

Ernesto L. DeLeon, 224 Jade St., Brownsville, Texas 78520

James A. Deats, 898 Logan's Way, Blanco, Texas 78606

Jeanne M. Doogs, 300 Trinidad Ct., Fort Worth, Texas 76126

Richard N. Draheim Jr., 339 Henry M. Chandler's Dr., Rockwall, Texas 75032-2439

Deborah Dunsinger 450 El Dorado #1303, Webster, Texas 77598

Philip L. Durgin, 31 Laurel Hill, Austin, Texas 78737-9309

Dan Engel, 2608 Greenwood, Arlington, Texas 76013

Jack D. Ewing, 2938 Meadowbrook Dr., League City, Texas 77573

Alfredo Flores Jr., P.O. Box 15666, Houston, Texas 77220

Baltazar Garcia, 712 McDaniel, Houston, Texas 77022

Edward T. Garcia, P.O. Box 3202, Freeport, Texas 77541

Juan A. Garcia, 1101 S. Cameron, Alice, Texas 78332

Mario Garcia, 735 W. 10th, Mercedes, Texas 78570

Edgar J. Garrett Jr., P.O. Box 465, Cooper, Texas 75432

Thomas L. Gatton, 2320 Southwest Fwy. #C, Houston, Texas 77098

LeRoy F. Gillam, 13031 Abalone Way, Houston, Texas 77044-1829

Eduardo Z. Gonzalez, P.O. Box 40, Edcouch, Texas 78538

Janie Martinez Gonzalez, 162 Bradley, San Antonio, Texas 78211

Samuel Gonzalez, 15721 Maiden Lane, Houston, Texas 77053

Arthur Granado, P.O. Box 638, Corpus Christi, Texas 78403

Darrell Grear, 1304 Red Oak St., Bryan, Texas 77803

William E. Grisham, 4154 Swans Landing, San Antonio, Texas 78217

J. David Gutierrez, 3720 Jackson St. #100, Irving, Texas 75061

Anton E. Hackebeil, P.O. Box 220, Hondo, Texas 78861-0220

Grant U. Hardeway Sr., 412 Main Street, Suite 300, Houston, Texas 77002

Heath G. Harris, P.O. Box 225404, Dallas, Texas 75222-5402

James B. Harris, P.O. Box 7, Wichita Falls, Texas 76307

David M. Hart, P.O. Box 79034, Saginaw, Texas 76179

Bobby E. Hearn Jr., 5909 Springtide Dr., Fort Worth, Texas 76135

Robert Ashton Herrera, 9607 Wildwood Ridge, San Antonio, Texas 78250

Gary A. Hinchman, 17 Paddock Pines Place, The Woodlands, Texas 77382

Samuel W. Hudson III, P.O. Box 150972, Dallas, Texas 75315-0972

Elizabeth C. Jandt, 112 N. Austin St., Seguin, Texas 78155

Ollie R. Jefferson, 422 E. Lamar Blvd., Suite 212, Arlington, Texas 76011

Michael A. John, 1700 Commerce St., Suite 1130, Dallas, Texas 75201

Brandon Steele Johnston, Rt. 5 Box 512, Big Sandy, Texas 75755

Stephen Kyle Johnston, 678 Fawn Drive, Houston, Texas 77015

Dennis Jones, P.O. Box 1027, Lufkin, Texas 75902

Greg A Kauffman, 2315 Rock Creek Road, Crowley, Texas 76036

V. Sue Koenig, 1803 Silverado Dr., Weatherford, Texas 76087

S. Christopher LaRue, 10878 Westheimer Rd. #373, Houston, Texas 77042-3202

David M Leibowitz, 111 Soledad St., Ste. 2000, San Antonio, Texas 78205-2293

Scott R. Link, 301 Fannin, Houston, Texas 77002

Sandy Madison, 3713 Linden Ave., Fort Worth, Texas 76107

Napoleon Madrid, 7811 Wild Eagle, San Antonio, Texas 78255

Raymundo Mancera, 2319 Tremont Ave., El Paso, Texas 79930-1113

Alberto T. Martinez, P.O. Box 549, San Diego, Texas 78384

Edmond S. Maxon, 10422 Shadow Wood, Houston, Texas 77043

Angus McGinty, P.O. Box 7352, San Antonio, Texas 78207-0352

Michael E. McLelland, 918 Antelope, Corpus Christi, Texas 78401

David M. Medina, 952 Echo Lane #350, Houston, Texas 77024

Sylvia R. Mendelsohn, 17592 S. US Hwy 281, San Antonio, Texas 78221-9716

Steve Mendoza, P.O. Box 291216, San Antonio, Texas 78229-1216

Clifford L. Messina, 10510 Tolman, Houston, Texas 77034

Jesse R. Molina, 1301 North Houston St., Fort Worth, Texas 76106

William E. Muirhead, 158 Countrywood Est., Cleveland, Texas 77327

Cynthia Newman, P.O. Box 2366, Prairie View, Texas 77446

Lawrence T. Newman, P.O. Box 2584, Houston, Texas 77252-2584

Warren V. Norred, 2707 Yorkfield Ct., Arlington, Texas 76001

Lloyd Wayne Oliver, P.O. Box 271503, Houston, Texas 77277

Alice Oliver-Parrott, 480 Thunder Canyon Rd., Canyon Lake, Texas 78133-5459

Morris L. Overstreet, 905 Congress Ave., Austin, Texas 78701

James Partsch-Galvan, 1611 Holman, Houston, Texas 77004

Robert L. Penrice, 2000 Professional Bldg., Loop 197, Texas City, Texas 77590

David C. Pepperdine, 18051 Kelly Blvd. #110, Dallas, Texas 75287

Jim Pruitt, P.O. Box 823279, Dallas, Texas 75382

Fernando R. Ramirez, 2735 Lakeshore Dr., Port Arthur, Texas 77640

Bonnie Rangel, 500 E. San Antonio #601, El Paso, Texas 79901

Nathan Reid, P.O. Box 901, Sugar Land, Texas 77487

Ruben L. Reyes, 2830 Aurora, El Paso, Texas 79907

Daniel Rivas, P.O. Box 36122, Houston, Texas 77236-6122

Jon Roland, 7793 Burnet Rd. #37, Austin, Texas 78757

Michael D. Rozell, 3350-A Hwy. 6 South, #555. Sugar Land, Texas 77479

Christina M. Ryan, 27129 Paula Lane, Conroe, Texas 77385

Ignacio Salinas Jr., 505 S. Victoria St., San Diego, Texas 78384

George C. Schwappach, 8318 Saddle Creek Rd., Abilene, Texas 79602-5454

David C. Scott, 2413 27th Street, Lubbock, Texas 79411-1301

Victor Smith, 1423 W. Red Bird Ln., Dallas, Texas 75232

Juan F. Solis III, 907 W. Kirk, San Antonio, Texas 78226

Ivan E. Stober, 2801 Meadowbrook Dr., Fort Worth, Texas 76103-2814

Joe W. Swirczynski, P.O. Box 733, Mineral Wells, Texas 76068

Robert W. Tate, 18081 Midway Rd. #715, Dallas, Texas 75287

Charles L. Tilton II, 1123 Timber Elm, Seguin, Texas 78155

Gregory R. Travis, Box 337, Fulshear, Texas 77441

Jerry Trevino, 4141 Molina, Corpus Christi, Texas 78416

Rudy G. Vasquez, P.O. Box 3664, Houston, Texas 77253-3664

Melva Washington-Becnel, 2403 Arbor, Houston, Texas 77004

Larry M. Wessels, P.O. Box 340, LaGrange, Texas 78945

Robert Lee West, 1525 Lakeshore Dr., Little Elm, Texas 75068

Julius E. Whittier, P.O.Box 4586, Dallas, Texas 75208

Clifford F. William, 8915 Sangamon, Houston, Texas 77074

Paul O. Williams, 3192 Hampshire Ct., Frisco, Texas 75034

Ron Wilson, P.O. Box 2910, Austin, Texas 78768

Michael P. Wolfe, 9712 Old Katy Rd. #107, Houston, Texas 77055-6209

John Worldpeace, 2620 Fountain View #106, Houston, Texas 77057

Virgil W. Yanta, 140 Hwy. 46 W., Boerne, Texas 78006-8114

Kenneth Yarbrough, P.O. Box 920949, Houston, Texas 77292-0949

Michael Yarbrough, 1314 Texas Ave. #515, Houston, Texas 77002

Humberto Zamora, 1014 East Harrison, Harlingen, Texas 78550

Alma Zepeda, 121 E. 12th #9, Houston, Texas 77008

Deadline: Semiannual GPAC Report due January 15, 2003

Sheila A. Holbrook-White, Texas Citizen Action PAC, P.O. Box 10231, Austin, Texas 78756

Ronnie Sowell, Lubbock Professional Police PAC, Security Park, 3602 Slide Rd. Ste. B-34, Lubbock, Texas 79414-2548

Suzan Fannin, Political Action Committee Of The Lubbock Assn. Of Insurance Agents, 1810 50th St., Lubbock, Texas 79493

Richard M. Lannen, Jesse Oliver Campaign, 3800 Marin St., Suite E, Dallas, Texas 75226

Josephine Z. Chavez, Texas Political & Legislative Committee, USA District #12 PAC Fund, 12821 Industrial Rd., Houston, Texas 77015

Guy C. Jackson III, Chambers County Democratic Executive Committee (CEC), P.O. Drawer D, Anahuac, Texas 77514

Darwin McKee, Central Texas PAC Centre Development, P.O. Box 2513, Austin, Texas 78768

Chilton Roberts, Texas Assn. Of Mortgage Brokers PAC, 502 E. 11th St. #400, Austin, Texas 78701

G. Daniel Mena, Unity 94 El Paso County, 3233 N. Piedras, El Paso, Texas 79930-3703

Wesley R. Carrera, Texas Water Quality Assn. PAC, 1119 Paulsun, San Antonio, Texas 78219

Jack Baxley, Fort Worth Associated General Contractors PAC, 417 Fulton St., Fort Worth, Texas 76104

Vicki L. Hoover, Rockwall County Democratic Party PAC, 6209 Scenic Dr., Rowlett, Texas 75088

Edward A. Christensen III, Local #154 PAC, 3605 Katy Freeway #210, Houston, Texas 77007

Alfred Adask, Equity Under All Law, 9794 Forest Ln. #159, Dallas, Texas 75243

Fred Lehmann, Grayson County Democratic Party PAC, 100 N. Travis St. #206, Sherman, Texas 75090-0014

Eartha Dotson, Galveston County Democrats Club, 1405 Appomattox Dr., Texas City, Texas 77591

Vidal G. De Leon, McLennan County Mexican Americans For Better Government PAC, 1619 Baylor Ave., Waco, Texas 76706

Pat Stevens, South Denton County PAC, 2025 Aspen Dr., Highland Village, Texas 75067

Keith Hogan, Friends Of Education, P.O. Box 81, Victoria, Texas 77902

Wanda Williams, Glass, Molders, Pottery, Plastics & Allied Workers Local #216, 1507 Gleason Avenue, Cleburne, Texas 76033-6737

J.R. Tyson, DOG PAC, P.O. Box 1326, Alvin, Texas 77512

H.J. Johnson, Pleasant Wood Pleasant Grove PAC, P.O. Box 150408, Dallas, Texas 75305-0408

Herman C. Roark Jr., Texas Telephone Assn. PAC, 502 East 11th St., Ste. 400, Austin, Texas 78701-2619

Janice L. Burkholder, Pathfinders Republican Women's Club, 21 Towering Pines Dr., The Woodlands, Texas 77381

Richard A. Solo, 8th District Democrats, 4107 Harvest Hill Rd., Apt. 1187, Dallas, Texas 75244-6321

Kenneth Stinson, Glass, Molders, Pottery, Plastics & Allied Workers International Union Local Union #284, 208 Eckman, Longview, Texas 75602

William E. Muirhead, Muirhead Election Committee, 158 Countrywood Est., Cleveland, Texas 77327

Stephanie Phillips, Justice For All PAC, 2426 Killarney Cir., Pearland, Texas 77581

Daniel L. Easterly, Fund To Take Back Texas Prisons, 1500 S. Dairy Ashford #115, Houston, Texas 77077

Edward T. Wendler Sr., 21st Century Democrats, 106 Golden Cove, Kyle, Texas 78640

Terry Sheneman, Texas Assn. Of Alcoholism & Drug Abuse Counselors PAC, 1005 Congress Ave., Suite 480, Austin, Texas 78701

Fred Lehmann, Texoma PAC, 100 N. Travis St. #206, Sherman, Texas 75090-0014

Caryl Bunton, ASSIST PAC, P.O. Box 55763, Houston, Texas 77255

Michael H. Jones, Voice Of The Elephant, 5744 Danciger Dr., Fort Worth, Texas 76112-3951

Dina Gonzales, Concerned Citizens For Better Government, 1510 7th Street, Floresville, Texas 78114

Arnold Pedraza, American Hispanics On Reform & Accountability, P.O. Box 3916, McAllen, Texas 78502

Clarence B. Bagby, Houston Historic Preservation PAC, 2003 Kane St., Houston, Texas 77007-7612

David Jackson, Republican Communications Network PAC, P.O. Box 703936, Dallas, Texas 75370-3936

Fernando Contreras Jr., Southside Democrats, P.O. Box 37278, San Antonio, Texas 78237-0278

Leslie C. Taylor, Precinct 222 Democratic Club, P.O. Box 980541, Houston, Texas 77098-0541

Bart C. Standley, Campaign For Houston, 3323 Richmond Ave. #C, Houston, Texas 77098-3007

Nancy Hrobar, Van Zandt County Assn. Of Taxpayers, 14232 FM 773, Ben Wheeler, Texas 75754

Louis T. Getterman III, Williamson County Republican Party General Election Campaign Fund, P.O. Box 1653, Georgetown, Texas 78627

Daniel K. Cook, Green Party Of Dallas/Fort Worth, P.O. Box 2501, Arlington, Texas 76004

Frank Fuentes, Hispanic Contractors Assn. De Tejas, Inc. PAC, 4100 Ed Bluestein #201, Austin, Texas 78721

R. Shawn Lepard, Plains Residents Organization for Ag. Growth PAC, P.O. Box 317, Guymon, Oklahoma 73942

Floyd E. Hodges Jr., Texans For Good Government, 280 W. Renner Rd #2611, Richardson, Texas 75081

H.R. Moseley, Vidor Police Assn. PAC, P.O. Box 1266, Mauriceville, Texas 77626

Peter L. Bargmann, Judicial Elections For Texas PAC, 660 Preston Forest Center #LB 362, Dallas, Texas 75230-2718

Karen K. Tarry, Doctors For Better Government, 5615 Morningside Dr. #402, Houston, Texas 77005

James R. Reynolds, Texans For Quality Health PAC, 4600 Tamarisk Cove, Austin, Texas 78747

John D. Poole II, Southern Party Of Texas PAC, P.O. Box 7452, Huntsville, Texas 77342

Bill Burdock, Eagle Mountain Political Fund, 714 South Saginaw, Saginaw, Texas 76179

Anthony R. Godinez, Judge Murray Moore Campaign Committee, 815 Produce Rd., Hidalgo, Texas 78557

Deborah D. Tucker, Texans Against Gun Violence Political Victory Fund, P.O. Box 4145, Austin, Texas 78765

David T. LaPlante, San Antonio Coalition Of Politically Active Christians, P.O. Box 460834, San Antonio, Texas 78246

Dwight E. Jefferson, Verner Liipfert Texas PAC, Verner, Liipfert, Bernhard, McPherson, 707 Walnut St. #203, Houston, Texas 77002-1165

Vance J. Beaudreau, Southern Independent Party, 1605 E. William J. Bryan Pkwy., Bryan, Texas 77803

Irene Morales-Russell, Citizens For Legal Ethics And Neutrality, 600 Toronto Ave., Apt. 36. McAllen, Texas 78503-3072

Christopher C. Stevens, Texas Conservative Caucus, 4800 Dakota St., Dickinson, Texas 77539

Leslie J. Baldwin, El Paso Pachyderms Pack Fund, 7900 Viscount Blvd., Apt. 281, El Paso, Texas 79925-5714

Michael J. Warner, Texas Amusement Association PAC, P.O. Box 92167, Austin, Texas 78709

Curtis B. Carden, Texas Tax Relief, 21226 Park Bend Dr., Katy, Texas 77450-4143

John Carpenter, Pecos County Greens, P.O. Box 501, Fort Stockton, Texas 79735-0501

John R. King, Committee for Private Property Rights, 5203 CR 1470, Lubbock, Texas 79407

Jenny L. Arceo, Filipino American Caucus for Empowerment, 8901 Jones Rd. #116, Houston, Texas 77065

DeWayne Lark, The People's PAC of The International Ministerial Alliance, P.O. Box 300905, Houston, Texas 77230

Kathie N. Ware, Concerned Citizens for Regional Water Political Action Committee, 12210 De Forrest, Houston, Texas 77066

Juan M. Calzada, Friends of Humberto Zamora, 1014 East Harrison Street, Harlingen, Texas 78550

John W. Lowe, Citizens for Joe Roberts, 1518 Raleigh, Carrollton, Texas 75007

Sharon N. Gray, Friends of Dionne Roberts, 6624 S.W. Freeway, Houston, Texas 77074

Jeff Van Fleet, Sunset Coalition, 7014 Woodland Oaks Dr., Magnolia, Texas 77354

Christopher M. Duewall, Robertson First, P.O. Box 324, Wheelock, Texas 77882

Sharon S. Warminski, Association of Families Supporting Responsible Development, 206 W. Castle Harbour, Friendswood, Texas 77546

Rudolf S. Stahel, Collin County Republican Party, 2520 Ave. K, Suite 280, Plano, Texas 75074

Jim Dorman, The Friends of the Montgomery County Republican Party, 16854 Glen Eagles Dr., Conroe, Texas 77385

Deadline: Monthly MPAC Report due September 5, 2002

Joseph J. Hummel, Arlington Professional Fire Fighters Assn. PAC, 706 E. Abram St., Arlington, Texas 76010

Deadline: Monthly MPAC Report due October 7, 2002

Joseph J. Hummel, Arlington Professional Fire Fighters Assn. PAC, 706 E. Abram St., Arlington, Texas 76010

Deadline: Monthly MPAC Report due November 5, 2002

Kathleen P. Batchelor, Bedford Leadership Forum, 23251 County Road 460, Mineola, Texas 78773-9799

Deadline: Monthly MPAC Report due December 5, 2002

Mark Wood, Houston Gay & Lesbian Political Caucus PAC, 1701 Hermann Dr. #3402, Houston, Texas 77004

Don L. King, Sensitive Care PAC, 500 N. Akard St. #3960, Dallas, Texas 75201-6604

Kathleen P. Batchelor, Bedford Leadership Forum, 23251 County Road 460, Mineola, Texas 75773-9799

Leonard T. Dunnahoe, Uncommon Sense, 214 St. Mary's Place, Rockwall, Texas 75087

Deadline: Monthly MPAC Report due January 6, 2003

Ronny L. Martin, Houston Police Officers Union PAC, 1602 State Street, Houston, Texas 77007

Mark Wood, Houston Gay & Lesbian Political Caucus PAC, 1701 Hermann Dr. #3402, Houston, Texas 77004

Don L. King, Sensitive Care PAC, 500 N. Akard St. #3960, Dallas, Texas 75201-6604

Kathleen P. Batchelor, Bedford Leadership Forum, 23251 County Road 460, Mineola, Texas 75773-9799

Leonard T. Dunnahoe, Uncommon Sense, 214 St. Mary's Place, Rockwall, Texas 75087

TRD-200302293
Karen Lundquist
Executive Director
Texas Ethics Commission
Filed: April 7, 2003

♦ ♦ ♦

Texas Health and Human Services Commission

Notice of Adopted Medicaid Provider Payment Rates

Proposal: As single state agency for the state Medicaid program, the Texas Health and Human Services Commission (HHSC) adopts new per diem payment rates for state owned veterans nursing facilities. The adopted payment rates for state veterans nursing facilities for state fiscal year 2003 are as follows: Big Spring, $115.00; Bonham, $115.00; Floresville, $115.00; and Temple, $115.00. Payment rates are adopted to be effective September 1, 2002.

Methodology and Justification: The adopted payment rates were determined in accordance with 1 Texas Administrative Code, Chapter 355, Subchapter C (relating to Reimbursement Methodology for Nursing Facilities), §355.311. Issued in Austin, Texas, on April 8, 2003.

TRD-200302319
Steve Aragon
General Counsel
Texas Health and Human Services Commission
Filed: April 8, 2003

♦ ♦ ♦

State Medicaid Office - Public Notice

The Health and Human Services Commission, State Medicaid Office, has received approval from the Centers for Medicare and Medicaid Services to amend the Title XIX Medical Assistance Plan by Transmittal Number 03-06, Amendment Number 641.

The amendment makes technical changes to Attachment 3.1-A and Attachment 3.1-B, as well as to Appendix 1 to Attachment 3.1-A and

3.1-B. It also updates the number sequence to correlate with the current preprint pages and eliminates obsolete references. The amendment is effective January 1, 2003.

If additional information is needed, please contact Christina Peeples, Health and Human Services Commission at 512-685-3157.

TRD-200302260
Steve Aragon
General Counsel
Texas Health and Human Services Commission
Filed: April 4, 2003

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Texas Department of Housing and Community Affairs

Notice of Public Hearing

Multifamily Housing Revenue Bonds (Fountain Circle) Series 2003

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at Johnson (LBJ) High School, 7309 Lazy Creek Drive, Austin, Texas 78724, at 6:00 p.m. on May 7, 2003 with respect to an issue of tax-exempt multifamily residential rental project revenue bonds in an aggregate principal amount not to exceed $11,750,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to Wendover Texas II, Ltd., a Texas limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing and equipping a multifamily housing project (the "Project") described as follows: 208-unit multifamily residential rental development to be constructed on approximately 24.1 acres located at 9371 US Highway 290 East, Austin, Texas 78724. The project will be initially owned and operated by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Project and the issuance of the Bonds. Questions or requests for additional information may be directed to Robbye Meyer at the Texas Department of Housing and Community Affairs, 507 Sabine, Austin, Texas 78701; (512) 475-2213 and/or rmeyer@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Robbye Meyer in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Robbye Meyer prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200302333
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: April 9, 2003

♦ ♦ ♦

Public Hearing

The Texas Department of Housing and Community Affairs (the Department) announces that it will hold a public hearing to receive comments on its draft program year (PY) 2004 Low-Income Energy Efficiency Plan funded by the System Benefit Fund.

The public hearing will be held at 2:00 p.m. on Monday, May 12, 2003, in Room 118 of the Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas. At the hearing, a representative from the Department will provide descriptions of the Department's Low-Income Energy Efficiency Plan energy efficiency programs and the intended use of the PY 2004 funds.

The System Benefit Fund (SBF) was established as part of Senate Bill 7, which restructured the electric industry. The purpose of the SBF is to provide special assistance to low-income residential electric customers in paying their energy bills by providing a discount (approximately 10% discount) and reducing their energy consumption through weatherization; to offset lost revenue for school districts from the devaluation of electric generating plants; and to educate the public on "customer choice" in the restructuring of electric utilities. Measures established in the bill to assist low-income residential consumers include energy efficiency programs to be administered by the Department in coordination with existing weatherization programs. The targeted energy efficiency programs will serve low-income electric customers not served by municipally owned utilities or electrical cooperatives that have not adopted customer choice. The SBF is funded through a nonbypassable fee and is administered by the Public Utility Commission (PUC).

The Public Utility Commission released rules for SBF energy efficiency programs to allow broad latitude for program structure as long as the goal of increasing the low-income consumer's energy efficiency is achieved. The plan will provide information regarding the proposed activities of the program implementation for program year 2004. The Department plans to continue administering the SBF energy efficiency programs through the Weatherization Assistance Program (WAP) subgrantees, which will continue to coordinate the programs with WAP.

Local officials and citizens are encouraged to participate in the hearing process. Written and oral comments received will be used to finalize the Department's PY 2004 Low-Income Energy Efficiency Plan. Written comments from those who cannot attend the hearing in person may be provided by the close of business at 5:00 p.m. on May 12, 2003, to Ms. Lolly Caballero, Senior Planner, Energy Assistance Section, Texas Department of Housing and Community Affairs, 507 Sabine, Suite 600, Austin, Texas 78701 or by electronic mail to lcaballe@tdhca.state.tx.us or by fax to (512) 475-3935. A copy of the proposed state plan may be requested by calling Ms. Caballero at (512) 475-0471 or by writing Ms. Caballero at the Department's address given above. The proposed 1st draft plan will be available April 16, 2003 and the 2nd draft plan will be available May 1, 2003. The draft plans will also be available on the Department's Website at www.tdhca.state.tx.us.

Individuals who require auxiliary aids or services for this meeting should contact Ms. Gina Esteves, ADA responsible employee, at (512) 475-3943 or Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200302344
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: April 9, 2003

♦ ♦ ♦

Texas Bootstrap Loan Program FY 2003 Notice of Funding Availability

The Texas Department of Housing and Community Affairs (TDHCA), through its Office of Colonia Initiatives (OCI), is pleased to announce that it will make available approximately Three Million Dollars ($3,000,000) utilizing State of Texas Housing Trust Fund and

Junior Lien Single Family Mortgage Revenue Bonds to purchase or refinance real property on which to build new residential housing or improve existing residential housing through self-help construction for low, very low, and extremely low income individuals and families (Owner-Builders); including persons with special needs.

The OCI administers the Texas Bootstrap Loan Program (the Program) by working through certified Nonprofit Owner-Builder Housing Organizations.

Targeting of Extremely Low Income in 2003

In an effort to encourage the production of affordable housing for individuals and families of Extremely Low Income, TDHCA is meeting its goal of directing the funds in accordance with §2306.753(d) of the Texas Government Code. The maximum amount of funding per organization is $600,000. The maximum loan amount using TDHCA funds may not exceed $30,000 per household. The total amount of loans made with TDHCA and any other source combined may not exceed $60,000 per household. TDHCA, may, at its discretion, award funds above the maximum award limit to eligible organizations that have in the past demonstrated successful implementation of this initiative. Projects utilizing additional non-TDHCA resources will be required to provide documentation identifying the sources of these additional funds and information about their rates and terms.

Eligibility requirements establish a priority for loans made to Owner-Builders, as set out in §2306.753, Texas Government Code, with an annual income of less than $17,500.

To be eligible for a loan, an Owner-Builder:

(1) may not have an annual income that exceeds 60 percent, as determined by TDHCA, of the greater of the state or local Area Median Family Income (AMFI), when combined with the income of any person who resides with the Owner-Builder;

(2) must have resided in this state for the preceding six months;

(3) must have successfully completed an owner-builder education class; and

(4) must agree to:

(A) provide at least 60 percent of the labor necessary to build or rehabilitate the proposed housing by working through a certified Nonprofit Owner-Builder Housing Organizations; or

(B) provide an amount of labor equivalent to the amount required in connection with building or rehabilitating housing for others through a certified Nonprofit Owner-Builder Housing Organization;

(C) TDHCA may select Nonprofit Owner-Builder Housing Organizations to certify the eligibility of Owner-Builders to receive a loan. A certified Owner-Builder Nonprofit Housing Organization selected by TDHCA shall use the eligibility requirements established by TDHCA to certify the eligibility of an Owner-Builder for this program.

Eligible applicants include Colonia Self-Help Centers and State Certified Nonprofit Owner-Builder Housing Organizations. In accordance with §2306.753(d) of the Texas Government Code, Title 10, TDHCA shall set aside at least two-thirds of the available funds for Owner-Builders whose property is located in an Economically Distressed Area Program (EDAP) counties, as defined under Subchapter K, Chapter 17, Water Code:

Andrews

Brewster

Brooks

Cameron

Crane

Crosby

Culberson

Dimmit

Duval

El Paso

Frio

Grimes

Hidalgo

Hudspeth

Jeff Davis

Jim Hogg

Jim Wells

Kinney

La Salle

Liberty

Marion

Maverick

Newton

Pecos

Presidio

Red River

Reeves

San Augustine

San Patricio

Starr

Terrell

Tyler

Upton

Uvalde

Val Verde

Ward

Webb

Willacy

Winkler

Yoakum

Zapata

Zavala

The remainder of the funding will be available to TDHCA certified Nonprofit Owner-Builder Housing Organizations in the State of Texas. The amounts available for distribution are as follows:

$1,000,000 State of Texas

$2,000,000 Economically Distressed Areas (EDA)

General Information for NOFA:

Applications meeting threshold criteria will be evaluated and scored within categories, including but not limited to Operational Capacity and Experience, Financial Design, Quality of Program Design, Leveraging of Public and Private Resources, and Underserved Areas and Population. Applications will then be selected based on program scoring criteria (which is included in the application package), underwriting criteria, and geographic dispersion. TDHCA desires to select a diverse group of certified owner-builder nonprofit housing organizations that will serve various populations throughout the state.

Applicants for this program are encouraged to download the FY 2003 Texas Bootstrap Loan Program application package from TDHCA's web site located at http://www.tdhca.state.tx.us/htf.htm. Applicants may also request a hard copy version of the application package. Application packages will be transmitted via first class U.S. Postal Service unless applicants request transmittal via overnight courier and provide the name and account number of their desired courier.

TDHCA's Board of Directors reserves the right to change the award amount, and to award less than the requested amount.

Applications must be submitted on or before 5:00 p.m., Friday June 6, 2003.

FAXED APPLICATIONS WILL NOT BE ACCEPTED.

All interested parties are encouraged to participate in this program. Applications will be available on April 18, 2003. Technical Assistance for this application will be provided during April - June 2003. For additional information, time and date of workshops, or to request an application package, please call Phyllis BuenRostro with the Office of Colonia Initiatives at (800) 462-4251, check TDHCA's web-site at www.tdhca.state.tx.us or e-mail your request to pbuenros@tdhca.state.tx.us. Please direct your applications to:

Texas Department of Housing and Community Affairs

Attention: Office of Colonia Initiatives

Post Office Box 13941

Austin, Texas 78711-3941

Or by courier to:

507 Sabine, Suite 400

Austin, Texas 78701

TRD-200302337
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: April 9, 2003

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Houston-Galveston Area Council

Request for Proposal

The Houston-Galveston Area Council (H-GAC) is requesting proposals to conduct an access management and traffic mobility study for the FM 1960 corridor from west of SH 249 to east of IH 45 in Harris County (about 7.1 miles). The purpose of the study is to identify short-term transportation improvements to improve traffic flow and reduce motorist delay. The study will collect sufficient information to measure and evaluate a range of viable short-term improvement concepts, as well as address cost-benefit and cost-effectiveness of various solutions. The study shall conclude with the identification of a list of recommended improvements and ways to implement them, including time frame and funding sources.

A Pre-Proposal Conference was held on Monday, April 14, 2003, at H-GAC. Submittals are due by **3 p.m. on Tuesday, May 7, 2003.** Twelve (12) typewritten, bound/stapled and signed copies of the proposal are required. Late proposals will **NOT** be accepted.

The Request for Proposal packet can be downloaded from the H-GAC Transportation Department Web site at **www.h-gac.com/HGAC/Home/RFP/default.htm.**

Interested firms may also obtain the packet at the H-GAC offices at 3555 Timmons Lane, Suite 120, Houston, Texas 77027, or by contacting Jerry L. Bobo at 713-993-4571. All questions regarding the Request for Proposals can be sent to the attention of Jerry L. Bobo by email to jerry.bobo@h-gac.com, faxed to 713-993-4508, or mailed to the Houston-Galveston Area Council, P.O. Box 22777, Houston, TX 77227-2227.

TRD-200302315
Alan Clark
MPO Director
Houston-Galveston Area Council
Filed: April 8, 2003

♦ ♦ ♦

Texas Department of Insurance

Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by Arch Insurance Company proposing to use rates for commercial automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting flex percentages -60 for Fire Department Class, -30 for Ambulances Class Code 7913, and +30 for Ambulance Class Code 7914, under all classes and territories. The overall rate change is 0%.

Copies of the filing may be obtained by contacting the Texas Department of Insurance, P&C Actuarial Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 475-3017.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by May 5, 2003.

TRD-200302294
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: April 7, 2003

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Notice of Filing

The following petition has been filed with the Texas Department of Insurance, and is under consideration:

The adoption of amendments to the Plan of Operation for Texas Automobile Insurance Plan Association (TAIPA), pursuant to Article 21.81.

The proposal is to amend the TAIPA Plan of Operation, Section 13.C.7 regarding procedures for compliance with "Performance Standards for Insurers" set forth in Section 13.B. The current rule provides a procedure to determine if an insurer has failed to meet the performance standards for three consecutive months; however, it makes no provision for monitoring valid complaints at the end of that period. This amendment

provides a procedure by which the TAIPA Governing Committee will monitor valid complaints for an additional twelve month period to verify compliance by the insurer.

This filing is subject to Department approval without a hearing. Any comments may be filed with the Office of the Chief Clerk, Texas Department of Insurance, MC 113-2A, P.O. Box 149104, Austin, Texas 78714-9104, within 15 days after publication of this notice. An additional copy is to be simultaneously submitted to Marilyn Hamilton, Associate Commissioner, Property and Casualty Program, Texas Department of Insurance, Mail Code 104-PC, P.O. Box 149104, Austin, Texas 78714-9104.

For further information or to request a copy of the proposed amendments, please contact Sylvia Gutierrez at (512) 463-6327 (reference number A-0303-08).

TRD-200302220
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: April 4, 2003

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Notice of Public Hearing

The Commissioner of Insurance will hold a public hearing under Docket No. 2548 on April 29, 2003 at 1:30 p.m., in Room 100 of the William B. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas. The Commissioner will consider for adoption the repeal of section 7.28 concerning the regulation of accounting for reinsurance agreements by insurers.

The proposed repeal and the statutory authority for the proposed repeal were published in the November 8, 2002 issue of the *Texas Register* (27 TexReg 10558).

TRD-200302330
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: April 8, 2003

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Texas Department of Mental Health and Mental Retardation

Notice of Availability of Texas Community Mental Health Services State Plan (Federal Community Mental Health Block Grant)

The Federal Community Mental Health Block Grant statute (42 USC 300x-51) requires that the Texas Department of Mental Health and Mental Retardation (TDMHMR) make the Texas Community Mental Health Services State Plan available for public comment during its development.

TDMHMR is currently preparing the plan for Fiscal Year (FY) 2004 to describe the intended use of the Federal Community Mental Health Block Grant funds. These funds must be utilized by TDMHMR to develop new initiatives and/or enhance already existing service delivery systems for adults with severe mental illness and children with serious emotional disturbance.

Copies of the current FY2003 Texas Community Mental Health Services State Plan and previous state plans submitted to the federal government may be obtained on the TDMHMR web site at the following address: http://www.mhmr.state.tx.us/CentralOffice/ProgramStatisticsPlanning/BGrants. html or by contacting: Sam Shore, Director, Behavioral Health Services, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668.

Comments regarding the development of the FY2004 Texas Community Mental Health Services State Plan should be directed to Sam Shore, Director, Behavioral Health Services, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668. Comments must be received by 5:00 p.m., Friday, July 18, 2003.

TRD-200302334
Rudy Arredondo
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Filed: April 9, 2003

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Nortex Regional Planning Commission

Request for Proposal

Nortex Regional Planning Commission is seeking written proposals from qualified individuals or firms with emergency operations planning experience with local and county governments. The selected individual or firm will be required to conduct initial basic emergency management planning workshops in each of the nine counties to be served: Archer, Baylor, Cottle, Foard, Hardeman, Jack, Montague, Wilbarger, and Young counties. The selected individual or firm will be required to provide ongoing technical support as needed and required. Proposals must be submitted no later than 5:00 p.m. Central Standard Time on Monday, April 28th, to Mary Kilgo, Director of Emergency Planning, Nortex Regional Planning Commission, 4309 Jacksboro Highway, Wichita Falls, Texas 76302, phone (940) 322-5281.

The individual or firm selected to perform the scope of work will be selected by an internal review committee. Nortex RPC will use evaluation criteria and methodology consistent with the scope of work contained in the Request for Proposal. A complete copy of the Request for Proposal may be obtained by contacting Mary Kilgo, Director of Emergency Planning at (940) 322-5281.

TRD-200302340
Dennis Wilde
Executive Director
Nortex Regional Planning Commission
Filed: April 9, 2003

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Panhandle Regional Planning Commission

Request for Proposal for Child Care Services

The Panhandle Regional Planning Commission (PRPC) is seeking proposals from qualified contractors to manage the delivery of federal and state funded child care services for the 26 counties of the Panhandle Workforce Development Area.

The award will be based primarily on organizational capability, experience and effectiveness, program service capability, and cost effectiveness. Proposers must be willing to provide services to the entire area and operate on a cost reimbursement basis. The initial funding period for the contract to be awarded as a result of this solicitation is expected to be from September 1, 2003 through August 31, 2004. Contract renewals may be available for up to three additional one-year periods

contingent upon acceptable performance by the contractor, governing body approval and mutual agreement of the parties.

Organizations interested in submitting a proposal are encouraged to attend a Proposers Conference at 1:30 p.m. on Wednesday, April 30, 2003 in the PRPC 3rd Floor Conference Room, 415 West Eighth Avenue, Amarillo, Texas. Sealed proposals must be submitted to PRPC by 3:00 p.m. on Friday, May 30, 2003. Beginning April 18, 2003, a copy of the Request for Proposals may be obtained by contacting Tony White, Workforce Development, Contracts Coordinator at (806) 372-3381 or (800) 477-4562.

Issued By

Panhandle Regional Planning Commission

P. O. Box 9257

Amarillo, Texas 79105-9257

TRD-200302314
Anthony White
Workforce Development Contracts Coordinator
Panhandle Regional Planning Commission
Filed: April 7, 2003

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Public Utility Commission of Texas

Application for Reconciliation of Fuel Cost

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application filed on April 1, 2003, to reconcile fuel expenses and fuel revenues.

Docket Style and Number: Application of Texas-New Mexico Power Company (TNMP) for Reconciliation of Fuel Costs. Docket Number 27576.

The Application: In its application, TNMP seeks to reconcile its Texas jurisdictional over- recovery fuel costs and fuel revenues of $23,796,956.92 during the period of January 1, 2000 through the meter read date of January 2002 (reconciliation period) pursuant to P.U.C. Substantive Rule 25.236. The purpose of this fuel reconciliation proceeding is for the commission to review TNMP's eligible fuel costs incurred during the reconciliation period to determine whether they were reasonable and necessary to serve TNMP's customers. Under the Texas Utilities Code and commission rules, TNMP may not earn a profit on these expenses and may only pass them through to its customers, pending reconciliation of such costs in a fuel reconciliation proceeding.

According to TNMP, its application affects only the recovery of the fuel portion of the rates charged by TNMP for electricity in Texas and has no effect on TNMP's non-fuel base rates. The requested reconciliation will affect all customers and classes of customers that will be affected by the stranded cost true-up filing that TNMP is required to make, after January 10, 2004, pursuant to the terms of Public Utility Regulatory Act §39.262.

TNMP is requesting that the commission find (1) TNMP's eligible fuel expenses associated with electric service provided during the reconciliation period of $247,813,982.44 reasonable and necessary expenses incurred to provide electric service; (2) that TNMP properly accounted for fuel-related revenues associated with electric service provided during the reconciliation period in the amount of $294,369,545.12 collected pursuant to fuel factor and surcharges in effect during the reconciliation period; and (3) that after taking into consideration the balance in TNMP's fuel accounts resulting from TNMP's previous fuel reconciliation, net interest accruing over the reconciliation period and the effects of fuel factor changes and surcharges implemented during the reconciliation period, TNMP had a net fuel over-recovery balance of $23,796,956.92 for electric service provided during the reconciliation period.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll- free) 1-800-735-2989. All comments should reference Docket Number 27576.

TRD-200302306
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: April 7, 2003

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On April 2, 2003, Digital Teleport, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60214. Applicant intends to reflect a change in ownership/control.

The Application: Application of Digital Teleport, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 27589.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at PO Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than April 23, 2003. Hearing and speech- impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 27589.

TRD-200302234
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: April 4, 2003

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Notice of Application for Relinquishment of a Service Provider Certificate of Operating Authority

On April 2, 2003, City Telecom, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60466. Applicant intends to relinquish its certificate.

The Application: Application of City Telecom, Inc. for Relinquishment of its Service Provider Certificate of Operating Authority, Docket Number 27585.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at PO Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than April 23, 2003. Hearing and speech- impaired individuals with text telephones (TTY) may contact the commission at

(512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 27585.

TRD-200302235
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: April 4, 2003

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on April 4, 2003, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Vantage Systems Design, Incorporated for a Service Provider Certificate of Operating Authority, Docket Number 27596 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, HDSL, SDSL, RADSL, VDSL, Optical Services, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, wireless, and Internet access services

Applicant's requested SPCOA geographic area includes the area of Texas comprising the Brownsville and Corpus Christi Local Access and Transport Areas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than April 23, 2003. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 27596.

TRD-200302332
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: April 8, 2003

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Notice of Filing to Withdraw Services Pursuant to P.U.C. Substantive Rule 26.208

Notice is given to the public of Verizon Southwest's application filed with the Public Utility Commission of Texas (commission) on April 7, 2003 to withdraw services.

Docket Title and Number: Application of GTE Southwest, Incorporated doing business as Verizon Southwest for the Discontinuance of the X.25/X.75 Packet Switching Services. Docket Number 27611.

Verizon Southwest filed an application to discontinue X.25/X.75 Packet Switching Services pursuant to P.U.C. Substantive Rule 26.208(h). Verizon Southwest stated that several vendors have announced that they will no longer provide research and development support for this technology while other equipment vendors plan to discontinue manufacturing the equipment. Verizon Southwest proposed to grandfather the service to existing customers at their current location. Verizon Southwest stated that the service will continue to be supported by Verizon Southwest and all current customers will be contacted and presented with alternative solutions with adequate time to transition to alternative services (e.g., Frame Relay, ATM or IP-VPN). Verizon Southwest proposed noticing each customer by direct mail.

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll-free 1-800-735- 2989. All correspondence should refer to Docket Number 27611.

TRD-200302329
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: April 8, 2003

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Notice of Petition for Expanded Local Calling Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of a petition on February 27, 2003, for expanded local calling service (ELCS), pursuant to Chapter 55, Subchapter C of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Project Title and Number: Petition of the Scotland Exchange for Expanded Local Calling Service, Project Number 27422.

The petitioners in the Scotland exchange request ELCS to the exchanges of Bluegrove, Bowie, Henrietta, and Holliday.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512)936-7120 or toll free at 1-888-782-8477 no later than May 5, 2003. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2789. All comments should reference Project Number 27422.

TRD-200302197
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: April 3, 2003

♦ ♦ ♦

Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas, a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214 on April 1, 2003. The Applicant expects to file the LRIC study on April 11, 2003.

Docket Title and Number: CenturyTel of Port Aransas, Inc. Application for Approval of LRIC Study for Simple Choice Service Pursuant to P.U.C. Substantive Rule §26.214, Docket Number 27582.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 27582. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and

speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200302238
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: April 4, 2003

♦ ♦ ♦

Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas, a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214 on April 1, 2003. The Applicant expects to file the LRIC study on April 11, 2003.

Docket Title and Number: CenturyTel of Lake Dallas, Inc. Application for Approval of LRIC Study for Simple Choice Service Pursuant to P.U.C. Substantive Rule §26.214, Docket Number 27583.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 27583. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200302237
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: April 4, 2003

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Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas, a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214 on April 1, 2003. The Applicant expects to file the LRIC study on April 11, 2003.

Docket Title and Number: CenturyTel of San Marcos, Inc. Application for Approval of LRIC Study for Simple Choice Service Pursuant to P.U.C. Substantive Rule §26.214, Docket Number 27584.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 27584. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200302236
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: April 4, 2003

♦ ♦ ♦

Public Notice of Interconnection Agreement

On April 2, 2003, Denton Telecom Partners I, L.P. and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 27590. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27590. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by May 5, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27590.

TRD-200302309

Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: April 7, 2003

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Public Notice of Interconnection Agreement

On April 2, 2003, dpi Teleconnection, L.L.C. and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 27591. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27591. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by May 5, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27591.

TRD-200302308

Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: April 7, 2003

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Public Notice of Interconnection Agreement

On April 3, 2003, Trinity Valley Services, Incorporated, United Telephone Company of Texas, Incorporated doing business as Sprint, and Central Telephone Company of Texas doing business as Sprint, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104- 104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 27592. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27592. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by May 5, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones

(TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27592.

TRD-200302307
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: April 7, 2003

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Public Notice of Workshop on Proposed New §25.489 Relating to Treatment of Premises with No Retail Electric Provider of Record

The Public Utility Commission of Texas (commission) will hold a workshop regarding proposed new Substantive Rule §25.489, relating to Treatment of Premises with No Retail Electric Provider of Record, on Thursday, April 24, 2003, at 9:00 a.m. in Hearing Room A, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 27084, *PUC Rulemaking to Revise Customer Protection Rules*, has been established for this proceeding.

Prior to the workshop the commission will make available in Central Records under Project Number 27084 an agenda for the format of the workshop. Copies of the agenda will also be available on the Commission's website at www.puc.state.tx.us.

Questions concerning the workshop or this notice should be referred to Carrie Collier, Analyst-Retail Market Oversight, Electric Division, at (512) 936-7163. Hearing and speech- impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200302305
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: April 7, 2003

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Texas Department of Transportation

Correction of Error

Correction of Error for Request for Qualifications - Aviation Division: A request for qualifications to engage in aviation professional services pursuant to Chapter 2254, Subchapter A, of the Government Code was published in the March 28, 2003, edition of the Texas Register (28 TexReg 2816). The following information is being published in order to correct an error that was contained in that notice.

Strike the following sentence:

"The top three rated firms selected from proposals will be awarded contracts for a minimum of three airport layout plans each."

And replace it with:

"A minimum of three top rated firms will be awarded contracts for a minimum of three airport layout plans each."

If you have any questions, please call Karon Wiedemann, Director, Grant Management, Aviation Division, Texas Department of Transportation (512) 416-4520.

TRD-200302287
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: April 7, 2003

♦ ♦ ♦

Notice of Request for Proposal

The Texas Department of Transportation (TxDOT) announces a Request for Proposal (RFP) for private consultant services pursuant to Government Code, Chapter 2254, Subchapter B. The term of the contract will be from project initiation to 120 days later. The Information Systems Division (ISD) of TxDOT will administer the contract. The RFP will be released on April 18, 2003.

Purpose: The consultant will support the TxDOT ISD Mainframe Location Project team with developing a detailed Statement of Work that defines TxDOT's sourcing requirements and providing contract negotiation advice and guidance to ensure a successful outsourcing transition for mainframe and production UNIX functions and responsibilities with Northrop Grumman that may be relocated to the West Texas Disaster Recovery Operations Center (WTDROC).

Eligible Applicants: Eligible applicants include, but are not limited to, organizations that provide private consulting services.

Program Goal: The preparation and conduct of negotiation of an effective contract agreement between TxDOT and Northrop Grumman for potential services at WTDROC.

Review and Award Criteria: Each application will first be screened for completeness and timeliness. Proposals that are deemed incomplete or arrive after the deadline will not be reviewed. A team of reviewers from ISD will evaluate the proposals as to the private consultant's competence, knowledge, and qualifications and as to the reasonableness of the proposed fee for the services. The criteria and review process are further described in the RFP.

Deadlines: TxDOT must receive proposals prepared according to instructions in the RFP package at or before May 9, 2003, 5:00 p.m. Central Daylight Time.

To Obtain a Copy of the RFP: Requests for a copy of the RFP should be submitted to Bertha Legge, Contract Administration, Information Systems Division, 125 East 11th Street, Austin, Texas 78701-2483. Telephone (512) 465-7527.

E-mail: blegge@dot.state.tx.us

TRD-200302201
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: April 4, 2003

♦ ♦ ♦

Texas Workforce Commission

Public Notice

Texas Labor Code Section 212.206 provides that the Texas Workforce Commission may designate a person to receive service on behalf of the Commission. The Commission, during the April 8, 2003, meeting, officially designated John D. Moore, General Counsel as the agent to receive service for all lawsuits against the Commission.

George D. Cato is no longer the Commission's designated agent for service.

Please call Johanna McCully-Bonner at (512) 463-2510 if you have any questions.

♦ ♦ ♦

TRD-200302322
John Moore
General Counsel
Texas Workforce Commission
Filed: April 8, 2003

How to Use the Texas Register

Information Available: The 13 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following a 30-day public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 26 (2001) is cited as follows: 26 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "26 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 26 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC)*** is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 19, April 13, July 13, and October 12, 2001). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

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